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-LI. D.L.R., See Pages vii-xix.

VOL. 51

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

RUSSEL S. SMART

ASSOCIATE EDITOR OF PATENT AND TRADE MARK CASES.

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:

CANADA LAW BOOK CO. LIMITED

84 BAY STREET

1920

CASES REPORTED.

IN THIS VOLUME.

Abramoff v. Podratz	(Sask.)	313
Adams v. Keers	(Ont.)	514
Bailey Cobalt Mines Ltd., Re	(Ont.)	589
Beaver Wood Fibre Co. Ltd. and American Forest Products Corporation, Re	(Ont.)	643
Belyea v. City of Saint John	(N.B.)	495
Bietel v. Corballis	(Sask.)	721
Brehaut v. City of North Battleford	(Sask.)	609
Butterworth Estate, Re	(Alta.)	474
Canadian Copper Co. v. Lindala	(Ont.)	565
Canadian Pacific R. Co. v. Claman's Ltd	(B.C.)	668
Cappan, The King v., ex rel. Hammond	(Man.)	672
Cherniak and College of Physicians and Surgeons of Ontario, Re	(Ont.)	522
Chotem v. Porteous	(Sask.)	507
Cunningham v. Workmen's Compensation Board	(B.C.)	470
Davey v. Walker	(Sask.)	713
Drake v. Carter	(B.C.)	372
Duggan v. Franco-Belgian Investment Co.	(Alta.)	602
Elliott v. Winkenweder	(Sask.)	716
Esdale v. Bank of Ottawa	(Alta.)	485
Fenton, Estate of	(Man.)	694
Feodoroff v. Podratz	(Sask.)	313
Fisher v. Kinney	(N.S.)	396
Gauthier v. The King	(Can. Ex.)	558
Godfrey v. Cooper	(Ont.)	455
Grand Trunk R. Co. v. Dixon	(Ont.)	576
Grant, Re	(Alta.)	369
Halifax Lumber Company's Assessment, Re	(N.S.)	341
Hart v. Cooper	(Ont.)	455
"Imo," The Ship, v. General Transatlantic Co	(Imp.)	403
Jacobus v. Sadowski	(Alta.)	692
Jones v. City of Vancouver	(B.C.)	320
King, The, ex rel. Hammond v. Cappan	(Man.)	672
King, The, v. Ritchie	(Man.)	652
Laird v. Laird	(B.C.)	642
Lazard Bros. & Co. v. Union Bank of Canada	(Ont.)	636
London Guarantee and Accident Co. Ltd. and Gorbovitsky, The King, v.	(Can. Ex.)	624
Lynett, Re	(Ont.)	489
Macdonald, R. v	(Alta.)	539
Mather v. Bank of Ottawa	(Ont.)	353
Matheson v. Town of Mitchell	(Ont.)	477
McColl v. Canadian Pacific R. Co	(Man.)	480
McKinley v. Accounting Machine Co	(Alta.)	574

McKinley and McCullough, Re ..... (Ont.) 659
McLaughlin v. Gentles ..... (Ont.) 383
McLintock v. Lowes ..... (Alta.) 453
Montreal Tramways Co. v. McAllister ..... (Imp.) 429
Montreuil v. Campbell ..... (Sask.) 326
Nelson and Cranston v. The National Trust Co. Ltd., Re Butterworth Estate ..... (Alta.) 474
Norstrant v. Drumheller ..... (Alta.) 373
Northern Pipe Line Co. v. Dominion Sugar Co. ..... (Ont.) 548
Polchyki v. Chromik ..... (Alta.) 345
Provincial Board of Health for Ontario and City of Toronto, Re (Ont.) 444
Quaal, Estate of ..... (Sask.) 720
Rawlings and Ball v. Galibert ..... (Can.) 579
Rederiakatiebolaget v. Newcombe ..... (Imp.) 426
Rex v. Macdonald ..... (Alta.) 539
Ritchie, The King v. ..... (Man.) 652
Roseberry v. Workmen's Compensation Board ..... (B.C.) 470
Royal Print & Litho Ltd. v. Adams ..... (N.S.) 701
Russell v. Toombs ..... (Alta.) 574
St. Cyr v. Spencer Grain Co. and Northern Crown Bank ..... (Sask.) 706
Security Trust Co. v. Wishart ..... (Alta.) 614
Shragge v. Rabinovitch ..... (Alta.) 316
Smith v. Rae ..... (Ont.) 323
Standard Silver Lead Mining Co. v. Workmen's Compensation Board ..... (B.C.) 470
Sterling Engine Works v. Red Deer Lumber Co. ..... (Man.) 509
Stock v. Meyers and Cook ..... (Ont.) 328
Suckling v. Lyons Paint and Glass Co. ..... (Man.) 700
Tkaczuk v. Stewart ..... (Man.) 441
Union Bank v. Boggs ..... (Sask.) 706
United Cigar Stores v. Miller ..... (Can.) 433
Wade v. James ..... (Ont.) 704
Warburton v. Cooper ..... (Ont.) 455
Whimster v. Dragoni ..... (B.C.) 503
Whimster v. Mills ..... (B.C.) 505
Whimster v. Northern Cafe Co. ..... (B.C.) 506
Winnipeg Electric R. Co., Re ..... (Man.) 697

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 51 INCLUSIVE.

ADMINISTRATOR—Compensation of administrators and executors—Allowance by Court..... III, 168

ADMIRALTY—Liability of a ship or its owners for necessaries supplied..... I, 450

ADMIRALTY—Torts committed on high seas—Limit of jurisdiction.....XXXIV. 8

ADVERSE POSSESSION — Tacking — Successive trespassers..... VIII, 1021

AGREEMENT—Hiring—Priority of chattel mortgage over.....XXXII, 566

ALIENS—Their status during war.....XXIII, 375

ANIMALS—At large—Wilful act of owner.....XXXII, 397

APPEAL—Appellate jurisdiction to reduce excessive verdict..... I, 386

APPEAL—Judicial discretion—Appeals from discretionary orders..... III, 778

APPEAL—Pre-requisites on appeals from summary convictions.....XXVIII, 153

APPEAL—Service of notice of—Recognizance..... XIX, 323

ARBITRATION—Conclusiveness of award.....XXXIX, 218

ARCHITECT—Duty to employer..... XIV, 402

ASSIGNMENT—Equitable assignments of choses in action..... X, 277

ASSIGNMENTS FOR CREDITORS—Rights and powers of assignee..... XIV, 503

AUTOMOBILES—Obstruction of highway by owner....XXXI, 370

AUTOMOBILES AND MOTOR VEHICLES.....XXXIX, 4

BAIL—Pending decisions on writ of habeas corpus...XLIV, 144

BAIL—Right to on commitment for a misdemeanour.. L, 633

BAILMENT—Recovery by bailee against wrongdoer for loss of thing bailed..... I, 110

BANK INTEREST—Rate that may be charged on loans. XLII, 134

BANKS—Deposits—Particular purpose—Failure of—Application of deposit..... IX, 346

BANKS—Written promises under s. 90 of the Bank Act XLVI, 311

BILLS AND NOTES—Effect of renewal of original note.. II, 816

BILLS AND NOTES—Filling in blanks..... XI, 27

BILLS AND NOTES—Presentment at place of payment.. XV, 41

BROKERS—Real estate brokers—Agent's authority.... XV, 595

BROKERS—Real estate agent's commission—Sufficiency of services..... IV, 531

BUILDING CONTRACTS—Architect's duty to employer.. XIV, 402

BUILDING CONTRACTS—Failure of contractor to complete work..... I, 19

BUILDINGS—Municipal regulation of building permits. VII, 422

BUILDINGS—Restrictions in contract of sale as to the user of land..... VII, 614
CARRIERS—The Crown as common.....XXXV, 285
CAVEATS—Interest in land—Land Titles Act—Priorities under..... XIV, 344
CAVEATS—Parties entitled to file—What interest essential—Land titles (Torrens system)..... VII, 675
CHATTEL MORTGAGE—Of after-acquired goods..... XIII, 178
CHATTEL MORTGAGE—Priority of—Over hire receipt..XXXII, 566
CHEQUES—Delay in presenting for payment..... XL, 244
CHOSE IN ACTION—Definition—Primary and secondary meanings in law..... X, 277
COLLISION—On high seas—Limit of jurisdiction....XXXIV, 8
COLLISION—Shipping..... XI, 95
COMPANIES—See Corporations and Companies.....
CONFLICT OF LAWS—Validity of common law marriage. III, 247
CONSIDERATION—Failure of—Recovery in whole or in part..... VIII, 157
CONSTITUTIONAL LAW—Corporations—Jurisdiction of Dominion and Provinces to incorporate companies.....XXVI, 294
CONSTITUTIONAL LAW—Power of legislature to confer authority on Masters.....XXIV, 22
CONSTITUTIONAL LAW—Power of legislature to confer jurisdiction on provincial courts to declare the nullity of void and voidable marriages..... XXX, 14
CONSTITUTIONAL LAW—Powers of provincial legislatures to confer limited civil jurisdiction on Justices of the Peace.....XXXVII, 183
CONSTITUTIONAL LAW—Property and civil rights—Non-residents in province..... ..... IX, 346
CONSTITUTIONAL LAW—Property clauses of the B.N.A. Act—Construction of.....XXVI, 69
CONTEMPT OF COURT..... LI, 46
CONTRACTORS—Sub-contractors—Status of, under Mechanics' Lien Acts..... IX, 105
CONTRACTS—Commission of brokers—Real estate agents—Sufficiency of services..... IV, 531
CONTRACTS—Construction—"Half" of a lot—Division of irregular lot..... II, 143
CONTRACTS—Directors contracting with corporation—Manner of..... VII, 111
CONTRACTS—Distinction between penalties and liquidated damages..... XLV 24
CONTRACTS—Extras in building contracts..... XIV, 740
CONTRACTS—Failure of consideration—Recovery of consideration by party in default..... VIII, 157
CONTRACTS—Failure of contractor to complete work on building contract..... I, 9
CONTRACTS—Illegality as affecting remedies..... XI, 195
CONTRACTS—Money had and received—Consideration—Failure of—Loan under abortive scheme... IX, 346

CONTRACTS—Part performance—Acts of possession and the Statute of Frauds ..... II, 43
CONTRACTS—Part performance excluding the Statute of Frauds ..... XVII, 534
CONTRACTS—Payment of purchase money—Vendor's inability to give title ..... XIV, 351
CONTRACTS—Rescission of, for fraud ..... XXXII, 216
CONTRACTS—Restrictions in agreement for sale as to user of land ..... VII, 614
CONTRACTS—Right of rescission for misrepresentation—Waiver ..... XXI, 329
CONTRACTS—Sale of land—Rescission for want of title in vendor ..... III, 795
CONTRACTS—Statute of Frauds—Oral contract—Admission in pleading ..... II, 636
CONTRACTS—Statute of Frauds—Signature of a party when followed by words shewing him to be an agent ..... II, 99
CONTRACTS—Stipulation as to engineer's decision—Disqualification ..... XVI, 441
CONTRACTS—Time of essence—Equitable relief ..... II, 464
CONTRACTS—Vague and uncertain—Specific performance of ..... XXXI, 48
CONTRIBUTORY NEGLIGENCE — Navigation — Collision of vessels ..... XI, 95
CORPORATIONS AND COMPANIES—Debentures and specific performance ..... XXIV, 376
CORPORATIONS AND COMPANIES—Directors contracting with a joint-stock company ..... VII, 111
CORPORATIONS AND COMPANIES—Franchises—Federal and provincial rights to issue—B.N.A. Act ..... XVIII, 364
CORPORATIONS AND COMPANIES — Jurisdiction of Dominion and Provinces to incorporate companies ..... XXVI, 294
CORPORATIONS AND COMPANIES—Powers and duties of auditor ..... VI, 522
CORPORATIONS AND COMPANIES — Receivers — When appointed ..... XVIII, 5
CORPORATIONS AND COMPANIES—Share subscription obtained by fraud or misrepresentation ..... XXI, 103
COURTS—Judicial discretion—Appeals from discretionary orders ..... III, 778
COURTS—Jurisdiction—Criminal information ..... VIII, 571
COURTS—Jurisdiction—Power to grant foreign commission ..... XIII, 338
COURTS—Jurisdiction—"View" in criminal case ..... X, 97
COURTS—Jurisdiction as to foreclosure under land titles registration ..... XIV, 301
COURTS—Jurisdiction as to injunction—Fusion of law and equity as related thereto ..... XIV, 460
COURTS—Publicity—Hearings in camera ..... XVI, 769

COURTS—Specific performance—Jurisdiction over contract for land out of jurisdiction..... II, 215
COVENANTS AND CONDITIONS—Lease—Covenants for renewal..... III, 12
COVENANTS AND COND TIONS—Restrictions on use of leased property..... XI, 40
CREDITOR'S ACTION—Creditor's action to reach undisclosed equity of debtor—Deed intended as mortgage..... I, 76
CREDITOR'S ACTION—Fraudulent conveyances—Right of creditors to follow profits..... I, 841
CRIMINAL INFORMATION—Functions and limits of prosecution by this process..... VIII, 571
CRIMINAL LAW—Appeal—Who may appeal as party aggrieved.....XXVII, 645
CRIMINAL LAW—Cr. Code. (Can.)—Granting a "view" —Effect a evidence in the case..... X, 97
CRIMINAL LAW—Criminal trial—Continuance and adjournment—Criminal Code, 1906, sec 901....XVIII, 223
CRIMINAL LAW—Gaming—Betting house offences....XXVII, 611
CRIMINAL LAW—Habeas corpus procedure..... XIII, 722
CRIMINAL LAW—Insanity as a defence—Irresistible impulse—Knowledge of wrong..... I, 287
CRIMINAL LAW—Leave for proceedings by criminal information..... VIII, 571
CRIMINAL LAW—Orders for further detention on quashing convictions..... XXV, 649
CRIMINAL LAW—Prosecution for same offence, after conviction quashed on certiorari.....XXXVII, 126
CRIMINAL LAW — Questioning accused person in custody..... XVI, 223
CRIMINAL LAW—Sparring matches distinguished from prize fights..... XII, 786
CRIMINAL LAW—Summary proceedings for obstructing peace officers.....XXVII, 46
CRIMINAL LAW—Trial—Judge's charge—Misdirection as a "substantial wrong"—Criminal Code (Can. 1906, sec. 1019)..... I, 103
CRIMINAL LAW—Vagrancy—Living on the avails of prostitution..... XXX, 339
CRIMINAL LAW—What are criminal attempts..... XXV, 8
CRIMINAL TRIAL—When adjourned or postponed.....XVIII, 223
CROWN, THE—As a common carrier.....XXXV, 285
CROWN, THE..... XL, 366
CY-PRES—How doctrine applied as to inaccurate descriptions..... VIII, 96
DAMAGES—Appellate jurisdiction to reduce excessive verdict..... I, 386
DAMAGES—Architect's default on building contract—Liability..... XIV, 402

DAMAGES—Parent's claim under fatal accidents law —Lord Campbell's Act ..... XV, 689
DAMAGES—Property expropriated in eminent domain proceedings—Measure of compensation ..... I, 508
DEATH — Parent's claim under fatal accidents law —Lord Campbell's Act ..... XV, 689
DEEDS—Construction—Meaning of "half" of a lot.. II, 143
DEEDS—Conveyance absolute in form—Creditor's action to reach undisclosed equity of debtor.... I, 76
DEFAMATION—Discovery—Examination and interrogations in defamation cases ..... II, 563
DEFAMATION—Repetition of libel or slander—Liability IX, 73
DEFAMATION—Repetition of slanderous statements—Acts of plaintiff to induce repetition—Privilege and publication ..... IV, 572
DEFINITIONS—Meaning of "half" of a lot—Lot of irregular shape ..... II, 154
DEMURRER—Defence in lieu of—Objections in point of law ..... XVI, 173
DEPORTATION—Exclusion from Canada of British subjects of Oriental origin ..... XV, 191
DEPOSITIONS—Foreign commission—Taking evidence ex juris ..... XIII, 338
DESERTION—From military unit ..... XXXI, 17
DISCOVERY AND INSPECTION—Examination and interrogatories in defamation cases ..... II, 563
DIVORCE—Annulment of marriage ..... XXX, 14
DIVORCE LAW IN CANADA ..... XLVIII, 7
DONATION—Necessity for delivery and acceptance of chattel ..... I, 306
EASEMENTS OF WAY—How arising or lost ..... XLV, 14
EASEMENTS—Dedication of highway to public use—Reservations ..... XLVI, 517
EASEMENTS—Reservation of, not implied in favour of grantor ..... XXXII, 114
EJECTMENT—Ejectment as between trespassers upon unpatented land—Effect of priority of possessory acts under colour of title ..... I, 28
ELECTRIC RAILWAYS—Reciprocal duties of motormen and drivers of vehicles crossing tracks ..... I, 783
EMINENT DOMAIN—Allowance for compulsory taking. XXVII, 250
EMINENT DOMAIN—Damages for expropriation—Measure of compensation ..... I 508
ENGINEERS—Stipulations in contracts as to engineer's decision ..... XVI, 441
EQUITY—Agreement to mortgage after-acquired property—Beneficial interest ..... XIII 178
EQUITY—Fusion with law—Pleading ..... X, 503
EQUITY—Rights and liabilities of purchaser of land subject to mortgages ..... XIV, 652
ESCHEAT—Provincial rights in Dominion lands ..... XXVI, 137

ESTOPPEL—By conduct—Fraud of agent or employee.. XXI, 13
ESTOPPEL—Plea of ultra vires in actions on corporate contract.....XXXVI, 107
ESTOPPEL—Ratification of estoppel—Holding out as ostensible agent..... I, 149
Evidence—Admissibility — Competency of wife against husband..... XVII, 721
EVIDENCE—Admissibility—Discretion as to commission evidence..... XIII, 338
EVIDENCE—Criminal law—Questioning accused person in custody..... XVI, 223
EVIDENCE—Deed intended as mortgage—Competency and sufficiency of parol evidence.....XXIX, 125
EVIDENCE—Demonstrative evidence—View of locus in quo in criminal trial..... X, 97
EVIDENCE—Examination of testimony—Use of photographs .....XLVII, 9
EVIDENCE—Extrinsic—When admissible against a foreign judgment..... IX, 788
EVIDENCE—Foreign common law marriage..... III, 247
EVIDENCE—Meaning of "half" of a lot—Division of irregular lot..... II, 143
EVIDENCE—Opinion evidence as to handwriting..... XIII, 565
EVIDENCE—Oral contracts—Statute of Frauds—Effect of admission in pleading..... II, 636
EVIDENCE—Sufficient to go to jury in negligence actions.. .....XXXIX, 615
EXECUTION—What property exempt from..... XVII, 829
EXECUTION—When superseded by assignment for creditors..... XIV, 503
EXECUTORS AND ADMINISTRATORS—Compensation—Mode of ascertainment..... III, 168
EXEMPTIONS—What property is exempt.....XVI, 6; XVII, 829
FALSE ARREST — Reasonable and probable cause — English and French law compared..... I, 56
FALSE PRETENCES—The law relating to.....XXXIV, 521
FIRE INSURANCE—Insured chattels—Change of location I, 745
FISHING RIGHTS IN TIDAL WATERS—Provincial power to grant.....XXXV, 28
FOOD—Liability of manufacturer or packer of food for injuries to the ultimate consumer who purchased from a middle man..... L, 409
FORECLOSURE—Mortgage—Re-opening mortgage foreclosures..... XVII, 89
FOREIGN COMMISSION—Taking evidence ex juris..... XIII, 338
FOREIGN JUDGMENT—Action upon..... IX 788; XIV, 43
FORFEITURE—Contract stating time to be of essence —Equitable relief..... II, 464
FORFEITURE—Remission of, as to leases..... X, 603
FORGERY.....XXXII, 512
FORTUNE-TELLING—Pretended palmistry.....XXVIII, 278
FRAUDULENT CONVEYANCES—Right of creditors to follow profits..... I, 841

FRAUDULENT PREFERENCES—Assignments for creditors—Rights and powers of assignee..... XIV, 503
GAMING—Automatic vending machines.....XXXIII, 642
GAMING—Betting house offences.....XXVII, 611
GIFT—Necessity for delivery and acceptance of chattel. I, 306
HABEAS CORPUS—Procedure..... XIII, 722
HANDWRITING—Comparison of—When and how comparison to be made..... XIII, 565
HANDWRITING—Law relating to..... XLIV, 170
HIGHWAYS—Defects—Notice of injury—Sufficiency... XIII, 886
HIGHWAYS—Defective bridge—Liability of municipality.....XXXIV, 589
HIGHWAYS—Duties of drivers of vehicles crossing street railway tracks..... I, 783
HIGHWAYS—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways..... IX, 490
HIGHWAYS—Liability of municipality for defective highways or bridges.....XLVI, 133
HIGHWAYS—Private rights in, antecedent to dedication XLVI, 517
HIGHWAYS—Unreasonable user of.....XXXI, 370
HUSBAND AND WIFE—Foreign common law marriage —Validity..... III, 247
HUSBAND AND WIFE—Property rights between husband and wife as to money of either in the other's custody or control..... XIII, 824
HUSBAND AND WIFE—Wife's competency as witness against husband—Criminal non-support..... XVII, 721
INFANTS—Disabilities and liabilities—Contributory negligence of children..... IX, 522
INJUNCTION—When injunction lies..... XIV, 460
INSANITY—Irresistible impulse—Knowledge of wrong —Criminal law..... I, 287
INSURANCE—On mortgaged property..... XLIV, 24
INSURANCE—Effects of vacancy in fire insurance risks XLVI, 15
INSURANCE—Fire insurance—Change of location of insured chattels..... I, 745
INSURANCE—Policies protecting insured while passengers in or on public and private conveyances..... XLIV, 186
INSURANCE—The exact moment of the inception of the contract..... XLIV, 208
INTEREST—That may be charged on loans by banks.. XLII, 134
INTERPLEADER—Summary review of law of.....XXXII, 263
INTERPRETATION—Statutes in pari materiâ.....XLIX, 50
JUDGMENT—Actions on foreign judgments....IX, 788; XIV, 43
JUDGMENT—Conclusiveness as to future action—Res judicata..... VI, 294
JUDGMENT—Enforcement—Sequestration..... XIV, 855
JUSTIFICATION—As a defence on criminal charge..... XLII, 439
LANDLORD AND TENANT—Forfeiture of lease—Waiver. X, 603

LANDLORD AND TENANT—Lease—Covenant in restriction of use of property ..... XI, 40
LANDLORD AND TENANT — Lease — Covenants for renewal ..... III, 12
LANDLORD AND TENANT—Municipal regulations and license laws as affecting the tenancy—Quebec Civil Code ..... I, 219
LAND TITLES (Torrens system)—Caveat—Parties entitled to file caveats—"Caveatable interests" .. VII, 675
LAND TITLES (Torrens system)—Caveats—Priorities acquired by filing ..... XIV, 344
LAND TITLES (Torrens system) — Mortgages — Foreclosing mortgage made under Torrens system—Jurisdiction ..... XIV, 301
LAW OF TUGS AND TOWAGE ..... XLIX, 172
LEASE—Covenants for renewal ..... III, 12
LIBEL AND SLANDER—Church matters ..... XXI, 71
LIBEL AND SLANDER—Examination for discovery in defamation cases ..... II, 563
LIBEL AND SLANDER—Repetition—Lack of investigation as affecting malice and privilege ..... IX, 37
LIBEL AND SLANDER—Repetition of slanderous statement to person sent by plaintiff to procure evidence thereof—Publication and privilege ..... IV, 572
LIBEL AND SLANDER—Separate and alternative rights of action—Repetition of slander ..... I, 533
LICENSE—Municipal license to carry on a business—Powers of cancellation ..... IX, 411
LIENS—For labour—For materials—Of contractors—Of sub-contractors ..... IX, 105
LIMITATION OF ACTIONS—Trespassers on lands—Prescription ..... VIII, 1021
LOTTERY—Lottery offences under the Criminal Code. XXV, 401
MALICIOUS PROSECUTION—Principles of reasonable and probable cause in English and French law compared ..... I, 56
MALICIOUS PROSECUTION—Questions of law and fact—Preliminary questions as to probable cause ..... XIV, 817
MANDAMUS ..... XLIX, 478
MARKETS—Private markets—Municipal control ..... I, 219
MARRIAGE—Foreign common law marriage—Validity. III, 247
MARRIAGE—Void and voidable—Annulment ..... XXX, 14
MARRIED WOMEN—Separate estate—Property rights as to wife's money in her husband's control ..... XIII, 824
MASTER AND SERVANT—Assumption of risks—Superintendence ..... XI, 106
MASTER AND SERVANT—Employer's liability for breach of statutory duty—Assumption of risk ..... V, 328
MASTER AND SERVANT—Justifiable dismissal—Right to wages (*a*) earned and overdue, (*b*) earned, but not payable ..... VIII, 382

MASTER AND SERVANT—When master liable under penal laws for servant's acts or defaults.....XXXI, 233
MASTER AND SERVANT — Workmen's compensation law in Quebec..... VII, 5
MECHANICS' LIENS—Percentage fund to protect sub-contractors..... XVI, 121
MECHANICS' LIENS—What persons have a right to file a mechanic's lien..... IX, 105
MISDEMEANOUR—Commitment for, Right to bail.... L, 633
MONEY—Right to recover back—Illegality of contract —Repudiation..... XI, 195
MORATORIUM—Postponement of Payment Acts, construction and application..... XXII, 865
MORTGAGE—Assumption of debt upon a transfer of the mortgaged premises..... XXV, 435
MORTGAGE—Equitable rights on sale subject to mortgage..... XIV, 652
MORTGAGE—Discharge of as re-conveyance.....XXXI, 225
MORTGAGE—Land titles (Torrens system)—Foreclosing mortgage made under Torrens system—Jurisdiction..... XIV, 301
MORTGAGE—Limitation of action for redemption of..XXXVI, 15
MORTGAGE—Necessity for stating yearly rate of interest.....XXXII, 60
MORTGAGE—Power of sale under statutory form.....XXXI, 300
MORTGAGE—Re-opening foreclosures..... XVII, 89
MORTGAGE — Without consideration — Receipt for mortgage money signed in blank.....XXXII, 26
MUNICIPAL CORPORATIONS — Authority to exempt from taxation..... XI, 66
MUNICIPAL CORPORATIONS—By-laws and ordinances regulating the use of leased property—Private markets..... I, 219
MUNICIPAL CORPORATIONS—Closing or opening streets. IX, 490
MUNICIPAL CORPORATIONS — Defective highway — Notice of injury..... XIII, 886
MUNICIPAL CORPORATIONS—Drainage—Natural water-course—Cost of work—Power of Referee..... XXI, 286
MUNICIPAL CORPORATIONS — Highways — Defective— Liability.....XXXIV, 589
MUNICIPAL CORPORATIONS—License—Power to revoke license to carry on business..... IX, 411
MUNICIPAL CORPORATIONS—Power to pass by-law regulating building permits..... VII, 422
NEGLIGENCE—Animals at large.....XXXII, 397
NEGLIGENCE—Defective premises—Liability of owner or occupant—Invitee, licensee or trespasser..... VI, 76
NEGLIGENCE—Duty to licensees and trespassers— Obligation of owner or occupier..... I, 240

NEGLIGENCE—Evidence sufficient to go to jury in negligence action.....XXXIX, 615
NEGLIGENCE—Highway defects—Notice of claim..... XIII, 886
NEGLIGENCE—Negligent driving, contributory, of children..... IX, 522
NEGLIGENCE—Ultimate..... XL, 103
NEGLIGENCE OR WILFUL ACT OR OMISSION—Within the meaning of the Railway Act.....XXXV, 481
NEW TRIAL—Judge's charge—Instruction to jury in criminal case—Misdirection as a "substantial wrong"—Cr. Code (Can.) 1906, sec. 1019..... I, 103
PARTIES—Irregular joinder of defendants—Separate and alternative rights of action for repetition of slander..... I, 533
PARTIES—Persons who may or must sue—Criminal information—Relator's status..... VIII, 571
PATENTS—Application of a well-known contrivance to an analogous use is not invention.....XXXVIII, 14
PATENTS—Construction of—Effect of publication..... XXV, 663
PATENTS—Expunction or variation of registered trade-mark.....XXVII, 471
PATENTS—Manufacture and importation under Patent Act.....XXXVIII, 350
PATENTS—New combinations as patentable inventions XLIII, 5
PATENTS—New and useful combinations—Public use or sale before application for patent.....XXVIII, 636
PATENTS—Novelty and invention.....XXVII, 450
PATENTS—Prima facie presumption of novelty and utility.....XXVIII, 243
PATENTS—Utility and novelty—Essentials of.....XXXV, 362
PATENTS—Vacuum cleaners..... XXV, 716
PENALTIES AND LIQUIDATED DAMAGES—Distinction between..... XLV, 24
PERJURY — Authority to administer extra-judicial oaths.....XXVIII, 122
PHOTOGRAPHS—Use of—Examination of testimony on the facts.....XLVII, 9
PLEADING—Effect of admissions in pleading—Ora contract—Statute of Frauds..... II, 636
PLEADING—Objection that no cause of action shewn —Defence in lieu of demurrer..... XVI, 517
PLEADING—Statement of defence—Specific denials and traverses..... X, 503
PRINCIPAL AND AGENT — Holding out as ostensible agent—Ratification and estoppel..... I, 149
PRINCIPAL AND AGENT—Signature to contract followed by word shewing the signing party to be an agent—Statute of Frauds..... II, 99
PRINCIPAL AND SURETY—Subrogation—Security for guaranteed debt of insolvent..... VII, 168
PRIVITY OF CONTRACT—As affecting the liability of a manufacturer of food for injuries to the ultimate consumer..... L, 409

PRIZE FIGHTING—Definition—Cr. Code (1906), secs. 105-108 ..... XII, 786
PROFITS A PRENDRE ..... XL, 144
PROVINCIAL POWERS TO GRANT EXCLUSIVE FISHING RIGHTS ..... XXXV, 28
PUBLIC POLICY—As effecting illegal contracts—Relief. XI, 195
QUESTIONED DOCUMENTS AND PROOF OF HANDWRITING —Law relating to ..... XLIV, 170
REAL ESTATE AGENTS—Compensation for services—Agent's commission ..... IV, 531
RECEIPT—For mortgage money signed in blank ..... XXXII, 26
RECEIVERS—When appointed ..... XVIII, 5
REDEMPTION OF MORTGAGE—Limitation of action ... XXXVI, 15
RENEWAL—Promissory note—Effect of renewal on original note ..... II, 816
RENEWAL—Lease—Covenant for renewal ..... III, 12
SALE—Of goods—Acceptance and retention of goods sold. XLIII, 165
SALE—Part performance—Statute of Frauds ..... XVII, 534
SCHOOLS—Denominational privileges—Constitutional guarantees ..... XXIV, 492
SEDITION—Treason ..... LI, 35
SEQUESTRATION—Enforcement of judgment by ..... XIV, 855
SHIPPING—Collision of ships ..... XI, 95
SHIPPING—Contract of towage—Duties and liabilities of tug owner ..... IV, 13
SHIPPING—Liability of a ship or its owner for necessaries ..... I, 450
SLANDER—Repetition of—Liability for ..... IX, 73
SLANDER—Repetition of slanderous statements—Acts of plaintiff inducing defendant's statement—Interview for purpose of procuring evidence of slander—Publication and privilege ..... IV, 572
SOLICITORS—Acting for two clients with adverse interests ..... V, 22
SPECIFIC PERFORMANCE—Grounds for refusing the remedy ..... VII, 340
SPECIFIC PERFORMANCE—Jurisdiction—Contract as to lands in a foreign country ..... II, 215
SPECIFIC PERFORMANCE—Oral contract—Statute of Frauds—Effect of admission in pleading ..... II, 636
SPECIFIC PERFORMANCE — Sale of lands — Contract making time of essence—Equitable relief ..... II, 464
SPECIFIC PERFORMANCE—Vague and uncertain contracts ..... XXXI, 485
SPECIFIC PERFORMANCE—When remedy applies ..... I, 354
STATUTE OF FRAUDS—Contract—Signature followed by words shewing signing party to be an agent ..... II, 99
STATUTE OF FRAUDS—Oral contract—Admissions in pleading ..... II, 636
STATUTES—In pari materiâ—Interpretation ..... XLIX, 50

STREET RAILWAYS—Reciprocal duties of motormen and drivers of vehicles crossing the tracks..... I, 783
SUBROGATION—Surety—Security for guaranteed debt of insolvent—Laches—Converted security..... VII, 168
SUMMARY CONVICTIONS—Notice of appeal—Recognizance—Appeal..... XIX, 323
SUMMARY CONVICTIONS—Amendment of..... XLI, 53
TAXES—Exemption from taxation..... XI, 66
TAXES—Powers of taxation—Competency of province. IX, 346
TAXES—Taxation of poles and wires.....XXIV, 669
TENDER—Requisites..... I, 366
TIME—When time of essence of contract—Equitable relief from forfeiture..... II, 464
TOWAGE—Duties and liabilities of tug owner..... IV, 13
TRADE-MARK—Distinction between trade-mark and trade-name, and the rights arising therefrom...XXXVII, 234
TRADE-MARK—Passing off similar design—Abandonment.....XXXI, 602
TRADE-MARK—Registrability of surname as.....XXXV, 519
TRADE-MARK—Rights as between two parties who use a trade-mark concurrently..... LI, 436
TRADE-MARK—Trade-name—User by another in a non-competitive line..... II, 380
TRADE-NAME—Name of patented article as trade-mark. XLIX, 19
TREASON—Sedition..... LI, 35
TRESPASS—Obligation of owner or occupier of land to licensees and trespassers..... I, 240
TRESPASS—Unpatented land—Effect of priority of possessory acts under colour of title..... I, 28
TRIAL—Preliminary questions—Action for malicious prosecution..... XIV, 817
TRIAL—Publicity of the courts—Hearing in camera.. XVI, 769
TUGS—Liability of tug owner under towage contract.. IV, 13
TUGS—Duty of a tug to its tow.....XLIX, 172
ULTRA VIRES—In actions on corporate contracts...XXXVI, 107
UNFAIR COMPETITION—Using another's trade-mark or trade-name—Non-competitive lines of trade..... II, 380
VENDOR AND PURCHASER—Contracts—Part performance—Statute of frauds..... XVII, 534
VENDOR AND PURCHASER—Equitable rights on sale subject to mortgage..... XIV, 652
VENDOR AND PURCHASER—Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title..... XIV, 351
VENDOR AND PURCHASER—Sale by vendor without title—Right of purchaser to rescind..... III, 795
VENDOR AND PURCHASER—Transfer of land subject to mortgage—Implied covenants.....XXXII, 497
VENDOR AND PURCHASER—When remedy of specific performance applies..... I, 354

VIEW—Statutory and common law latitude—Jurisdiction of courts discussed..... X, 97
WAGES—Right to—Earned, but not payable, when... VIII, 382
WAIVER—Of forfeiture of lease..... X, 603
WILFUL ACT OR OMISSION OR NEGLIGENCE—Within the meaning of the Railway Act.....XXXV, 481
WILLS—Ambiguous or inaccurate description of beneficiary..... VIII, 96
WILLS—Compensation of executors—Mode of ascertainment..... III, 168
WILLS—Substitutional legacies—Variation of original distributive scheme by codicil..... I, 472
WILLS—Words of limitation in.....XXXI, 390
WITNESSES—Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code sec. 242A..... XVII, 721
WITNESSES—Medical expert.....XXXVIII, 453
WORKMEN'S COMPENSATION—Quebec law—9 Edw. VII. (Que.) ch. 66—R.S.Q. 1909, secs. 7321-7347. VII, 5

THE KING v. RUSSELL.

(Annotated.)

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton, and Dennistoun, JJ.A. February 24, 1920.

1. JURY (§ II D—65)—CRIMINAL PROSECUTION—INDICTMENT—SEVERAL COUNTS — SELECTION OF JURY — NUMBER OF PEREMPTORY CHALLENGES.

The practice in the Province of Manitoba, in a criminal prosecution, is to limit the number of peremptory challenges on the selection of the jury to the number allowed in respect of the most serious offence of those charged in the indictment, and therefore where each of several counts in an indictment charges a seditious conspiracy, to effect the purposes stated in the several counts, it being the same conspiracy to carry into effect a seditious intention although charged in a different form in the several counts, the accused is only entitled to four peremptory challenges, under section 932 (3) of the Criminal Code.

[*Rex* v. *Kelly* (1916), 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282; *Rex* v. *Turpin*, (1904), 8 Can. Cr. Cas. 59; *The Queen* v. *Martin* (1848), 6 St. Tr. (N.S.) 925, referred to.]

2. EVIDENCE (§ IV R—491)—CRIMINAL CHARGE—DOCUMENTS—IN HANDS OF ACCUSED—IN HANDS OF PERSONS CHARGED WITH BEING PARTIES—IN HANDS OF THIRD PARTIES—ADMISSIBILITY IN EVIDENCE.

Documents found in the hands of the accused are clearly admissible in evidence and are *primâ facie* evidence against him, it being inferred that he knows their contents and has acted upon them.

[*Rex* v. *Horne Tooke* (1794), 25 How. St. Tr. at 120, followed.]

Documents found in the hands of persons whom the Crown charges with being parties to a conspiracy and relating to it are admissible if they were intended for the furtherance of the conspiracy and become evidence against the accused.

Documents found in the hands of third parties are admissible in evidence if they relate to the actions and conduct of the persons charged with the conspiracy or to the spread of seditious propaganda.

3. SEDITIOUS CONSPIRACY (§ I—1)—STRIKES—SECTION 590 CR. CODE—LAWFUL OBJECT — PROTECTION — UNLAWFUL OBJECT — REVOLUTION — LIABILITY—SEC. 134 CR. CODE.

Under sec. 590 of the Criminal Code it is lawful for workmen to combine in a strike in order to get higher wages and persons who aided or encouraged such a strike would not be committing an unlawful act because they were endeavouring to bring about something that is legal, but this section can be no protection where the conspirators did acts and caused acts to be done which were offences punishable by statute and therefore not protected by sec. 590 and where the ultimate purpose of the strike, as declared in public speeches and propaganda, was revolution, the overthrow of the existing form of government in Canada and the introduction of a form of Socialistic or Soviet rule in its place, which was to be accomplished by general strikes, force and terror and if necessary bloodshed, the conspirators of such a strike are guilty of seditious conspiracy under sec. 134 of the Criminal Code.

[Review of authorities. As to right to bail on commitment for a misdemeanor, see Annotation, 50 D.L.R. 633.]

Statement.

APPEAL from a conviction on a charge of seditious conspiracy in connection with the strike in the City of Winnipeg in May, 1919. Conviction affirmed.

MAN.

C. A.

THE KING v. RUSSELL.

Perdue, C.J.M.

A. J. Andrews, K.C., *I. Pitblado*, K.C., *J. B. Coyne*, K.C., *W. A. T. Sweatman* and *S. L. Goldstine*, for the Crown.

R. Cassidy, K.C., and *E. J. McMurray*, for the accused.

PERDUE, C.J.M.:—I do not intend to deal *seriatim* with the many questions reserved or to give written reasons for all the answers upon which the members of the Court have agreed.

After the accused had pleaded they refused to sever in their peremptory challenges to the jurors. The Crown then claimed the right to proceed against one of the accused and elected to proceed against Russell. This the trial Judge had power to permit: Archibold's Crim. Pleadings, 25th ed., pages 193, 1357; *Reg.* v. *Ahearne* (1852), 6 Cox C.C. 6.

At the trial the accused was allowed only 4 peremptory challenges on the selection of the jury. His counsel claimed that the accused was entitled to 4 peremptory challenges on each count in the indictment on the ground that each count charged a separate and distinct offence. Section 932 of the Cr. Code is as follows:—

932. Every one indicted for treason or for any offence punishable with death is entitled to challenge 20 jurors peremptorily.

2. Every one indicted for any offence other than treason, or an offence punishable with death, for which he may be sentenced to imprisonment for more than 5 years, is entitled to challenge 12 jurors peremptorily.

3. Every one indicted for any other offence is entitled to challenge 4 jurors peremptorily.

Each of the first 6 counts in the indictment charges a seditious conspiracy between the accused and the other persons mentioned, to effect the purposes stated in the several counts. It was the same conspiracy to carry into effect a seditious intention although charged in a different form in the several counts.

The maximum punishment for seditious conspiracy is, in the present case, 2 years imprisonment: Cr. Code., sec. 134. The amendment of that section in 9-10 Geo. V. 1919, ch. 46, sec. 5, does not apply to this case. The jury found the accused guilty on each count and the Judge imposed a sentence of 2 years imprisonment on each of the first 6 counts, the sentences to run concurrently. It was in fact a punishment of 2 years' imprisonment upon these 6 counts. The seventh count was one for committing a common nuisance, the maximum punishment for which is 1 year's imprisonment: sec. 222. The accused was found guilty on this count also and was sentenced to 1 year's imprisonment, the sentence to run concurrently with that upon the other counts.

Under sec. 856 of the Code any number of counts for any offences whatever may be joined in the same indictment, except that to a count charging murder no other than one charging murder shall be joined. Where there are more counts than one, each count may be treated as a separate indictment, and if the Court considers it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately: Cr. Code sec. 857. In *Rex* v. *Lockett*, [1914] 2 K.B. 720, Sir Rufus Isaacs, C.J., delivering the judgment of the Court of Criminal Appeal, said, at 732:—

> It is apparent that if the facts are in substance the same, the overt acts relied upon are the same, and if the overt acts are the same, then there is no repugnance in these counts, and the consequence is that they may be charged together in one indictment, and there is no ground upon which we can say that the Judge was bound to put the prosecution to its election.

In *The Queen* v. *Mitchel* (1848), 6 St. Tr. (N.S.) 599, there were joined together in the one indictment counts for feloniously compassing to depose the Queen, for feloniously compassing to levy war against the Queen and to force her to change her measures and counsels. The Court, following *Rex* v. *Blackson* (1837), 8 C. & P. 43; *The Queen* v. *O'Connell* (1844), 5 St. Tr. (N.S.) 783, and other cases, refused to put the Crown to its election. The reason assigned was that there was no repugnancy in the different offences charged, and that they constituted "but one *corpus delicti*, laid different ways." In the case at bar the first 6 counts relate to the same offence of seditious conspiracy. The offence is charged in different ways but the conspiracy and the overt acts are the same. I would also refer to *Rex* v. *Kelly* (1916), 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282, and to *O'Connell* v. *The Queen* (1844), 1 Cox C.C. 413, at 511.

In *Rex* v. *Turpin* (1904), 8 Can. Cr. Cas. 59, the indictment contained a charge for unlawful wounding and also a separate count for common assault, it was held that the accused was not entitled to claim additional peremptory challenges by reason of the addition of the count for assault. The reason, however, given for the decision was that it was not necessary to add a count for common assault in order to get a conviction for that offence if the evidence warranted it.

Under sec. 857, Cr. Code:—

> Unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft, not exceeding

MAN.

C. A.

THE KING v. RUSSELL.

Perdue, C.J.M.

3, alleged to have been committed within 6 months from the first to the last of such offences, whether against the same person or not.

If an accused is entitled on such an indictment to a separate set of peremptory challenges on each count he would be allowed 36 peremptory challenges which would be nearly double the number allowed on an indictment for treason or murder, and would exhaust the panel summoned for an ordinary country assize. The practice in this Province has hitherto been to limit the peremptory challenges to the number allowed in respect of the most serious offence of those charged in the indictment. This was in my opinion the clear intention of the Code. In England the number of peremptory challenges allowed to the accused is determined by the nature of the offence. Where the charge is felony (excepting high treason) the accused may challenge 20 jurors peremptorily. In cases of misdemeanour the accused was not entitled to any peremptory challenges. I can find no mention in the reports of a claim being made to more than 20 peremptory challenges where several counts for felony were joined together in the indictment. In *The Queen* v. *Martin* (1848), 6 St. Tr. (N.S.) 925, the indictment contained 14 separate counts each charging a felony or treason felony. The accused was allowed 20 peremptory challenges and no more. (See pages 956, 957, 967). The same rule should be, and has been, adopted in Canada. Section 932 of the Code affords no reason for making a different rule. In the United States, "the fact that an indictment contains several counts does not entitle defendant to any additional peremptory challenges:" 24 Cyc. 361.

Under the English law it was the practice where a juror was challenged for cause to put the reason for the challenge in writing. Issue was joined upon this and the trial proceeded before the triers. See *The Queen* v. *Martin*, 6 St. Tr. (N.S.) 925 at 963. The onus of proof is on the person challenging. If the ground of the challenge is that the juryman is not indifferent, he is not in general to be questioned as to the fact. It must be proved by extrinsic evidence: *The King* v. *Edmonds* (1821), 4 B. & Ald. 471, 1 St. Tr. (N.S.) 785; *The Queen* v. *Martin, supra*, at pages 963-964. The challenges for cause to which an accused person is entitled are set out in sec. 935 of the Code and no others except those mentioned in the section shall be allowed. The ground of challenge claimed in this case was under (b) of the above section, that the juror was not indifferent.

Counsel for the accused put the following question to the juror: "Did the strike cause you loss?" This question was not admissible upon 2 grounds, (1) it had no bearing on the ground of challenge that the juryman was not indifferent, (2) there was no right to question the juryman as to that ground.

In any event the objection to the refusal of the Judge to allow the question to be asked was waived by counsel for the accused abandoning the trial of the proposed juror before the triers, and without waiting for their verdict.

It might be mentioned that under sec. 936 of the Code the Court may require the party challenging to put his challenge in writing. The form of such challenge is provided by Form 70 (Cr. Code).

The acts and declarations of one conspirator in regard to the common design are evidence against the others. A foundation should first be laid by proof, sufficient, in the opinion of the Judge, to establish *primâ facie* the fact of conspiracy between the parties, or, at least, proper to be laid before the jury, as tending to establish that fact.

Taylor on Evidence, 10th ed., page 418, par. 590, says:—

> The connection of the individuals in the unlawful enterprise being thus shewn, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them.

The conspiracy may be proved by circumstantial evidence, by the detached acts of the persons accused, including their written correspondence, entries made by them, and by documents in their possession relating to the main design. "On this subject it is difficult to establish a general inflexible rule, but each case must, in some measure, be governed by its own peculiar circumstances": Taylor on Evidence, 10th ed., page 418, par. 591.

Counsel for the accused objected to the reception in evidence of a great number of documents mentioned in Schedule "C" to the fifth question. It would take too much space to discuss these one by one. They can be divided into 3 classes:—

1. Documents found in the hands of the accused; 2. documents found in the hands of persons whom the Crown charges with being parties to the conspiracy; 3. documents found in the hands of other parties which would shew the extent of the propaganda.

MAN.

C. A.

THE KING v. RUSSELL.

Perdue, C.J.M.

The documents belonging to the first class are clearly admissible. Writings found in a man's hands are *primâ facie* evidence against him. It will be inferred that he knows their contents and has acted upon them. If they refer to the conspiracy they will be important to shew complicity and intention: *Rex* v. *Horne Tooke* (1794), 25 How. St. Tr. 1 at 120; Taylor on Evidence, pars. 593, 594, 812.

Documents coming under the second class are admissible if they were intended for the furtherance of the conspiracy. Documents found in the hands of parties to the conspiracy and relating to it become evidence against the accused: *Rex* v. *Hardy* (1794), 24 How. St. Tr. 199, 452, 475; *Reg.* v. *Connolly* (1894), 25 O.R. 151. The parties to the conspiracy may never have seen or communicated with each other yet by the law they may be parties to the same common criminal agreement, with the same consequences to each other from acts done by one of them or documents found in possession of one of them: *Reg.* v. *Parnell* (1881), 14 Cox C.C. 508, 515; *Reg.* v. *Murphy* (1837), 8 C. & P. 297.

As to the third class, I think that documents found in the hands of third parties are admissible in evidence if they relate to the actions and conduct of the persons charged with the conspiracy or to the spread of seditious propaganda as one of the purposes of the conspiracy: *Rex* v. *Wilson* (1911), 21 Can. Cr. Cas. 105; *Rex* v. *Kelly* (1916), 27 Can. Cr. Cas. 140, 27 Man. L.R. 105, affirmed in 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282; *Reg* v. *Connolly*, 25 O.R. 151, 164, 176.

The spread of seditious propaganda in the shape of pamphlets or other printed matter was one of the means by which the purpose of the conspiracy in the present case was to be effected. If such printed matter is found in the hands of a stranger and can be traced as coming from a party to the conspiracy it is evidence against the others. Letters connecting the party to the conspiracy with the act of sending the literature would also be evidence against him and his co-conspirators.

The main objection raised by the defence on this question was as to letters written by one Beatty to Stevenson, the secretary of the Dominion executive of Socialists in Canada. The accused, Russell, was the Manitoba secretary of that party and was in correspondence with Stevenson. The trial Judge charged the jury on this point as follows:—

It is for you to say whether the evidence satisfies you that these persons (including Stevenson), or any of them, were such co-conspirators with Russell. If any of them was a co-conspirator his acts and statements in furtherance of the conspiracy would be evidence against Russell.

If, on the other hand, the jury is not convinced that any of these persons was a co-conspirator, then his acts and statements should not be considered by the jury as evidence against Russell of seditious intention or of conspiracy, and should be disregarded entirely.

As to such letters as those of Beatty, and as to the statements made by others whom I have not named—there are so many that I will just put it that way and you will understand—as to their acts and statements I would advise you to disregard them, except as to the class of propaganda which is thereby indicated, the extent of such, and the intent thereby disclosed, and those responsible for such propaganda in so far as you may find them connected with the accused Russell.

I think the jury would understand that Russell was not to be made responsible for the acts or statements of any person unless that person had been, to the satisfaction of the jury, connected with Russell in the conspiracy. The letters of Beatty were to be disregarded except in so far as they shewed the class of propaganda that was being circulated and the persons responsible for it. But unless the jury found that these persons were connected with Russell in the conspiracy he would not be responsible for their actions in any way.

It was contended by counsel for the defence that the general strike which took place in Winnipeg on May 15, 1919, and continued for more than a month thereafter was the lawful act of a "trade combination" and that the persons responsible for the strike could not be prosecuted for conspiracy by reason of the protection afforded by sec. 590 of the Cr. Code. That section is as follows:—

590. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute.

A trade combination is thus defined by Cr. Code, sec. 2, subsec. (38):—

"Trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service.

The offence charged against the accused and others named or referred to in the indictment was seditious conspiracy. This is a

MAN.

C. A.

THE KING v. RUSSELL.

Perdue, C.J.M.

statutory offence: Code, secs. 132, 134. There was ample evidence establishing the charge. The conspiracy contemplated the doing of acts which were offences punishable by statute, such as inducing the servants and workmen employed by the Post Office Department of the Dominion of Canada to go on strike, thereby committing an indictable offence: (Post Office Act, R.S.C. 1906, ch. 66, secs. 125-126); inducing the firemen employed by the City of Winnipeg to go on strike, thereby endangering life and property (Code, sec. 499); causing workmen and employees to break their contracts of hiring and abandon their work, contrary to the Master & Servant Act, R.S.M. 1913, ch. 124; causing offences against the provisions of the Industrial Disputes Investigation Act, 6-7 Edw. VII. 1907 (Dom.), ch. 20, secs. 56 & 57. The above are only a few of the acts punishable by statute which it was the purpose of the conspiracy to commit and which were committed in pursuance of it.

A combination by two or more without justification or excuse to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him, nor continue in his employment, is actionable if it results in damage to him: *Quinn* v. *Leathem*, [1901] A.C. 495. In giving his judgment in that case Lord Brampton said, at 528:—

> A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved.

Lord Brampton also quoted the statement of the law by Willis, J., which was adopted by the House of Lords in *Mulcahy* v. *The Queen*, (1868), L.R. 3 H.L. 306, at 317, and is as follows:—

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable. Where two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. . . . The number and the compact give weight and cause danger.

The statutory provision in England which comes closest to our

sec. 590 is sec. 3 of the Act of 38-39 Vict. 1875 (Imp.), ch. 86. The first paragraph of sec. 3 was originally as follows:—

An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

While this clause of the English Act stood as above the case of *Lyons* v. *Wilkins*, [1896] 1 Ch. 811, was decided. In that case the officers of a trade union ordered a strike against the plaintiff manufacturers, and also as against S., a person who made goods for the plaintiff only, and their pickets by their direction watched and beset the works of the plaintiffs and of S. for the purpose of persuading workmen to abstain from working for the plaintiffs. It was held that the picketing and the strike against S. for the indirect purpose of injuring the plaintiffs were illegal acts. Lord Lindley, in giving his judgment, said at page 823:—

Until Parliament confers on trade unions the power of saying to other people, "You shall not work for those who are desirous of employing you upon such terms as you and they may mutually agree upon," trade unions exceed their power when they try to compel people not to work except on the terms fixed by the unions. I need hardly say that up to the present moment no such power as that exists. By the law of this country no one has ever, and no set of people have ever had that right or that power.

This judgment was delivered in 1896. Kay and Smith, L.J.J., were of the same opinion as Lord Lindley. Kay, L.J., cited sec. 3 of the Act of 1875 (Imp.), and went on to say at pages 828-829:—

There it appears that strikes are legalized by Act of Parliament, and that one person would not be indictable for a crime by endeavouring to encourage or bring about that which in itself is not illegal, namely, a strike. Therefore a combination of two or more persons to do this would come exactly within the words of the 3rd section of the Act, and would not, since this Act of Parliament, be an offence against the law. But then it does not go further than that. At present the Legislature has simply legalized strikes, and a strike is an agreement between persons who are working for a particular employer not to continue working for him. Also, I take it that under the terms of the section which I have read it is not illegal for a trade union to promote that strike. But further than that the law has not gone.

Smith, L.J., at page 834, was of opinion that if there had been a trade dispute between S.'s workmen and S. himself the trade union might have called out his men on strike, but it had no right to call out S.'s men so as to prevent him from working for the plaintiff.

Now if we take our sec. 590 of the Code, reading it along with sub-sec. (38) of sec. 2, we find that no prosecution shall be main-

MAN.

C. A.

THE KING v. RUSSELL.

Perdue, C.J.M.

tainable against any person for conspiracy . . . for doing any act or causing any act to be done for the purpose of any combination between (1) masters, (2) workmen, (3) or other persons, for regulating or altering the relations between any persons being masters or workmen, or for regulating or altering the conduct of any master or workman in or in respect of his business or employment or contract of employment or service. In order that the combination may enjoy the immunity provided by the enactment it must have as its purpose at least one of the purposes above set forth.

It is lawful for workmen to combine in a strike in order to get higher wages because that would be a combination to regulate or alter the conduct of a master in his employment of his workmen. Persons who aided or encouraged such a strike would not be committing an unlawful act because they were endeavouring to bring about something that is legal. But supposing there is a strike by the moulders in A.'s foundry and in order to assist the strike the employees of a cartage company combine in a refusal to carry goods to or from A.'s foundry, or the railway company's employees combine in refusing to receive or handle A.'s goods; neither of these combinations comes within the protection afforded by sec. 590. I would refer to *Reg.* v. *Gibson* (1889), 16 O.R. 704, where the effect of the statutory provision as it was in R.S.C., 1886, ch. 173, sec. 13, is discussed.

"Sympathetic" or "secondary" strikes are no longer "actionable," in England by the Trade Disputes Act, 6 Edw. VII. 1906 (Imp.), ch. 47, secs. 3 and 5. We have no similar enactment in Canada legalizing such strikes. The law in Canada applying to such strikes would be the same as it was in England before the Trade Disputes Act, 1906, was passed. By the law of England as laid down before the last-mentioned Act, if two or more persons conspired to incite or to compel another to break a contract it would be a criminal act: *Reg.* v. *Parnell*, 14 Cox C.C. 508; *Mogul Steamship Co.* v. *McGregor* (1889), 23 Q.B.D. 598, 616; [1892] A.C. 25; *Quinn* v. *Leathem*, [1901] A.C. 495, 510-511, 529-531, 538; *Giblan* v. *National Amalgamated Union, &c.*, [1903] 2 K.B. 600, 621.

But I feel that I have been unnecessarily discussing the question in view of the facts proved in this case. The persons who planned and brought about the general strike in Winnipeg of May 15, 1919,

were not acting for the purpose of a trade combination so as to entitle them to the immunity provided by sec. 590. The accused and the other persons who combined with him, being the wing of the Socialist party known as the "Reds," had obtained control of the Trades and Labour Council in the early part of 1919. The Trades and Labour Council by resolution decided early in May that a vote should be taken, authorizing the calling of a general strike; it was also decided that the vote of all the unions should be pooled and that the decision of the majority of the pooled votes should govern. Each union therefore was to be bound by the decision of the majority of all the unions. This vote was then taken by ballot and the Minutes of the Trades and Labour Council of May 13th shew that on that date it was decided by the Trades and Labour Council to call a general strike at 11 a.m. on Thursday, May 15. It was ordered: "Every worker will drop tools at the same moment." When this decision was reached by the Trades and Labour Council it was shewn in evidence that the employees of the Winnipeg Electric R. Co. had not completed the taking of their vote and that a number of other unions such as the telephone operators, commercial telegraphers, barbers, musicians, Selkirk Asylum operators, etc., had not reported. Almost every class of employees in Winnipeg had been organized as a trade union. These included skilled and unskilled labour, railway employees, street car men, bakers, milkmen, drivers of motor cars, clerks in stores and shops, compositors and other newspaper workers, civic employees, the city firemen, police, electric light and waterworks employees, scavengers, draymen, delivery men, telegraph and telephone operators, post office employees, in fact almost every form of labour, service or employment. On May 15, 1919, a general strike took place. Notice of the strike was given to the employers in most cases on May 14, 1919, and none prior to that date. During a period of 6 weeks business, industry and the ordinary pursuits of civil life in Winnipeg were interrupted and the citizens subjected to apprehension and terror. The city was, in effect, in a state of siege. Persons who were willing to work were threatened and driven from work by the strikers. The supplies of food, water and other necessaries were endangered. Riots took place, and injury was caused to persons and property. The overt acts set out in the indictment were proved in evidence. They throw much light on the purpose and intention of the conspiracy.

MAN.

C. A.

THE KING v. RUSSELL.

Perdue, C.J.M.

But it is argued for the defence that all the trade unions that struck had united for one common trade union purpose, and that this was a trade combination engaged in a legitimate strike. The answer to that argument is that the combination did acts and caused acts to be done which were offences punishable by statute and therefore it was not protected by sec. 590.

The accused has been found guilty upon all the counts set forth in the indictment. There was amply sufficient evidence to justify the jury in making their findings. In fact they could not have honestly arrived at any other conclusion. So far from being a legitimate strike the combination was in fact, as the jury has found, a seditious conspiracy. To aid a brother trade union in its strike for higher wages, or to obtain higher wages for all, was not the real object of the combination. What took place before the strike shews that the accused and his associate "Reds" aimed at something much more drastic. Their ultimate purpose, as declared in their public speeches, was revolution, the overthrow of the existing form of government in Canada and the introduction of a form of Socialistic or Soviet rule in its place. This was to be accomplished by general strikes, force and terror and, if necessary, by bloodshed. The Bolshevists in Russia were greeted and approved. A vast quantity of propaganda in the shape of pamphlets, booklets, printed papers, etc., was distributed by the conspirators as widely as possible. All of this contained matter intended to excite discontent and stir up class hatred, much of it was seditious, some of it was treasonable. The agitation prior to and during the strike shewed no desire on the part of the leaders to bring about by constitutional means an improvement in the position of the wage-earner or the securing for him of a greater share in the fruits of his labour. Writing to brother Socialists prior to the strike the accused contemptuously refers to the rank and file of the workingmen as the "plugs." It was said by speakers at meetings and in the literature distributed that "revolution and not evolution" was to be the means employed in accomplishing their purposes. "Capitalism" was to be destroyed and our whole system of government was to be overturned. The accused and his associates advocated a "dictatorship of the proletariat." All industries were to become the property of the workers and be operated "for use and not for profit." Land was to become the property of the state. At the

meeting in the Walker Theatre in Winnipeg on December 22, 1918, the accused, according to reliable witnesses, made the following statement: "Blood is running in Russia and blood will run in this country from the Atlantic to the Pacific, or we will get our rights." On another occasion he stated that the Soviet government (of Russia) was a better government than our own and predicted that it was coming in Canada. These statements were made to large audiences, many of whom were foreigners, and were received with much applause.

There is one other point to which I might briefly refer. By the English Act, 38-39 Vict. 1875, ch. 86, what is known as "peaceful picketing" is excepted from the enactment making intimidation and picketing in general illegal: sec. 7. This was adopted in Canada by the Act 39 Vict. 1876, ch. 37, sec. 2; R.S.C. 1886, ch. 173, sec. 12. When the Cr. Code, 1892, was compiled the exception in favour of "peaceful picketing" was omitted (see sec. 520) and has never since, so far as I can find, been re-enacted.

I have read the judgments of my brothers Cameron and Dennistoun and agree with their conclusions. The questions reserved for the opinion of this Court should be answered as follows: To the first paragraph of the first question: Yes; the motion to quash the indictment was properly dismissed. To the second paragraph of the said first question: Yes, the motion in arrest of judgment was properly dismissed. To the third paragraph of the said first question: There has been no mistrial. To the second question: Yes. To the third question: Yes. To the fourth question: The trial Judge was right in disallowing this question. To the fifth question: The evidence was properly admitted. To the sixth question: Yes. To the seventh question: Yes; the evidence was properly admitted. To the eighth question: Yes; the evidence was properly admitted. To the ninth question: The evidence was properly admitted. To the tenth question: The evidence was properly admitted. To the eleventh question: The verdict is good. To the twelfth question: No. To the thirteenth question: There was no substantial wrong or miscarriage occasioned on the said trial. To the fourteenth question: Yes.

CAMERON, J.A.:—Amongst the questions reserved by the trial Judge were several relating to his charge to the jury. One of these is in respect of that portion of his charge dealing with general

Cameron, J.A.

MAN.

C. A.

THE KING v. RUSSELL.

Cameron, J.A.

and sympathetic strikes, and is thus stated: "Did I misdirect the jury as to the legality or otherwise of general strikes and general sympathetic strikes, having relation to this strike?" "This strike" refers to the general or sympathetic strike that occurred in this city, commencing May 15 last and continuing in force for 6 weeks thereafter. The events leading up to and connected with that strike are detailed at length in the evidence, and are well known to the world.

In his charge the trial Judge reviewed the history of the law relating to trade combinations and trade unions in England from the time of Edward III., referred to the legislation of 1824, 1825, 1859, 1871 and 1875 and various well-known decisions of the Courts. He also sketched the history of the Canadian legislation pointing out differences between it and that of England. He referred to the definition of sympathetic strike given in the box by the accused Russell, viz., "When a dispute originates between an employer and his employees, and when the labor organizations see that organization being beat, they come to their assistance by calling a strike to force their employers to bring force to bear upon the original disputants to make a settlement." The trial Judge emphasized to the jury the threat of force underlying this statement.

In dealing with the question of strikes and picketing he pointed out that the sub-section of the English Conspiracy and Protection of Property Act, 38-39 Vict. 1875, ch. 86, prohibiting intimidation and watching and besetting, which provides that "attending at or near the house or place where a person resides, or works or carries on business . . . to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section" was reproduced in the Canadian Act, An Act to Amend the Criminal Law relating to Violence, Threats and Molestation, 39 Vict. 1876, ch. 37. This is the provision which was intended to protect and justify "peaceful picketing." But though re-enacted in the revision of 1886, it is not now found in our Code. The trial Judge told the jury, and rightly I think, that with us the striker has no more justification for picketing than he obtains by the right of every British citizen to go about his own business in a peaceable way.

That particular portion of the charge which is the subject of the question reserved is as follows:—

How can a general sympathetic strike, the object of which is to tie up all industry, to make it so inconvenient for others that they will cause force to be brought about, to stop the delivery of food, to call off the bread, to call off the milk, to tie up the wheels of industry, and the wheels of transportation from coast to coast. To lower the water pressure in a city like Winnipeg, which since the establishment of modern improvements has no other way in which to carry on its life; how can such a strike be carried on successfully without a breach of all these matters; without violence, intimidation, without watching and besetting? How can you say if you exercise your common sense that those in charge of a strike like that did not intend those things should follow? And, gentlemen, all those things followed. You heard about the Canada Bread. No striker may trespass upon my property now to do what they did at the Canada Bread. Is it likely to commit a breach of the peace? Gentlemen, if you and I were the Canada Bread it would have caused a breach of the peace, I think.

Without going into detail it is plain that the statute law of England relating to trade combinations, trade unions, combinations of workmen, and strikes differs in material particulars from that of Canada, and the decisions of the English Courts thereon are to be read with those differences in mind. Important provisions of the Trade Disputes Act of 1906 are not to be found in our legislation. So far as the criminal aspect of the matters involved in this case are concerned they must be considered in view of the provisions of our Code. The judgment of Loreburn, L.C., in *Conway v. Wade*, [1909] A.C. 506, dealing with the term "trade dispute" and holding the secondary strike justified by the Trade Disputes Act of 6 Edw. VII. 1906, ch. 47, where he says at 512: "the section cannot fairly be confined to an act done by a party to the dispute" is obviously based altogether on the provisions of that statute and has no application in Canadian law.

There was no contention in this case that there was not sufficient evidence for the jury, and no question was reserved on that subject. In fact the evidence for the Crown was of an overwhelming character and volume. The defence was, therefore, thrown back upon the immunity which, it was argued, was given the accused by sec. 590 of the Cr. Code, which provides:—

590. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute.

"Trade combination" is defined in sec. 2, sub-sec. (38):—

(38) "Trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or

MAN.

C. A.

THE KING v. RUSSELL.

Cameron, J.A.

workman in or in respect of his business or employment, or contract of employment or service.

All the acts done or caused to be done by the accused and those with whom he was in combination brought out in the evidence were, it was argued "for the purpose of a trade combination" and therefore protected by the section. Whether the combination was a single union or a combination of them and whatever may have been the real purpose for which it was formed, were, it was urged, immaterial considerations in view of the protecting words. From this viewpoint every or any strike is lawful, if not meritorious.

But the concluding words of the section (590) "unless such act is an offence punishable by statute" cannot be overlooked. Clearly, if the acts done or caused to be done, the objects for the accomplishment of which the alleged conspiracy was formed, were offences punishable by statute the protection given by the section becomes narrowly confined within certain ascertainable limits.

In England under the Conspiracy and Protection of Property Act, 38-39 Vict. 1875, ch. 86, an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute, is not indictable as a conspiracy if such act committed by one person would not be punishable as a crime. This provision does not affect the law relating to riot, unlawful assembly, breach of the peace, sedition or any offence against the State or the Sovereign. It is, apparently, therefore, somewhat similar to, but with manifest differences from our sec. 590, and other than sec. 590 has no counterpart in our Code.

A long series of Acts culminating in the year 1800 made it a criminal offence for workmen to agree together for the purpose of obtaining in combination higher wages or shorter hours of work . . . The consequence was that the Courts were not called upon to decide whether such a combination constituted a conspiracy at common law and statements to the effect that it does constitute a criminal offence may be explained by reference to the statutes in force at the time or on the ground that they referred to offences against the State or of a public nature. 27 Hals., p. 638, par. 1195.

These Acts were repealed in 1824 and 1825, and notwithstanding some dicta to the contrary,

it is now clear that a combination in restraint of trade is not a criminal offence at common law, unless it is a combination in pursuit of a malicious purpose to ruin or injure a person, as opposed to a combination for the purpose of a legitimate trade object. Ib., p. 639, par. 1196.

In 27 Hals., page 601, par. 1140, a strike is defined as:—

a simultaneous cessation of work on the part of workmen. It does not necessarily involve any breach of either the civil or criminal law; for it is not

illegal to persuade men lawfully to determine their contracts with their employer or not to work for an employer.

It is pointed out in the note (b), page 601, to the statement that "the word is of an artificial character and does not represent any legal definition or description."

As to the effect of the provision in the Conspiracy and Protection of Property Act, 1875 (Imp.), on the legality of strikes, in *Gozney* v. *Bristol, etc.*, [1909] 1 K.B. 901, Cozens-Hardy, M.R., said, on the argument that the effect was to legalize strikes in the broadest terms and Fletcher Moulton, L.J., said, at page 923, that were a strike illegal at common law (which it was not) then it would have been legalized by the above Act.

In *Lyons* v. *Wilkins*, [1896] 1 Ch. 811, and *Quinn* v. *Leathem*, [1901] A.C. 495, 541, it was held that the provision did not legalize a combination to call out the workmen of A. with whom there was no dispute, in order to prevent A. from dealing with B. with whom there was a dispute; but this view is now undermined in England in the light of the definition of "trade dispute" in the Trade Disputes Act, 1906, which is not to be found in our Code. The important dicta in *Lyons* v. *Wilkins*, *supra*, of Lindley, L.J., at page 822, of Kay, L.J., at page 828, and of Smith, L.J., at page 833, are, therefore, still applicable to cases arising in Canada where warranted by the facts.

As long as a strike is for a legitimate purpose, such as, for instance, advancing the rate of wages, the fact that injury results to the employer does not thereby alter the character of the act. It is a case of *damnum absque injuria*. The employer may suffer loss or be financially ruined but under the law as it is, our Courts of Justice are impotent to give him a remedy. But there are limitations on this rule as "the lawfulness of a strike depends, not only on the means used to render it effective, but also on its object. A combination to quit work is lawful only where its purpose is to obtain for the parties a benefit which they can lawfully claim. If the primary object is to injure others in their business or calling, or to deprive them of their liberty of action without just cause and not to advance the interests of the combination except perhaps in some remote or indirect way, it is unlawful." Corpus Juris, vol. 12, page 570.

MAN.

C. A.

THE KING v. RUSSELL.

Cameron, J.A.

The term "sympathetic strike" is also one of artificial character, without a fixed legal meaning. It is a vague phrase, elusive in meaning, like "collective bargaining." The term "sympathetic strike" may convey the idea of workmen in certain industries ceasing work voluntarily and without breach of their own contracts to express their sympathy for and moral support of other workmen already on strike. On this continent it is certainly not confined in meaning to any such peaceful demonstration or to the restricted meanings given to it or to the apparently identical term "secondary strike" in England as mentioned in Cohen on Trade Union Law, 3rd ed., 109. Here we have been educated to give the terms "general" or "sympathetic strike" much wider meanings and to so expand them as to include even the idea which underlies the significant phrase "direct action." The terms imply not only the purpose declared in the definition given by the accused at the trial, which expresses the idea of force brought to bear on employers to compel them to bring pressure to bear upon another employer whose workmen are on an unsuccessful strike, but it may imply more than that. It may even mean a strike which is avowedly declared for the purpose of forcing the action of a government, as, for instance, in compelling the release of a convicted criminal, the abandonment of prosecutions or for any other similar, or it may be wholly different, object which those in control of trade organizations may decide to attempt to attain by the threat or enforcement of a general or sympathetic strike.

As to the legality of a sympathetic strike, there is a valuable article on the subject appended to the report of *Pickett* v. *Walsh* (1906), 6 L.R.A. 1067. The author follows the decision of the Massachusetts Supreme Court in that case, deals with other decisions of the United States Courts, refers to *Quinn* v. *Leathem*, *supra*, and *Giblan* v. *National Amalgamated Union*, *etc.*, [1903] 2 K.B. 600, and thus states his conclusion (page 1075) which seems to accord with our jurisprudence:—

> If the strike is in the nature of a boycott or sympathetic strike—that is, if it involves no trade dispute between the strikers and their employer; in other words, is not a natural incident or outgrowth of the relation of employer and employed—the strike cannot be justified and is therefore always an illegal one.

In arriving at this conclusion the writer confines himself to the question of the legality of strikes viewed as strikes pure and simple and puts out of contemplation (page 1068)

all those matters such as picketing, threats, intimidation, violence and lawlessness of every description, which unfortunately have been so often the accompaniment of strikes as to make one forget that they are not necessarily incident thereto and to persuade one, because of such unlawful features, to view all strikes as illegal.

But in the case now before the Court we are not called upon to deal with the strike, sympathetic or otherwise, as an abstract proposition but in connection with the very accompaniments the writer of the note discards in his discussion and with other circumstances of the most far-reaching character.

The definition of general or sympathetic strike given by the accused may be correct so far as it goes and in some cases. But it falls far short of setting forth the true objects in view of the accused and his fellows who precipitated the strike of last summer and it is a travesty so far as it purports to confine the pressure exerted by the strikers as being brought to bear on employers only. The general strike of last summer was in fact an insurrectionary attempt to subvert the authority of our Governments, Municipal, Provincial and Dominion and substitute for them an irresponsible "strike committee," an attempt attended for a time with a measure of success which, looked at in retrospect, seems incredible. This "strike committee" issued decrees in the approved Soviet style. It put an end to street car transportation, shut off telephone communication, interfered with the city's water supply, called out the firemen from their posts and left the city without fire protection until the strikers' places had been filled by volunteers. When the members of the police force, renouncing their sworn allegiance, had voted to join the strikers, the strike committee issued an edict that "ordered" them back to duty. The delivery of milk, bread and ice was forbidden. Restaurants and eating places were closed save those favored with "permit cards." In the city delivery and transmission of His Majesty's mails were for a time completely stopped. The newspapers were suspended and telegraphic communication with the outside world forbidden. The special police force, organized to take the place of the ordinary police force when its members were finally dismissed for disobedience to their lawful superiors, was mobbed and driven from the streets and the city left practically without police protection. One member of the special police, who had been awarded the Victoria Cross for gallant conduct in the war, was seriously injured

MAN.

C. A.

THE KING v. RUSSELL.

Cameron, J.A.

and had a narrow escape with his life. In the rioting that occurred subsequently there were numerous casualties and members of the Royal Northwest Mounted Police were assailed with missiles of all kinds, shot at from the streets and roofs of buildings and several of them wounded. Workers in the hospitals were called from their tasks and the management of the Winnipeg General Hospital was forced in the interests of its sick and dying patients, to obtain permission from the strike committee to keep its employees at their posts. A widespread system of espionage, intimidation and terrorism was organized and executed with relentless vigilance and activity. All these events and incidents and many more are a matter of history and of evidence, and to say that they were merely bringing pressure to bear on certain employers to force other employers to yield to demands made on them is utterly beside the truth. It was a bold attempt to usurp the powers of the duly constituted authorities and to force the public into submission through financial loss, starvation, want and by every possible means that an autocratic junta deemed advisable. I cannot see how it is possible to speak of such a revolutionary uprising as a mere "sympathetic" or "general strike." In view of the grim facts, to argue that this outbreak was brought about for the purpose of a trade combination is, to my mind, simply out of the question. The contention put forward on the argument that the consolidation into one organization of all, or nearly all, the trade organizations in the city, which developed or merged during the strike into the One Big Union, was merely a "trade combination" and, therefore, protected by the law is, in view of the facts, wholly untenable.

But we are not necessarily called upon to consider all of these aspects of the case, vitally important though they may be. We can confine ourselves to the saving concluding words of sec. 590 of the Code referred to and, on the facts as they were brought out in the evidence and are notorious to the world, and from that viewpoint, let us consider what is the precise extent of the protection given by the section.

Seditious conspiracy is defined and its punishment fixed by the Code, sec. 132. Unlawful assemblies and riots are dealt with in secs. 87 to 90, and nuisances by secs. 221 and 222. There are the sweeping provisions of sec. 164 making wilful disobedience of

any Act of Parliament or of any Provincial Legislature, unless some other punishment is provided, an indictable offence. We have the provisions of sec. 498 dealing with conspiracy in matters of transportation, etc. In sec. 499 are to be found highly important provisions making it an indictable offence to break a contract with resultant danger to life or property and wilfully to break a contract connected with supply of power, light, gas or water and the section declares that malice is no element in the offence. By sec. 501 it is made an offence punishable on indictment or summary conviction to compel any person to abstain from doing anything he has a lawful right to do by the use of violence, threats, following or watching or besetting. And to this section there is no longer the previously existing proviso which sought to legalise "peaceful picketing" by permitting attending at the house of another for the purpose of communication as was clearly pointed out by the trial Judge.

By sec. 573 of the Code:—

> Every one is guilty of an indictable offence . . . who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

This is a most comprehensive enactment. It relates not only to indictable offences, conspiracies to commit which are not specifically dealt with in the Code, but to offences indictable at common law. This section alone, in my opinion, closes the door of hope on the accused.

I refer also to the Industrial Disputes Investigation Act, 6-7 Edw. VII. 1907 (Dom.), ch. 20, the provisions of which were flagrantly violated during the strike at the instigation of those directing its operations.

That there were offences committed coming within those statutory provisions and brought out in the evidence cannot be disputed. The accused knew that they would take place in the carrying out of the designs to which he was a party. If he did not know he should have known. It is difficult, perhaps impossible, to imagine a set of circumstances in which sec. 590 would afford immunity but, however that may be, it is clear that in this case the section is no shield but an open trap into which the accused has rushed heedless of warnings, and he must take the consequences.

I am convinced that the part of the trial Judge's charge to which exception was taken, as formulated in the question I have

MAN.

C. A.

THE KING v. RUSSELL.

Cameron, J.A.

discussed, is a proper, accurate and studiously moderate statement of the law on the subject with which it deals.

The greatest number of the questions reserved for the consideration of this Court were disposed of on the argument without hearing counsel for the Crown. Amongst those which counsel for the Crown were asked to discuss was that relating to the number of challenges to which the accused was entitled at the trial. There is no doubt in my mind that the accused was limited to 4 challenges whether this indictment contained one count or seven. This phase of the case is fully dealt with by the Chief Justice in his reasons for judgment and in addition to the authorities mentioned by him I would refer to this statement of the law from 24 Cyc. 361:—

> The fact that an indictment contains several counts does not entitle defendant to any additional peremptory challenges, even though the different counts charge separate and distinct offences which may be joined in the same indictment.

The question of the admissibility of certain evidence was discussed at length on the hearing. I am satisfied the trial Judge's ruling on this point was unimpeachable. Such evidence must inevitably be admissible from the very nature of the offence where, as in this case, the conspiracy is on a vast scale and its ramifications are multitudinous and far-reaching, and I agree with the views expressed on this subject by Dennistoun, J.A., in his judgment.

Haggart, J.A. Fullerton, J.A.

HAGGART and FULLERTON, JJ.A., agree with Perdue, C.J.M.

Dennistoun, J.A.

DENNISTOUN, J.A.:—A number of the questions of law reserved for the consideration of this Court by the trial Judge relate to the admission of documentary evidence consisting of letters written by and to Russell, one of the accused, by members of the Socialist Party of Canada, and also of publications of that party, and of labour organizations which were referred to in the course of the trial. Evidence was also admitted in respect to the Winnipeg general strike and its incidents. Evidence was admitted of what took place at certain Trade and Labour Conventions in different Provinces of Canada, and of speeches made and resolutions passed at those conventions. In addition evidence was given of speeches made at certain public meetings held in Winnipeg in December, 1918, and January, 1919.

In proving charges of conspiracy it is generally necessary to throw a wide net and to examine the catch carefully. If it contains

evidence which is clearly relevant and pertinent to the charge such evidence should not be excluded for the sole reason that there may have been included facts or statements or documents which would not otherwise properly come under review. In such a case the duty devolves upon the trial Judge to separate what is evidence properly admissible from that which should be discarded, and having done that and having properly warned the jury, to proceed with the trial and take the verdict.

Before proceeding to a consideration of the law, I desire to set out a brief and very incomplete resume of some of the outstanding features of this case as detailed in the evidence taken at the trial, for the purpose of shewing the far-reaching and widespread activities of the accused named in this indictment, and the groups of persons, and organizations, with whom they were associated. Having done that, an effort will be made to deal with the points in question, which will have assumed concrete form, and to measure the sufficiency of the warnings which the trial Judge gave to the jury in his charge.

The case lasted 23 days and an immense volume of evidence has been taken. I can only touch upon a few of the salient points.

QUEBEC CONVENTION.

A Labour Congress for the whole of Canada was held at Quebec in September, 1918. Delegates were sent from local and district labour councils. Russell, Johns and others attended as representatives of the Trades and Labour Council of Winnipeg; Kavanagh of Vancouver and Midgley of Vancouver were present. There was a sharp division between the delegates from Eastern and Western Canada, the Western delegates being the more radical in their ideas.

Certain resolutions were put before the Congress by the Western delegates but were defeated by the moderate section of the Congress.

The Western delegates then decided to call a Western Convention. Russell, Johns, Midgley and Kavanagh were appointed a committee to call the meeting.

THE WALKER THEATRE MEETING.

A meeting was held in Winnipeg on December 22, 1918, under the joint auspices of the Trades and Labour Council and the Socialist

MAN.

C. A.

THE KING v. RUSSELL.

Dennistoun, J.A.

Party of Canada. The accused Russell, according to the evidence of the witnesses Langdale and Peters, made a speech in which he said: "Blood is running in Russia, and blood will run in this country from the Atlantic to the Pacific, or we will get our rights. We are willing to wade in blood to obtain what we claim to be our rights." These words were spoken in the course of a speech extolling the existing government in Russia as the only free people's government that the world has ever seen, and the only government under which the workman had ever got his rights or could expect to get his rights. This speech and others of a suggestive though less outspoken character were addressed to a large audience which completely filled the Walker Theatre, many of the audience being returned soldiers and many of them aliens. The speeches were received with great applause and resolutions were passed condemning government by orders-in-council, demanding the release of political prisoners, the withdrawal of troops from Russia and sending greetings to the Russian Soviet in Russia. There were expressions freely used of an inflammatory character such as "We swear to keep the red flag flying forever"; "Long live the Russian Soviet"; "Long live Karl Leibknecht"; "Long live the working classes." Russell, Queen, Ivens and Armstrong, who were all named in the indictment, took part in this meeting as speakers. Queen was chairman. It was announced that literature was being generally disseminated through the country.

MAJESTIC THEATRE MEETING.

A meeting was held in the Majestic Theatre in Winnipeg on Sunday, January 19, 1919.

Outside the theatre copies of the "Red Flag" were distributed and inside the theatre copies of the "Socialist Bulletin" and other pamphlets. The theatre was full. The speakers were Armstrong, Johns, Russell and Blumenburg.

The meeting was stated to be under the auspices of the Trades and Labour Council. The witness Batsford says that about 75% of those present were foreigners.

Russell made a speech in which he praised the Russian Soviet Government and said that the Allied Governments were deliberately fabricating and concocting false reports as propaganda to put Russia in the wrong with the world; that the Soviet Government

was a better government than our government. He predicted that it was coming to Canada, and said that the Legislature did not do anything for the working people, that they had to organize and do things for themselves.

Johns said that the revolution would not need to be a bloody revolution. It could be made bloodless by the education of the people, who should read the literature which was being published. He said that he himself was not afraid to fight.

He was followed by Blumenburg, who said it was a mistake to say there would not be a fight. There would be a fight. He wore a red tie to which he drew attention, saying he was a "Red" and proud of it. He talked about a Red Revolution and having to make sacrifices to attain the end.

All of the speeches were greatly applauded.

Socialist Bulletin No. 1 was distributed at this meeting. It is Ex. No. 4.

On Sunday, January 26, 1919, riots broke out in Winnipeg, returned soldiers taking part in considerable numbers. This was due to these Walker Theatre and Majestic Theatre meetings and to the fact that it had been decided at the Majestic Theatre meeting to commemorate on that date the death of Rose Luxemburg and Karl Leibknecht. During the week the place of the meeting had been fixed as the Market Square. Returned soldiers assembled and broke up the meeting, and then proceeded in a mob to the headquarters of the Socialist Party, which they raided, destroying all the furniture and literature found in the premises; a large red flag was thrown out and publicly burned. The mob then attacked various places occupied by Austrians and destroyed the German Club.

On Monday, January, 27, rioting broke out again and Blumenburg's store was ransacked and wrecked, foreigners were beaten and made to kiss the British flag.

THE CALGARY CONVENTION.

This convention, which had been planned at the Quebec Convention, was called accordingly and met at Calgary on March 13, 14 and 15, 1919.

Russell was provincial secretary for Manitoba of the Socialist Party of Canada. He was also a delegate from the Winnipeg

MAN.

C. A.

THE KING v. RUSSELL.

Dennistoun, J.A.

Trades and Labour Council to the Calgary Convention, and attended as such.

Joseph Knight of Edmonton attended this convention. A few weeks previously he made a speech at a Miners' Convention which was also held at Calgary, in which he referred to the efforts being made to spread the propaganda of the Socialist and Labour movements which could not be separated. He referred to Lenin and his works and stated that "in the interpretation of 'political action' men have come to the position, in the end, of direct political action, which I may say is not in the method of the ballot box."

The accused Russell, Armstrong, Johns and Pritchard were all in attendance at the Calgary Convention.

A report of a committee on resolutions was presented and the following resolution was adopted unanimously on motion of Delegate Kavanagh, seconded by Delegate Pritchard:—

Whereas great and far-reaching changes have taken place during the last year in the realms of industry;

And whereas we have discovered through painful experiences the utter futility of separate action on the part of the workers organized merely along craft lines, such action tending to strengthen the relative position of the master class;

Therefore be it resolved that this Western Labour Conference place itself on record as favoring the immediate re-organization of the workers along industrial lines, so that by virtue of their industrial strength the workers may be the better prepared to enforce any demand they consider essential to their maintenance and well-being.

And be it further resolved that in view of the foregoing we place ourselves also on record as being opposed to the innocuity of labour leaders lobbying Parliament for palliatives which do not palliate.

Kavanagh made a speech in which he said that political action could not be defined, it meant "any action used to control political power in order to use it for the benefit of class. That is political action and it matters not what form it takes. We have come to understand that this parliamentary system is generally all choked with bureaucratic officials that it is impossible even with a majority in the House to get what you desire put into operation." He said that labour representatives in the Cabinet were "tools to deceive the worker."

The convention then proceeded to deal with the report of the Policy Committee upon the organization and constitution of the One Big Union.

ONE BIG UNION.

The principle of the One Big Union was adopted at the Calgary Convention. A ballot was directed to be taken on the question of a strike for a six-hour day, of severing connection with existing labour organizations, and of forming One Big Union. This ballot was taken by the "Locals" about the end of March.

The constitution of the One Big Union was adopted at a meeting held at Calgary about June 4. This was after the commencement of the Winnipeg strike.

That strike had been precipitated by a strike of the Metal Workers, in sympathy with which other local organizations were called out by the Winnipeg Trades and Labour Council.

THE GENERAL STRIKE IN WINNIPEG.

A ballot for a general strike was taken within the week preceding May 15, 1919.

At 11 o'clock on May 15 the strike became effective.

Russell was business agent of the Machinists' Union and of the Metal Trades Council. He was on the central strike committee, which at first consisted of 5 persons known as the "Big Five" and was composed of Russell, Winning, Veitch, McBride and Robinson.

A meeting of the general strike committee was held on May 14, at the Labour Temple in Winnipeg. Russell, Armstrong, Ivens, Queen, Heaps, were all present. They are all named in the indictment.

The general strike committee consisted of about 300 persons.

The police were instructed not to strike at that time, although they had voted to do so and had given a strike notice to the Police Commissioners, as it was anticipated that if they did so martial law would be proclaimed which was not desired by the committee.

Waterworks employees were instructed to remain on the job but to reduce the water pressure to 30 pounds, so that water would not rise higher than the first floors. After a lapse of time and as soon as the city council ordered the pressure back to normal, they were called out.

Every organization affiliated with the Trades and Labour Council was ordered out and every effort was made to force unorganized workers to stop work as well.

During the first week or so of the strike, the executive work was done by the "Big Five."

MAN.

C. A.

THE KING v. RUSSELL.

Dennistoun, J.A.

When the strike became effective it is said there were 24,000 persons who left their employment which included all the organized workers except the Typographical Union.

Among those who came out were the employees of the railways, street railways, telephone system, post office, express companies, milk and bread companies, the fire department, city health and scavenging departments, and hotels and restaurants.

As the police had representatives on the strike committee the force was dismissed as a whole by the Winnipeg Police Commission after refusal to sever connection with the Trades and Labour Council.

Pickets were placed on the post offices and throughout the city.

Publication of newspapers was eventually stopped by a strike of the pressmen operating the heavy presses.

Ivens and Queen, with others, were appointed to print and circulate a "Strike Bulletin," which was done. Armstrong was one of the "censor" committee. Sixteen to eighteen thousand copies were issued daily, copies being sent to all parts of Canada.

A committee of strikers was formed to supply food to returned soldiers and strikers. This proved impracticable and milk and bread drivers were ordered back to their jobs.

Permission was given to flour mills for the grinding of a limited amount of wheat; the limit having been exceeded, the mill workers were called out again.

Permits were issued by the strike committee for the carrying on of certain kinds of business, for the sending of censored telegrams, for the purchase of gasoline, etc.

Moving picture theatres were issued permit cards on condition that they posted a permit card "Permitted by authority of the Strike Committee" outside the theatre and shewed on the screen: "The operators in this theatre are working in harmony with the strike committee."

A permit was granted for the furnishing of certain supplies to the hospitals. Delivery waggons were not permitted to operate without a similar permit card prominently displayed.

Efforts were made to promote sympathetic strikes in other cities and were successful in the cities of Edmonton, Calgary, Regina, Brandon, and many points in Western Canada as far as Vancouver.

On June 4, drivers of milk and bread waggons were again called out.

Several of the accused, from time to time, addressed open-air meetings in support of the strike.

The citizens who were opposed to the sympathetic strike took steps to patrol the streets, to guard the fire alarm boxes, to man the fire halls, to supply workers in the waterworks department, to form volunteer military organizations, and to distribute food.

About May 23, a meeting took place at the City Hall between representatives of the strikers and the mayor and representatives of the city council. Russell, Queen and Ivens were present. Russell and Queen spoke. When the mayor stated that he represented constituted authority in the city, Queen rose and said he did not want to hear anything about constituted authority, they were running the city and would continue to run the city, and would shew the citizens who were running the city. He then told the mayor to sit down.

In June demonstrations and processions were frequent in the streets. A great deal of intimidation was evident.

The mayor describes a mob of about 4,000 aliens and 500 returned soldiers which assembled in the streets on June 10. The special police of the city were driven from the streets. There was serious rioting at this time.

On June 21 about 1,400 special civil police were available and the mayor issued a proclamation urging the citizens to keep off the streets. Prior to this there had been a direct prohibition of street parades. An attempt was made to run a few street cars on this date. The strike sympathizers demanded the right to parade and that the running of street cars be discontinued. Large crowds assembled in the streets. The special police were unable to cope with them. The mayor then called on the Royal Northwest Mounted Police for assistance; on arrival they were attacked by the crowd and shots were fired from the roofs of houses. The Riot Act was read by the mayor. The military were then called out. The mounted police fired volleys. One person was killed and a considerable number were wounded, one of whom subsequently died.

The strike lasted for 6 weeks. During the whole of that time there existed a wide-spread system of terrorism. It was due to the energetic action of the general body of the citizens that the necessaries of life were procured and distributed and property protected.

MAN.

C. A.

THE KING v. RUSSELL.

Dennistoun, J.A.

On June 17 the accused were arrested and subsequently admitted to bail.

On June 26 the strike collapsed and was called off by the strike committee.

LITERATURE.

It was announced at the Majestic Theatre meeting that literature was being generally disseminated through the country so that when the time came the people would know how to conduct themselves.

In the autumn of 1918, the Trades and Labour Council being dissatisfied with the editorial management of its official newspaper "The Voice," took control of the paper, changed its name to "The Western Labour News" and appointed Ivens, one of the accused named in the indictment, as editor, and Queen, also accused, as business manager. Russell was on the press committee of the paper. It made repeated and violent attacks on capitalism and the "exploiting class." On April 25, 1919, an article appeared all of which is in the same vein and of which the following is a sample:—

> There is no hope for the worker in the arena of politics. The ruling class has coralled all the political machinery that there is for democratic government. As they have treated the worker in the past they will treat him in the future. The worker is the beast who has to be kept under and if he cannot be kept under by specious reasoning or by doles, and soup kitchens, he will be handled by bayonets and machine guns. Only by the One Big Union can labour ever realize its solidarity and bring pressure to bear upon the exploiting class that will result in justice and a square deal for the workers.

In the issue appears a plan of "the Russian Soviet System" which the workers were urged to cut out and keep.

The witness, Zaneth, was employed by the Socialist Party of Canada to distribute among Western miners the Revolutionary Age, The Reg Flag, The Soviet, The Soviet at Work, Bolshevist and Soviet, Political Parties in Russia by Nicholas Lenin, Communist Manifesto of Canada, O.B.U. Bulletins and other similar literature.

Witness states he was told to give these publications away if necessary to get rid of them. Some of them had been prohibited by order-in-council.

Knight, Pritchard, Armstrong, O'Sullivan, Johns, Russell and others were members of the Socialist Party of Canada and were responsible for this propaganda.

The Socialist Bulletin was printed and widely distributed in Winnipeg. The Red Flag was published at Vancouver, the Soviet at Edmonton. They all contained articles of the same type.

Russell does not hesitate to associate himself with the following extract from The Manifesto of the Socialistic Party of Canada:—

The politics of the working class are comprised within the confines of the class struggle. And conversely, the class struggle is necessarily waged on the political field.

By this statement we do not imply that the political action of the working class must be limited within the bounds of constitutional convention or of parliamentary procedure, nor that the means employed in waging the class struggle must everywhere be the same. Political action we define as any action taken by the slave class against the master class to obtain control of the powers of state, or by the master class to retain control, using these powers to secure them in the means of life. For one country it may be the ballot, in another the mass strike, in a third insurrection.

These matters will be determined and dictated by the exigencies of time and place.

He also stated that the Communist Manifesto, Ex. 37, was certainly part of the propaganda which it was his duty to spread. It contains the following:—

The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win.

From the Socialist Bulletin circulated in Winnipeg in March, 1919, is taken the following:—

But if you are desirous of stopping the robbery, there is only one remedy, that is the overthrow of the capitalistic system upon which the robbery of the worker is based. This can only be done by the working class organizing themselves on the plane of power. They have done it in Russia, placing the working class in the position of the ruling class. That is what the Socialist Party of Canada stands for. Get busy and line up with this working class organization whose sole object is the overthrow of the present system of robbery, by placing the workers in control of wealth which they alone create, thus enabling them to individually enjoy what they socially produce.

The O.B.U. bulletin of May 1, 1919, Ex. 83, published in Winnipeg by the Manitoba committee, of which the accused Russell was secretary, contains a number of articles intended to stir up feelings of antagonism and hatred between classes in the community, and the same may be said of most of the literature read at the trial of this case.

Dealing with the question of strikes, it says:—

If we go on strike we must strike quickly, sudden and certainly. Don't give the boss time to think or prepare plans. He might get the better of us

MAN.

C. A.

THE KING v. RUSSELL.

Dennistoun, J.A.

and that would be bad for us and immoral. Strike when he has a big order which he must fulfil. It will hurt him more and us less, and that is moral. Tie up the industries in town, all the industries in all the towns, in the whole country, or in the whole world if necessary. The strike will end quicker and we will starve less and that's good for us and therefore moral.

. . . Don't strike for more than you have a right to demand. You have a right to demand all you have power to enforce.

It also contains the following:—

What would happen if labor withheld its power to produce? Capitalists, priests, politicians, press hirelings, thugs, sluggers, hangmen, policemen, and all creeping and crawling things that suck the blood of the common working man would die of starvation. Like Samson in the Temple, Labour's arms may rend the pillars which support society and bring the social edifice down to destruction about its own ears.

Ex. 171, a pamphlet by Lenin in the form of question and answer states that "all monarchs must be dethroned" and "all lands taken."

The Socialist Bulletin No. 1 of January, 1919, advertised the Walker Theatre meeting and refers to Russell as the agent for the distribution of that publication.

The Socialist Bulletin No. 6 published in May and dealing with the Russian revolution, says: "We desire to see foreign monarchies destroyed" and "One King is as dangerous as fifty." This number of the Bulletin was distributed on the morning of the strike.

In addition to being a delegate to the Quebec Convention, the Calgary Convention and one of the "Big Five" of the Winnipeg strike, Russell was provincial secretary of The Socialist Party of Canada, and distributed the Socialist Bulletin. He was district secretary-treasurer of the Railway Machinists' Union and publisher of the Machinists' Bulletin. He was secretary of the Manitoba Executive Committee of the O.B.U.

He states his position in connection with the dissemination of the literature quoted in the following words: "My function in the Socialist society ever since I have taken an interest in these things has been propaganda. I was doing the same with the labour organizations, the labour councils, that is what I was sent there for."

Such being a portion of the story of the widespread and connected activities of these accused persons objections to the admission of evidence can be more confidently considered and determined by a Court of Appeal which views the whole case with its ramifications, than by a trial Judge who gives his rulings from time to time as the case proceeds.

Counsel for the accused took the ground that evidence of speeches made by or in the presence of the accused Russell at trade union meetings, and evidence of acts done by strikers who were members of trade unions was inadmissible, being protected by the provisions of sec. 590 of the Code. With this I am unable to agree and concur in the reasons given by Perdue, C.J.M., and my brother Cameron, which I have had the privilege of perusing. The acts which the accused intended to be done and conspired to have done were seditious, and punishable by statute and were not within the immunity conferred by the section.

When this section is read in conjunction with sec. 573 of the Code, the difficulty of specifying any trade conspiracy which is not unlawful will be apparent.

The speeches quoted are evidence of a seditious intent on the part of the speakers, and when read together are evidence of agreement to aid and abet the commission of seditious acts which is the gist of conspiracy.

In my opinion they were properly admitted in evidence.

Counsel for the accused objected to the admission of documents of three classes: 1. Documents found in the possession of the accused. 2. Documents found in the possession of persons not named in the indictment. 3. Documents passing between parties other than those named in the indictment.

These documents were of two mixed classes, one of which dealt with labour problems, the other with advanced radical ideas of the type referred to at the trial as "left" or "red flag" socialism of a revolutionary character.

As for the documents found in the possession of Russell, there can be no doubt they were properly admitted as they were in existence at the time he was taken into custody. They go to prove either conspiracy or intention. *Horne Tooke Case*, 25 How. St. Tr. 1; *Hardy's Case*, 24 How. St. Tr. 199. Possession of letters implies knowledge of their contents: *Wright* v. *Tatham* (1837), 7 A. & E. 313, 369, 396; Taylor on Evidence, sec. 595; *Reg.* v. *O'Donnell* (1848), 7 St. Tr. (N.S.) 637, 652, 762.

The Socialist Party of Canada and the Trades and Labour Council of Winnipeg were working together for a common object. They held a joint meeting in the Walker Theatre on December 22, 1919, at which the speeches above quoted were made, and at

MAN.

C. A.

THE KING v. RUSSELL.

Dennistoun, J.A.

which literature common to both organizations was distributed. They openly advocated a common purpose. Russell was a principal official of both organizations and one of the speakers at the meeting. He states that his constant aim and employment was to spread the propaganda of both organizations. Johns and Armstrong, named in the indictment, were members of both organizations and associated with the spread of their propaganda. Pritchard was a member of the Socialist Party of Canada and along with Johns, Knight, Midgley and Naylor was on the central committee appointed at the Calgary Conference.

The Crown having established by strong and voluminous evidence that there was a conspiracy on foot with intent to carry into effect the numerous and serious overt acts set forth in the indictment, I am of opinion that the Socialistic and Labour publications admitted as evidence of intent were properly admitted when shewn, as they were, to be the authorized productions of the associations of which these men were prominent officials. It did not matter in whose possession they were found. Russell was familiar with them all and admitted it.

In any event the admission of copies of The Communist Manifesto found in the possession of Rose Henderson of Montreal, of Phillippi of Montreal and of Stevenson of Vancouver worked no harm to the accused Russell for he frankly associated himself with the doctrines which it contained. Rose Henderson was in correspondence with Russell and sent him a diagram of the Soviet Government which was published in the Western Labour News. Stevenson was the secretary of the Dominion Executive of the Socialist Party of Canada. Russell on Crimes, 146, 191; *Reg.* v. *Parnell*, 14 Cox C.C. 508, at 515; *Reg.* v. *Murphy* (1837), 8 C. & P. 297; Wright on Conspiracy, 213, 216; *Reg.* v. *Kelly*, 27 Can. Cr. Cas. 140, 27 Man. L.R. 105, affirmed in 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282; *Reg.* v. *Connolly*, 25 O.R. 151; *Rex.* v. *Hutchinson* (1904), 11 B.C.R. 24, 32; *R.* v. *Hardy*, 24 How. St. Tr. 199, 210.

With regard to the last point; letters passing between parties not named in the indictment such as those between Beatty and Stevenson, Cassidy and Stevenson, Simpson and Bennett, Roberts and Stevenson, Donaldson and Bennett, these were letters referring to the propaganda which Russell was circulating and asking

MAN.

C. A.

THE KING v. RUSSELL.

Dennistoun, J.A.

for more of it. The jury was warned by the trial Judge in respect to them as follows:—

If the jury is convinced that any one of these persons was not a co-conspirator, then his acts and statements should not be considered by the jury as evidence against Russell, of seditious intention or of conspiracy, and should be disregarded entirely. As to such letters as those of Beatty and as to the statements made by others whom I have not named—there are so many I will just put it that way—as to their acts and statements, I would advise you to disregard them, except as to the class of propaganda which is thereby indicated, the extent of such, and the intent thereby disclosed, and those responsible for such propaganda in so far as you may find them connected with the accused Russell.

These letters making as they do frequent reference to "revolt" and the "revolution" to the "Red Flag," "The Soviet" and "The Bolshevist" are clearly connected with the propaganda which Russell was distributing and were in my opinion properly admitted to shew the geographical extent to which that propaganda had reached, and to shew that these parties were working with Russell to carry out the same purposes. They had a direct bearing on the charges against the accused, their admission subject to the warning of the trial Judge was proper.

In conclusion, I am of opinion that no evidence was admitted which had a prejudicial effect on the fair trial of the accused and upon the whole of the reserved case that the answers to all questions should be in favour of the Crown. I concur in the reasons for judgment of Perdue, C.J.M., and my brother Cameron, which I have had the privilege of perusing.

Judgment accordingly.

ANNOTATION.

Annotation.

Sedition—Treason.

By JAMES CRANKSHAW, K.C., of the Montreal Bar.

In rendering their judgment upholding, in favour of the Crown, the rulings of the trial Judge and maintaining the jury's verdict of guilty against Russell, one of the men indicted for seditious conspiracy, the Judges of the Manitoba Court of Appeal go very fully over the law of Sedition and Treason as well as our law relative to trade unions and labour strikes, it having been argued in the *Russell* case, for the defence, that all the trade unions had united for one common trade union purpose, and that this was a trade combination engaged in a legitimate strike; but the Court of Appeal say that, so far from being a legitimate strike, the combination did and caused to be done *acts punishable by statute* and not protected by sec. 590 of the Cr. Code, which provides that, "No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for

Annotation.

doing any act or causing any act to be done for the purpose of a trade combination, *unless such act is an offence punishable by statute,*" and that it was, in fact, as the jury found, a seditious conspiracy, its real object not being to aid a brother trade union in its strike for higher wages or to obtain higher wages for all, but to attain the much more drastic aims of the accused and his associate "Reds" whose ultimate purpose, as declared in their public speeches, was revolution, the overthrow of the existing form of government in Canada, and the introduction of a form of Socialistic or Soviet rule in its place, to be accomplished by general strikes, force and terror, and, if necessary, by bloodshed.

SEDITION.—Section 132 of the Cr. Code provides that "*seditious words* are words expressive of a seditious intention," that "a *seditious libel* is a libel expressive of a seditious intention," and that "a *seditious conspiracy* is an agreement between two or more persons to carry into execution a seditious intention." And sec. 134 of the Cr. Code (which was amended at the last session of the Dominion Parliament, 9-10 Geo. V. 1919, ch. 46, sec. 5), makes it an indictable offence for any person to speak any *seditious words*, or to publish any *seditious libel* or to be a party to any *seditious conspiracy*, punishable (before the said amendment), by two years' imprisonment, and punishable, now, by twenty years' imprisonment.

In sec. 102 of the English Draft Code there is a clause defining a seditious intention as "An intention" (among other things) "to promote feelings of ill-will and hostility between different classes of subjects."

The prosecution's evidence adduced in the *Russell* case and commented upon by the Manitoba Court of Appeal seems to go further than proof of a seditious conspiracy. It is evidence of or approaching to proof of the crime of treason.

TREASON.—The ingredients of treason (as defined by sec. 74 of the Cr. Code), are, in effect, the same as those which constitute the offence of high treason, according to sec. 75 of the English Draft Code, as revised by the Royal Commissioners, who, in their remarks thereon, say that their definition exactly follows (with one or two exceptions of little or no importance), the existing law which depends upon the old Act of 25 Ed. III. 1350 (Stat. 5), ch. 2, and on the judicial construction put upon that Act—a construction well explained, in the opinion of the late Willes, J., in the case of *Mulcahy* v. *The Queen* (1868), L.R. 3 H.L. 306.

The essence of the offence of treason lies in the violation of the duty of allegiance owing to the State. The duty of allegiance is a duty which is due not only by the State's own subjects, but also by an alien residing within its territory and receiving the protection of its laws; and this is so whether the State to which the alien belongs be at peace with the Sovereign of the State where he resides or not. (See Broom's Common Law, 1875, 5th ed., pages 877, 878, and 9 Hal's., page 450.)

The principal heads of high treason, as contained in the Act of 25 Ed. III. 1350 (Stat. 5), ch. 2, are (*a*) imagining or compassing the King's death, (*b*) levying war against the King, and (*c*) adhering to the King's enemies, there being no *express* provision for any act of violence against the King's person which did not display an intention to kill him, and nothing about attempting to imprison or depose the King, *conspiracies* or *attempts* to levy war, or disturbances, however violent, which did not reach the point of levying war, although there was a proviso (afterwards repealed by I Henry IV. 1399, ch.

Annotation.

10), that Parliament, in its judicial capacity, might, upon the conviction of any person for a political offence, hold that it amounted to high treason, though not specified in the Act. (See 2 Stephens' History of Criminal Law, pages 243, 249, 250, 253.)

After the Act of Edward III., many Acts were, from time to time, passed for the purpose of adding new treasons, but nearly all of these Acts were either *temporary* or have, in one way or another, long since expired, and they exercised little or no *permanent* influence on the law of treason as contained in the old statute with the wide constructions upon its provisions by learned Judges and commentators, whose interpretations have received, in later Imperial legislation (30 Geo. III. 1790, ch. 6, and 11-12 Vict. 1848, ch. 12), full statutory recognition and authority.

The Statute of Treasons of Edward III., taken literally, was too narrow to afford complete protection to the King's person, power and authority; but the Judges in their decisions, and various writers, in their comments upon the subject, held "that to imagine the King's death means to intend anything whatever which, under any circumstances, may possibly have a tendency, however remote, to expose the King to personal danger, or to the forcible deprivation of any part of the authority incidental to his office (2 Stephens' History of the Criminal Law, pages 263, 268).

The mere intention of compassing the King's death seems to have constituted the substantive offence or *corpus delicti* in this kind of treason; thus shewing an apparent exception to the general doctrine that a person's bare intention is not punishable. But, although an overt act was not essential to the abstract crime, it was always held essential to the offender's conviction. The compassing or imagining the death was considered as the treason, and the overt acts were looked upon as the means employed for executing the offender's traitorous purpose. In other words, it was the intention itself that was looked upon as the crime; but, in order to warrant a conviction, it was necessary to make proof of the manifestation of the intention by some overt act tending towards the accomplishment of the criminal object. And so it was held that where conspirators met and consulted together how to kill the King, it was an overt act of compassing his death, even although they did not then resolve upon any scheme for that purpose. And all means made use of, either by persuasion or command, to incite or encourage others to commit the act, or join in the attempt to commit it, were held to be overt acts of compassing the King's death; and any person, who but assented to any overtures for that purpose, was involved in the same guilt. (See Broom's Common Law, 1875, 5th ed., pages 880, 881.)

Mere words of themselves were not regarded as an overt act of treason; for, in *Pine's* case, it was held that his having spoken of Charles I. as *unwise* and as *not fit to be King*, was not treason, although very wicked, and that, unless it were by some particular statute, no words alone would be treason. (2 Stephens' History of Criminal Law, page 308.)

But words were sometimes relied on to shew the meaning of an Act. As, where C., being abroad, said: "I will kill the King of England if I can come at him," and the indictment, after setting forth these words, charged that C. went into England for the purpose indicated by the words, it was held that C. might, on proof of these facts, be convicted of treason, for the traitorous intention, evinced by words uttered, converted an action, innocent in itself, into an overt act of treason. The deliberate act of writing treasonable words

Annotation. was also considered an overt act, if the writing were published; for *scribere est agere*. (3 Coke's Ins. 14.) But, even in that case, it was not the *bare* words themselves that were considered the treason, and the preponderance of authority favoured the rule that writings not published did not constitute an act of treason. (*Algernon Sidney's* case (1683), 9 How. St. Tr., 817; Broom's Common Law, 5th ed., page 883.)

The wide construction placed upon the language of the Statute of Treasons (25 Edward III., Stat. 5, ch. 2), is shewn by the words of Coke, who, in referring to the cases of Lord Cobham and the Earl of Essex, says: "He that declareth by overt act to depose the King, is a sufficient overt act to prove, that he compasseth and imagineth the death of the King." (3 Coke's Ins. 6.) Hale adds that "to levy war against the King directly is an overt act of compassing the King's death. (Hale, Pleas of the Crown, page 110.) And Foster says "a treasonable correspondence with the enemy is an act of compassing the King's death," and, in support of this, he refers to *Lord Preston's* case, in which it was held that taking a boat at Surrey Stairs, in Middlesex, to go on board a ship in Kent for the purpose of conveying to Louis XIV. a number of papers informing him of the naval and military condition of England and to so help him to invade England and depose William and Mary was an overt act of treason by compassing and imagining the death of William and Mary. (*Lord Preston's* case, (1691), 12 How. State Trials, page 645; Foster's Crown Cases, pages 195, 197.)

MAN.

K. B.

THE KING v. IVENS.

(Annotated.)

Manitoba King's Bench, en banc, Mathers, C.J.K.B., Prendergast, and Galt, JJ. February 24, 1920.

CONTEMPT (§ I B—6)—PUBLIC STATEMENT—IMPUTING UNFAIRNESS TO JUDGE AND JURY—PREJUDICE OF JURORS IN PENDING CASE.

A public statement made after the conclusion of a trial for seditious conspiracy, that the accused was tried by "a poisoned jury, by a poisoned Judge and is in gaol because of a poisoned sentence" and that those whose trial is still pending on the same charge are not guilty and their trial is "a farce and a travesty," is contempt of Court, as imputing unjustness and unfairness to the Judge and jury at the preceding trial and tending to prejudice the minds of the jury in the trials yet to take place.

Statement. MOTION to make absolute a rule *nisi* granted on February 10, on motion by the Deputy Attorney-General of Manitoba, calling upon William Ivens to answer for a contempt of Court alleged to have been committed by him in a speech delivered in the Columbia Theatre, Winnipeg, on December 29 last, to an audience of about 1,000 people.

John Allen, Deputy Attorney-General, for the Crown.

E. J. McMurray and *Ward Hollands*, for the accused.

Mathers, C.J.K.B. MATHERS, C.J.K.B.:—Ivens appeared in person and read 2 affidavits in his own defence, to which reference will be made later.

MAN.

K. B.

THE KING v. IVENS.

Mathers, C.J.K.B.

The facts appearing from the affidavits filed in support of the application and in those read by Ivens were as follows:—

At the Fall Assize for the Eastern Judicial District, at the City of Winnipeg, which commenced on November 4 last past, the Grand Jury found a True Bill against William Ivens, George Armstrong, Robert B. Russell, Richard J. Johns, William A. Pritchard, John Queen, A. A. Heaps and R. E. Bray, for seditious conspiracy. The accused persons were arraigned on the 26th day of November, 1919, and pleaded "not guilty."

The Crown elected to proceed with the trial of the accused Robert B. Russell alone and on that day the trial commenced before Metcalfe, J., and a jury. The trial of the other accused stood over to come up after the conclusion of the Russell trial.

On December 24, Russell was found guilty on all counts of the indictment and on the 27th he was, by Metcalfe, J., sentenced to 2 years in the penitentiary on each of the first 6 counts and 1 year on the seventh count, the sentences to run concurrently.

On that day the Assize was adjourned until January 7 and later was further adjourned until January 20. On the latter date the trial of the remaining persons above named was proceeded with before the same Judge and a jury, and is still pending.

On the evening of December 28, at a meeting of what is known as the Labour Church, in the Columbia Theatre in Winnipeg, Ivens, who is a clergyman, made the speech referred to.

In the affidavit read by Ivens on the return of the rule *nisi*, he sets out practically in full the speech which he admits having delivered.

The affidavit states that he read some passages from Professor Hazen's book "Europe since 1812," and continues:—

I said that a few months ago we would have thought it incredible that oppression such as followed the Napoleonic Wars could be possible in Canada but war and oppression seem inevitably to travel hand in hand. To-day the world and we in Canada are in the midst of a campaign of persecution and oppression, and we need carefully to study the lessons from the history of the past. This book should be on the shelves of all the people. It was written by an American, written before the war and so is the product of a nation that had not taken part in the wars of a century ago. For this reason it might well be taken as an unprejudiced statement of the facts of history. I want to read this to-night because in view of the verdict in the Russell trial I may not long be free. The idea of a conspiracy has never entered my mind. I have throughout the war uncompromisingly opposed force, but apparently we are in the grip of circumstances beyond our control and innocence may not avail; though I am not guilty of seditious conspiracy, there seems to be little hope that I shall escape a prison sentence. I am not a conspirator. I have dedicated my life to the cause of humanity, and to-day I am glad of that fact.

MAN.

K. B.

THE KING v. IVENS.

Mathers, C.J.K.B.

I have done my duty as I saw it. If I must go to jail I will go and will not complain, some day I shall again be free, and in that day, once again, I will do my duty as I see it.

If our punishment were the solution for the problems of unrest, I would be glad to suffer punishment but history proves that oppression intensifies unrest and there can be no solution until we discover and remove the causes of unrest. The extracts I read from Hazen I thought make things clear to my audience. I shewed how the spirit of repression brought about its own overthrow. I read quotations to shew that revolution was rife in Europe for half a century. Metternich and his compatriots found that while they could imprison men, ideas of liberty could not be imprisoned.

This oppression brought a wave of emigration. The peoples from Europe have since flocked to America. As they came they were welcomed by the Statue (sic.) of Liberty, which seemed to say "Welcome to the land of liberty."

But a change has come over the scene. War had again come upon us, and once again the Governments were trying to cure unrest by extraneous methods, rather than trying to cure the unrest from within by removing the cause. Recently a shipload of these same immigrants had left New York, and this time the Statue (sic.) of Liberty had seemed to say "Farewell Land of Oppression."

* * * * * * *

Canada was a young nation, she was energetic and responsive. We were not moderate, judicious, experienced, hence we go to extremes. Here wealth had almost complete control. It controlled the newspapers. They were owned and controlled by financiers, not to be newspapers but to popularize such schemes as financiers desired to accomplish from time to time. They controlled our Parliaments. By gerrymandering of seats, and by the arbitrary division of constituencies they almost at will defeated the will of the people and controlled the Parliaments.

* * * * * * *

It was clear that the Government was afraid of the unrest. They seemed to think that a group of workingmen were responsible, but the cause of unrest was inside. It was in the system that enabled men to profiteer out of war conditions. That was why we had been arrested. Russell had been convicted. The Daily Press had made a vitriolic attack on the men still to be tried in their papers yesterday. Their attacks were in essence intended to condemn us before we were sent to trial. They had deliberately poisoned the mind of the public. I then read from an editorial from a newspaper herewith produced and marked exhibit "A." Moreover, Judge Metcalfe had, in his address to the jury in the *Russell* case, made reference to the men not on trial that were tantamount to a statement of our guilt. These things made it necessary that we make a reply and a defence. This could not be done while Russell was before the Courts, but now his case was ended, and the newspapers immediately opened fire on the rest of us, knowing that our jury still had to be chosen. Bob Russell was tried by a poisoned jury, by a poisoned Judge, and he is in jail to-night because of a poisoned sentence. When Judge Metcalfe refused to let us into the Court, while Russell was on trial, he ought not to have continually been rapping at us. He referred to us all by name, what he said was practically a statement of our guilt, and the way he rolled the words "preacher Ivens" under his tongue as if it were a poisoned morsel.

If Tommy Metcalfe says we acted unlawfully during the strike he said so unlawfully. I defy Judge Metcalfe or anybody else to bring any law to prove that a general strike is unlawful.

Bob Russell has been condemned by the Courts of the land, and a Judge has pronounced sentence, but there is another Court and another Judge, and I say that before God, Bob Russell is an innocent man.

To arrest men who are doing their best lawfully and peacefully to carry on a strike and charge them with seditious conspiracy is a farce and a travesty. We are to be tried on that charge. Is it because we are the enemies of liberty that we are being prosecuted? No: Rather it is because we are fighting the battle for liberty.

The strike was broken but at a terrific cost. Our parliament was prostituted; our mounted police were discredited; an espionage system had been put into force; men were imprisoned without warrant; bitter discontent was aroused against the Government, etc. What was the solution? Would repression solve our problems, and settle our troubles? The answer is no. To the question, From whence cometh our salvation, we make answer: 1. The workers must organize strongly upon the political field, 2. And secondly they must organize strongly upon the industrial field.

I stand for political action every time. I have never broken the laws of the land. I have never advocated revolution. I have never conspired with living man. Though I may have said some harsh things about the Judiciary and the Government, I have never breathed defiance to the State, or taught or written sedition. I challenge any man to shew the contrary. I have always advocated parliamentary action, pointing out both its strength and its weakness.

I will refer hereafter to the concluding portion of Iven's affidavit.

The part of this speech which it is alleged constitutes the kind of contempt known as scandalising the Court is: "Bob Russell was tried by a poisoned jury, poisoned Judge, and he is in jail to-night because of a poisoned sentence."

Since Ivens admits the use of the language complained of, nothing remains but to examine it with its context and the surrounding circumstances and see whether or not he is guilty of the offence charged. Before proceeding to do so, however, I desire to say something about what constitutes a contempt of Court and what are the means the law has placed at the disposal of the judicature for checking and punishing contempt of Court. To this end I cannot do better than to quote the language of Lord Russell, C.J., speaking on behalf of the Full Court of King's Bench, in the case of *The Queen* v. *Gray*, [1900] 2 Q.B. 36, at 40. He there said:—

> Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published

MAN.

K. B.

THE KING v. IVENS.

Mathers, C.J.K.B.

calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L.C., characterised as "scandalising a Court or a Judge." That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under circumstances and with such an object is published.

The jurisdiction of the Court to deal summarily with those guilty of contempt Lord Russell points out, in the same case, is not a new-fangled jurisdiction. He says, at p. 40:—

It is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction, the history, purpose, and extent of which are admirably treated in the opinion of Wilmot, C.J. (then Wilmot, J.), in his Opinions and Judgments. It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt; because, if it is not a case beyond reasonable doubt, the Courts will and ought to leave the Attorney-General to proceed by criminal information.

The object to be served by arming the Court with this power is admirably stated by Blackburn, J., in the *Skipworth* case (1873), L.R. 9 Q.B. 230, at 232. He says:—

The phrase "contempt of Court" often misleads persons not lawyers, and causes them to misapprehend its meaning, and to suppose that a proceeding for contempt of Court amounts to some process taken for the purpose of vindicating the personal dignity of the Judges, and protecting them from personal insults as individuals. Very often it happens that contempt is committed by a personal attack on a Judge or an insult offered to him; but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself; and there would be scarcely a case, I think, in which any Judge would consider that, as far as his personal dignity goes, it would be worth while to take any steps. But there is another, and a much more important purpose, for which proceedings for contempt of Court become necessary. When a case is pending, whether it be civil or criminal, in a Court it ought to be tried in the ordinary course of justice, fairly and impartially.

A little further on he says, at 233:—

When an action is pending in the Court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the Courts, by the exercise of a summary jurisdiction, to deal with and prevent any such matter which should interfere with the due course of justice; and that power has been exercised, I believe, from the earliest times that the law has existed. It certainly has been exercised in the manner in which we now exercise it. The Courts of Justice being clothed by the law with that power, a duty is cast on the Court, in a proper case, and where they see it is necessary that the Court should summarily interfere to prevent something that would obstruct the due course of justice, to exercise that power.

When Ivens made the speech referred to, the trial of Russell was ended but the Assize had been adjourned to January 7 following, when the trial of the other 7 accused persons, of whom Ivens was one, was to come on.

We do not think that any person who heard Ivens could have entertained any other belief than that he was making a charge that the conduct of Metcalfe, J., had been unjust, that the verdict of the jury had been an unjust verdict, and that the sentence was an unjust sentence. We can assign no other meaning to the word "poisoned" used in this connection. He explains that what he meant was that the minds of the Judge and the jury had been poisoned against Russell by unfair Press references. Whether or not that was his meaning, the fact remains that his words were calculated to create in the minds of those who heard them, and were no doubt intended by him to have the effect of creating in the minds of his audience, the impression that Russell had been unjustly and unfairly dealt with by the Judge and jury who tried him. The tendency of such a speech could only be to shake the confidence of the public in the fair and impartial administration of justice through the Courts. His contemptuous reference to the presiding Judge as "Tommy Metcalfe" could only be intended to bring him into contempt and to lower his authority.

But the matter does not stop there. He speaks of being to-day in the midst of a campaign of persecution and oppression; he refers to his own impending trial; denies that he has ever been guilty of seditious conspiracy; he intimates that there is little hope that he shall escape a prison sentence, and states that to arrest men who are doing their best lawfully and peacefully to carry on a strike is a farce and a travesty and they are to be tried on that charge, not because they are enemies of liberty but because they are fighting the battle for liberty.

Could any fair minded person interpret such language otherwise than as holding up of Russell and the other accused persons as victims of injustice and oppression? The law of England has always regarded the public discussion of the merits of a pending prosecution as an outrage on public decency which should not be tolerated because of its inevitable tendency to interfere with the ordinary course of justice. Yet Ivens, in language well calculated to excite a strong prejudice in favour of himself and those whose

MAN.

K. B.

THE KING v. IVENS.

Mathers, C.J.K.B.

trial is still pending, discusses the merits of the pending prosecution, declares their innocence, that their arrest and prosecution is a farce and a travesty, and that they have no hope of a fair trial. Ivens says that he did not intend to place himself in contempt of Court and does not think he had done so. We must accept his statement and we can but express astonishment that a man of his education and attainments can entertain the belief that he had a right to canvass the merits of a pending prosecution in a public meeting, or that to do so did not constitute an unwarrantable interference with the course of justice, with reference to the then approaching trial.

If there are others who share Ivens' belief with respect to the public discussion of the guilt or innocence of those who are then being or are about to be tried in a Court of Justice, both he and they must learn that they have misread the law.

In this connection we adopt the language of Lord Cockburn, C.J., in the *Onslow* case (1873), L.R. 9 Q.B. 219. He said at p. 227:—

> It is clear that this Court has always held that comments made on a criminal trial, or other proceedings, when pending, is an offence against the administration of justice and a contempt of the authority of this Court. It can make no difference in principle whether those comments are made in writing or in speeches at public assemblies. Neither can it make any difference in principle whether they are made with reference to a trial actually commenced and going on, or with reference to a trial which is about to take place.

We can entertain no doubt whatever that Ivens' speech constituted that species of comment upon a pending criminal trial which the law forbids. He imputed unjustness and unfairness to the Judge and jury by whom Russell was tried and he went on to tell his audience that those who were still to be tried were not guilty, that their trial was a farce and a travesty. Nothing could be more likely to prejudice the minds of the jurors who may come to try these men and to create an atmosphere favourable to them. It is just such *ex parte* attempts to excite popular prejudice and thus render a fair trial impossible that the law is intended to prevent.

He refers to the fact that the Press had made an attack upon the remaining accused men knowing that their jury had still to be chosen. I have read the editorial to which he refers and I must say that it contained much that the accused men had a

right to complain of, and had Ivens contented himself with protesting against this article, he probably would not have been visited with the consequences of contempt of Court for so doing. Instead, however, he launched out with an unwarranted attack upon the Judge and jury by which Russell was tried, and so himself committed the offence of which he complained, and with some reason, that the newspaper had been guilty. The fact of an improper editorial having been published by the newspaper in question cannot be pleaded as a palliation of his offence. The course of the accused was to have brought the matter to the attention of the Attorney-General or themselves to have summoned the publisher before the Court where his offence could and no doubt would have been properly dealt with. But the publisher is not before us because the accused have not seen fit to pursue the course open to them and we are not in a position to exercise our punitive jurisdiction with regard to him. I want to say, however, that in the past newspapers have used a great deal too much freedom in commenting upon pending or impending prosecutions for criminal offences and I trust that in the future greater care will be exercised not to publish anything the tendency of which would be to raise a prejudice either for or against an accused person.

I will now refer to the concluding portion of Mr. Ivens' affidavit. In the last paragraph, after stating that in speaking as he did he did not intend to be in contempt, nor did he believe that he had been in contempt, he continues:—

> I say that I spoke entirely without malice towards this honourable Court, with no desired wish or intent of being in contempt of this honourable Court. If, however, this Court should be of the opinion, notwithstanding the above facts, that in speaking in the manner above mentioned I placed myself in contempt of this Court, then I say that I sincerely regret having made this statement as above set forth and I respectfully request that this Court accept my full apology therefor. At the same time I undertake not to be guilty in the future of conduct which might be deemed in disrespect, or in contempt of this Court.

In making this apology and submission and in giving this undertaking, which we hope and believe were sincerely made and given, Ivens has assumed an entirely correct attitude and has made it easy for this Court to deal with his offence.

This Court must and shall deal rigorously with those who attempt to destroy its authority and had not Ivens assumed the

MAN.

K. B.

THE KING v. IVENS.

Mathers, C.J.K.B.

submissive attitude which he has done, it would have been our painful duty to have administered a somewhat severe punishment. As it is we adjudge him guilty of contempt of Court in not only scandalising the Court and Metcalfe, J., but also in attempting to prejudice the fair trial of the accused men now on trial. For that offence we have power to fine, or imprison, or both.

Ivens is now being tried and I understand he is conducting his own defence. We must do nothing which might have the effect of crippling him in his defence or in any way prejudicing a fair trial.

In the *Skipworth* case, *supra*, to which allusion has already been made, the accused man was brought up for contempt and made a similar submission to that now made by Ivens. The Court, in disposing of his case, said that if a fine was imposed he might thereby be deprived of means required for his defence on the charge for which he was to be tried, and if he were imprisoned he would be hampered in conducting his defence. The Court decided under the circumstances that it would neither impose a fine nor imprisonment. It was it said, however, absolutely essential that such proceedings should be stopped and it bound him over to be of good behaviour and not be guilty of any further contempt for the space of 3 months and to be imprisoned until security was given.

Under the circumstances we think it will be sufficient to follow the course taken in the *Skipworth* case, *supra*, and to order Ivens to enter into a recognizance himself in the sum of $1,000 and one or more sureties to a like amount, to be of good behaviour and not to be guilty of any contempt of this Court for the space of 3 months from the present time, and to be imprisoned until such security be given.

Prendergast, J. Galt, J.

PRENDERGAST, J., and GALT, J., concur with MATHERS, C.J.K.B. *Judgment accordingly.*

Annotation.

ANNOTATION.

Contempt of Court.

By JAMES CRANKSHAW, K.C., of the Montreal Bar.

At the Fall Assize, which commenced at Winnipeg on November 4, 1919, the Grand Jury found a true bill against William Ivens, Robert B. Russell and 6 other men, for seditious conspiracy. The accused persons, on being arraigned on November 26 last, pleaded "not guilty," and the Crown, having

Annotation.

elected to first proceed with the trial of the accused Russell, alone, his trial commenced on that day before Metcalfe, J., and a jury, the trial of the other 7 persons accused to come up after the conclusion of the Russell trial. On December 24 last, Russell was found guilty on all counts of the indictment; and, on December 27 last, he was, by Metcalfe, J., sentenced to 2 years in the penitentiary on each of the first 6 counts, and 1 year on the seventh count, the sentences to run concurrently. On that day, the Assize was adjourned until January 7, last, and later was further adjourned until January 20 last, when the trial of the remaining accused persons was proceeded with before the same Judge and a jury, and was, on February 10 last, still pending.

On the evening of December 29 last, at a meeting of what is called the Labour Church in the Columbia Theatre, Winnipeg, William Ivens made to an audience of about 1,000 people a speech, in which (among other things), he stated that he was not guilty of seditious conspiracy, but that, in view of the verdict in the Russell trial, there seemed to be little hope that he himself should escape a prison sentence, adding that "Bob Russell was tried by a *poisoned* jury, by a *poisoned* Judge, and is in gaol because of a *poisoned* sentence," and, further, that "to arrest men who are doing their best lawfully and peacefully to carry on a strike and charge them with seditious conspiracy is a farce and a travesty."

On February 10 last, the Court, on motion of the Deputy-Attorney-General, granted a rule *nisi* calling upon Ivens to answer for a contempt of Court committed by him in the above mentioned speech. Ivens admitted the use by him of the language complained of, but with no wish or intent of being in contempt of Court, adding that if the Court should be of the opinion that, in speaking in the manner complained of, he had placed himself in contempt of Court he regretted having done so and respectfully requested the Court to accept his full apology therefor; and the Court, on motion to make absolute the rule *nisi*, entertains no doubt that Ivens' speech constituted that species of comment upon a pending criminal trial which the law forbids, because he imputed unjustness and unfairness to the Judge and jury by whom Russell was tried, and he went on to tell his audience that those who were still to be tried were not guilty but their trial was a farce and a travesty. In view, however, of Ivens' offer of apology the Court found it sufficient to order him to enter into a recognizance in the sum of $1,000, and one or more sureties to a like amount, to be of good behaviour and not to be guilty of contempt of Court for the space of three months from the present time.

CONTEMPT OF COURT.—The essence of Contempt of Court is action or inaction amounting to interference with or obstruction to, or having a tendency to interfere with or to obstruct the due administration of justice. (See *Re Dunn*, [1906] Vict., L.R. 493, cited at p. 1157 of Archbold's Crim. Pleadings, Practice & Evidence, 25th ed.)

IMP.

P. C.

TORONTO R. Co. v. CITY OF TORONTO.

Judicial Committee of the Privy Council, Viscount Finlay, Viscount Cave and Lord Shaw. January 20, 1920.

STREET RAILWAYS (§ I—5)—REMOVAL OF ICE AND SNOW FROM STREETS BY CITY—NEGLIGENCE OF STREET RAILWAY—LIABILITY OF RAILWAY TO CITY FOR COST OF REMOVAL—TORONTO RAILWAY COMPANY ACT, 55 VICT. 1892 (ONT.), CH. 99, SEC. 25.

The City of Toronto is entitled to recover moneys (and interest on the same) expended by it in connection with the removal of ice and snow from certain streets of the city, which should have been removed by the Toronto Railway Company in accordance with its charter, 55 Vict. 1892 (Ont.), ch. 99, and its agreement with the city of 1st Sept., 1891.

Statement. APPEAL by defendants from a judgment of the Ontario Supreme Court, Appellate Division, 46 D.L.R. 435, in an action to recover the cost of removal of snow from certain streets in the city of Toronto. Affirmed.

The judgment of the Board was delivered by

Lord Shaw LORD SHAW:—The question in this case has reference to the removal of snow which falls on the lines of a street railway which runs through the City of Toronto. The judgments of the Court below have affirmed the liability of the appellants, the Railway Company, for the cost of the removal by the respondents, the City, of snow swept by the appellants from the tracks of their railway on to the solum of the streets on the side of the tracks.

The respondents sued the appellants for the cost of the removal of that snow, and on April 13, 1918, Lennox, J., who tried the case, gave a judgment, 42 O.L.R. 603, in the respondents' favour for $16,118.44. This judgment was affirmed by the Appellate Division of the Supreme Court of Ontario on December 18, 1918, 46 D.L.R. 435, 24 Can. Ry. Cas. 255, 44 O.L.R. 308.

In 1891 the respondents entered into an agreement, of date September 1, of that year, with George Washington Kiely and others, called the "purchasers," for the sale to them of the street railways or tramways then existing in the City of Toronto, together with the exclusive right to operate surface street railways in the city for the period and on the terms set forth in the document. By an Act of the Ontario Legislature, passed in 1892 (55 Vict. ch. 99), the appellants were incorporated in order to take over and work this contract, and the agreement was declared valid and binding, with certain provisos which the Act contained. These need not be entered upon further than to refer to sec. 25 of the

statute, the terms of which will be hereinafter quoted. Following upon the statute, the appellants operated the street railways in Toronto and have continued to do so under the agreement and Act.

Thereafter, and particularly since 1900, there has been a copious stream of legislation bearing upon the Ontario railways and upon the powers and functions of the Ontario Railway and Municipal Board. These statutes stand chronologically as follows:

63 Vict. 1900, ch. 102. This Act (passed, it has been said, in consequence of certain judicial pronouncements) amended the Act of 1892 by adding a section thereto (sec. 28) dealing with the enforcement of agreements and giving power to the Court to inquire into any alleged breach thereof and make such order as may be necessary "in the interests of justice to enforce a substantial compliance with the said Act" . . . and to "enforce the same by order and injunction." It further, by sec. 5, gave power to the Court, "notwithstanding any rule of law or practice to the contrary," to make an order for specific performance in the event of a particular breach or breaches.

In 1904 the Act, 4 Edw. VII., Ont., ch. 93, was passed, still further amending the Act of 1892 and providing for the liability of the appellants, in the event of their neglecting or refusing to give a reasonable service of cars, to pay sums of $100 per day, recoverable by action by the corporation "in any Court of competent jurisdiction."

In 1906 came the Ontario Railway Act (6 Edw. VII., ch. 30), a general Act, which, however, by sec. 5, preserved the effectiveness of any special Acts by making these prevail in the event of any conflict with the provisions of the general statute. In the same year (1906) was passed the Ontario Railway and Municipal Board Act.

These two respective statutes—the one dealing with the railway and its powers, and the other with the Board and its powers—are repeated as follows:—In 1913 there were the two Acts, 3 & 4 Geo. V., ch. 36 (the Railway Act) and ch. 37 (the Board Act). Then in 1914 came the Revised Statutes (ch. 185 of that year being the Railway Act and ch. 186 being the Board Act).

This wealth of legislation is to some extent accounted for by revision merely, but it also contains a certain frequency of change, and it is manifest that appeals to the Legislature to readjust the

IMP.
P. C.
TORONTO R. CO.
v.
CITY OF TORONTO.
Lord Shaw.

relations of the City and the Railway Company were well known and were accompanied with success. In the result the task of judicial interpretation becomes, on the part of the Judges in the Courts below, increasingly complex. Their Lordships have, as the Courts below had, to thread their way through these Acts, and they have come to a conclusion which agrees in substance with the judgments appealed from.

There are, in fact, only 2 points in the appeal. The first is a point of jurisdiction, it being maintained that (in view of the comprehensive powers of the Railway Board) Courts of law have no jurisdiction to give a decree for payment to the Corporation in respect of a tort arising out of a breach of the obligations resting upon the Railway Company under the Act of 1892, which confirmed the agreement of 1891. The other point has reference to what is the sound construction of that statute and agreement.

This judgment will take these points in their order.

I. On the point of jurisdiction, the appellants found upon sec. 260 of the Act, R.S.O. 1914, ch. 185, which, as already mentioned, is a repetition of the Acts of 1913 and 1906. The material portions of sec. 260 are as follows:—

260—(1) Where a railway or street railway is operated in whole or in part upon or along a highway under an agreement with a municipal corporation, and it is alleged that such agreement has been violated, the Board shall hear all matters relating to such alleged violation and shall make such order as to it may seem just, and by such order may direct the Company or person operating the railway, or the municipal corporation, to do such things as the Board deems necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as in its opinion constitute a violation thereof.

(2) The Board may take such means and employ such persons as may be necessary for the proper enforcement of such order, and in pursuance thereof may forcibly or otherwise enter upon, seize and take possession of the whole or part of the railway, and the real and personal property of the Company together with its books and offices, and may, for that purpose, assume and take over all or any of the powers, duties, rights and functions of the directors and officers of such Company and supervise and direct the management of such Company and its railway in all respects, including the employment and dismissal of officers and servants of the Company, for such time as the Board shall continue to direct such management.

(3) Upon the Board so taking possession of such railway and property, it shall be the duty of every officer and employee of the Company to obey the orders of the Board or of such person as it may place in authority in the management of any or all departments of such railway.

(4) The Board shall, upon taking possession, have power to demand and receive all money due to and to pay out all money owing by the Company,

and may give cheques, acquittances and receipts for money to the same extent and in as full and ample a manner as the proper officers of the Company could do if no such order had been made.

There can be no doubt that the Board, in the event of violation of the agreement, is thus vested with very strong powers. It may make "such order as to it may seem just" and direct the Company to do what "the Board deems necessary for the proper fulfilment of such agreement." And in the event of the Railway Company remaining obdurate, the Board may itself enter into possession of the property and business and carry on the latter.

The situation in which the parties found themselves—more particularly in the years 1914 and 1915—is shewn in the correspondence which has been produced—a correspondence which discloses the acute differences which prevailed between the parties on this subject of the removal of snow from the street railway tracks. The Railway Company declined to budge from a certain position which it took up, that it had a right to put the snow on the same places of deposit as were used by the city. All appeals by the latter were met by dilatory tactics, culminating in a refusal to do anything else than they were doing, that is to say, putting the track snow on the streets, and leaving it there. In these circumstances the Judge of the County Court was called in as arbitrator, and he affirmed the duty of the Railway Company under the agreement. This was disregarded. Then proceedings took place before the Railway Board. They had the same result; and that Board found its orders met with the same policy of obstruction and non-compliance.

The points as to jurisdiction arises here and may be put thus:—Was the City in these circumstances excluded from all common law remedy for the expense consequent upon the performance of an act of administration which they had themselves to take up in the interests of public convenience and for the avoidance of public danger—an act which, if the view of the Courts below be correct, was one which fell to be performed by the Street Railway Company.

It may seem natural to observe that the strong powers vested in the Railway Board should be held to include, not only the doing of such things, but the making of such orders for payment of money as would clear up the situation which had been created; but their Lordships, after full consideration of the statutes, do

IMP.

P. C.

TORONTO R. CO. v. CITY OF TORONTO.

Lord Shaw.

not see in them any clause which either expressly or by implication gives the Railway Board a power to grant a decree for a sum of money due as upon tort or in respect of breach of contract, as already referred to. It would require, in their Lordships' opinion, the clearest expression or the clearest implication, in order to confer such a jurisdiction upon a statutory Board, and it would further require the clearest expression or implication in order to oust the jurisdiction of the ordinary Courts of the country to whom awards of damages for failure of duty, breach of contract, or commission of tort are matters of plain and everyday jurisdiction. They accordingly find, agreeing with the Courts below, that they had jurisdiction to deal with the action and give a decree in respect to the claim sued for.

II. As to the merits of the dispute between the parties, it is, in their Lordships' view, unnecessary, and therefore undesirable, to make further reference to the statutes and agreement than by quoting sec. 25 of the Act of 1892 and secs. 21 and 22 of the agreement of 1891. The sections of the agreement are as follows:—

21. The track allowances (as hereinafter specified), whether for a single or double line, shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously; but the purchaser shall not sprinkle salt or other material on said track allowances for the purpose of melting snow or ice thereon, without the written permission of the city engineer, and such permission shall, in no case, be given on lines where horse power is used.

22. If the fall of snow is less than 6 inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the city engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but, should the quantity of snow or ice, etc., at any time exceed 6 inches in depth, the whole space occupied as track allowances (viz., for double tracks, 16 feet 6 inches, and for single tracks, 8 feet 3 inches) shall, if the city engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the city engineer.

The section of the statute, 55 Vict. 1892, ch. 99, is as follows:—

25. And whereas doubts have arisen as to the construction and effect of secs. 21 and 22 of the said conditions, it is hereby declared and enacted that the said Company shall not deposit snow, ice, or other material upon any street, square, highway, or other public place in the City of Toronto, without having first obtained the permission of the city engineer of the said city, or the person acting as such.

One cannot peruse the documents and communications anterior to this action without seeing how the sections of the agreement in particular have afforded ground for maintaining different construc-

tions thereof. Section 21 of the agreement is quite definite that the track allowances are to be kept free from snow and ice at the expense of the purchaser. That has not been challenged. It is a general regulative section; and, under it, it must be acknowledged that the duty of clearance of snow from the lines rests with the Railway Company. The true question, and indeed the only one, arises after that duty has been performed, and is: What is to be done with the snow thus cleared away by the Railway Company on to the city streets? Notwithstanding sec. 25 of the statute, as above quoted, the dispute as conducted between the parties had reference mainly to the latter portion of sec. 22 of the agreement, which provides that should

> the quantity of snow or ice, etc., at any time exceed 6 inches in depth, the whole space occupied as track allowances . . . shall, if the city engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the city engineer.

There are no doubt certain troublesome questions of construction here. What is "the quantity of snow or ice?" Does that mean the accumulated quantity or does it mean the quantity of the fall? Further, does that part of sec. 22 apply to a quantity of ice only so long as it is upon the track itself? If so, looking to the fact that some years ago rotary machines were provided which were sanctioned by the Board for the continuous clearing of the tracks, it is in the highest degree unlikely that the quantity of snow on these themselves would ever reach a height of 6 inches. Then, lastly, does the provision that the material is to be removed and deposited at such point or points on or off the street as may be ordered by the city engineer obliterate the duty altogether in the event of a specific point not being chosen by the engineer either in or out of the city? Their Lordships do not enter upon these questions (others might easily be figured), but they merely state them in order to indicate the value of the statutory interposition for the avoidance of trouble in the construction of these sections of the agreement.

In the opinion of their Lordships, sec. 25 of the Act of 1892, which proceeds upon the preamble that doubts have arisen as to the construction and effect of the articles above quoted from the agreement, imposes a duty upon the Railway Company which is clear and absolute. It is that they "shall not deposit snow, ice,

IMP.

P. C.

TORONTO R. CO. v. CITY OF TORONTO.

Lord Shaw.

or other material upon any street, square, highway, or other place in the city . . . without having first obtained the permission of the city engineer." There does not seem to their Lordships to be any advantage in discussion or elaboration in regard to this section, its words being so plain.

The only point that remains is a point to be answered affirmatively or negatively. Did the Railway Company deposit that snow on the streets, etc., without the engineer's consent? There is no doubt that the Company did so. There is accordingly no doubt that the Company is in breach of its statutory duty. By the word "deposit" is meant the final disposal of the snow which is swept from the tracks. There must *ex necessitate* be an interim and quite temporary deposit of the snow as it is swept off the tracks on to the streets. That snow so swept off must, according to the statute, be deposited elsewhere than in the city unless the city engineer gives his consent.

That he would have given his consent to any reasonable arrangement their Lordships do not suggest any doubt; but in point of fact consent was not obtained from him, and that is an end of the matter so far as the section is concerned. Over and over again what he did was to order the accumulations to be taken to some point off the streets. This was his way of indicating that he did not consent to its remaining on the streets or public places; but before the Railway Company can claim any right under the section to leave a deposit of snow in the city they must first establish that *de facto* they have the engineer's consent to what they propose to do.

Their Lordships are relieved to think that this in substance may impose no great hardship. In answer to a question put to him on this subject to the following effect:—"You realise that, in the absence of mentioning a place to dump the snow, the Company, unless they had some place of their own, would have to take it outside of the city altogether?" Harris, the city engineer, replied: "Oh, no; they could do as we do. We get permission from private individuals to use it for dumping, and from the Harbour Commissioners Board to dump in the bay, and we get permission from the Park Commission to dump in some of the breathing spaces." Their Lordships do not take that as exhaustive of the opportunities for disposal which were and are open to the Railway Company, if it

IMP.
P. C.
TORONTO R. Co. v. CITY OF TORONTO.
Lord Shaw.

be willing and anxious to perform its statutory duty, but it indicates that it is confronted by no insuperable difficulty in this task.

Notwithstanding a statutory duty so clear as their Lordships have indicated, the Company continued to sweep the snow from the tracks and leave it on the streets. In those circumstances what were the city authorities to do? An emergency was created which might be dangerous to traffic and to life. The Board thinks the City was quite within its rights in seeing to the streets being cleared, and that the expense so incurred, in so far as applicable to removing the improper deposit of the Railway Company, is one to recoup which the Company is under obligation. So far as the payment is concerned, it would make no difference whether it could be ascribed to damages for breach of contract or to damages in tort; but in the opinion of their Lordships the payment falls to be made as damages for tort committed in the breach of a statutory prohibition.

Their Lordships will humbly advise His Majesty that the appeal stand dismissed with costs. *Appeal dismissed.*

TORONTO R. Co. v. CITY OF TORONTO.

IMP.
P. C.

Judicial Committee of the Privy Council, Viscount Finlay, Viscount Cave, Lord Sumner and Lord Parmoor. December, 18, 1919.

1. APPEAL (§ XI—720)—SPECIAL LEAVE—PRIVY COUNCIL—DIRECT FROM RAILWAY BOARD—NECESSITY OF STATING FACTS CORRECTLY—RESCISSION OF ORDER.

It is competent to grant special leave to appeal to the Privy Council direct from the Railway Board, but it is incumbent on the petitioners in any case in which special leave is applied for to see that the facts are correctly brought to the notice of the Board, and if at any stage it is found that there has been a failure to do so the leave may be rescinded.

[See also *The Emerson-Brantingham Implement Co.* v. *Schofield*, post 87.]

2. RAILWAYS (§ II B—19)—BRIDGE OVER RAILWAY TRACKS—COST—LIABILITY OF STREET RAILWAY FOR PORTION—POWER OF RAILWAY BOARD TO IMPOSE—VALIDITY OF RAILWAY ACT.

The Railway Board of Canada, acting under sec. 59 of the Railway Act, R.S.C., 1906, ch. 37, (see amendments 8-9 Ed. VII. 1909, ch. 32), directed that the Toronto Railway Company (a Provincial company) should bear a certain portion of the costs of the construction of a bridge which the corporation was by order authorised to construct for the purpose of carrying the highway with the tracks thereon of the Toronto Railway Company over the tracks of the Canadian Pacific R. Co., the Grand Trunk R. Co. and the Canadian Northern R. Co., all three Dominion railways. Their Lordships held that the Board had power under the Railway Act to make the said order, that the Act was not *ultra vires* the Dominion Parliament, and that the Provincial company was bound by the said order.

[*Toronto Corporation* v. *Canadian Pacific R. Co.*, [1908] A.C. 54, followed; *B.C. Electric R. Co.* v. *Vancouver Victoria and Eastern R. Co.*, 19 D.L.R. 91, [1914] A.C. 1067; *Toronto R. Co.* v. *City of Toronto*, (1916), 30 D.L.R. 86, 20 Can. Ry. Cas. 280, 53 Can. S.C.R. 222, distinguished.]

IMP.

P. C.

TORONTO R. CO. v. CITY OF TORONTO.

Viscount Finlay.

APPEAL by special leave by the Toronto Railway Co. against three orders made by the Railway Board for Canada, as to the payment of its portion of the costs of constructing the bridge on Queen Street over the railway tracks in the City of Toronto. Affirmed.

The judgment of the Board was delivered by

VISCOUNT FINLAY:—This is a case in which special leave has been obtained by the Toronto Railway Company to appeal against three orders. The first of these orders was made on July 3, 1909, by the Railway Board for Canada and directed that the Toronto R. Co. should bear a certain proportion of the costs of the construction of a bridge which the Corporation was by the Order authorised to construct for the purpose of carrying the highway of Queen St. East, Toronto, with the tracks thereon of the Toronto R. Co., a Provincial railway, over the tracks of the Canadian Pacific R. Co., the Grand Trunk R. Co., and the Canadian Northern R. Co., all three Dominion railways. The second order was dated November 30, 1917, and by it the Railway Board directed that the Toronto R. Co. should make a payment of $80,000 on account towards the cost of construction. The third order appealed against was dated February 4, 1918, and was made by Middleton, J., of the Supreme Court of Ontario, 43 D.L.R. 739, 42 O.L.R. 82, refusing a stay of execution against the Toronto R. Co.

It was urged on behalf of the appellants that the Order for payment of part of the costs of construction was not authorised by the Railway Act, R.S.C. 1906, ch. 37*. On behalf of the respondents, the Corporation of Toronto, it was contended, first, that special leave to appeal from orders of the Railway Board cannot be granted; secondly, that the order for special leave to appeal in the present case ought to be rescinded, on the ground that the relevant facts were not correctly stated in the petition; and, thirdly, that the order for payment of part of the costs of construction made against the Toronto R. Co. was authorised by the Railway Act and could not be impeached.

Queen St. East is a public highway in Toronto running east and west, and along it runs the appellants' railway. It was crossed on the level by the railways of the Canadian Pacific, the Grand Trunk, and the Canadian Northern Cos. On June 20,

*See consolidation and amendment 9-10 Geo. V., 1919, ch. 68.

IMP.

P. C.

TORONTO R. CO. v. CITY OF TORONTO.

Viscount Finlay.

1905, an application was made by the Toronto Corp. to the Railway Board under sec. 186 of the Railway Act of 1903, for an order permitting the corporation to construct a high level bridge over the tracks of the railways crossing Queen St. East, and for an order determining the proportions in which the costs of construction should be borne by the railways and other parties interested. This application was served on the several companies, one of which was the Toronto Railway Co., the present appellants. The application was heard in April, November and December, 1906, by the Railway Board. The Toronto Railway Co. appeared by counsel before the Board. On December 12, their counsel admitted the jurisdiction of the Board the Company to contribute a part of the costs as a party interested, but later in the day he stated that this concession was made only for the purpose of the argument in case some other remedy should be open to him.

On July 3, 1909, the Railway Board made the principal order appealed against. It is in the following terms:—

In the matter of the application of the City of Toronto, hereinafter called the "Applicant," for authority to build a high level bridge over the Don Improvement and the tracks of the C.P.R. Co., the G.T.R. Co., and the C.N.O.R. Co., at Queen St. East, in the City of Toronto:

Upon hearing evidence and what was alleged by counsel for the Applicant, the Toronto St. R. Co., the C.P.R. Co., the G.T.R. Co., and the C.N.O.R. Co.

It is ordered:

1. That the Applicant be, and it is hereby, authorised to construct a bridge to carry the highway and the tracks of the Toronto St. R. Co., over the tracks of the C.P.R. Co., the G.T.R. Co., and the C.N.O.R. Co., where such tracks cross Queen St. East, in the City of Toronto.

2. That the Applicant submit detail plans of the proposed bridge and approaches thereto for the approval of an engineer of the Board by the 15th day of September, 1909, and construct the bridge ready for traffic by the first day of July, 1910. 3. That the cost of the construction of the bridge and approaches and the land damages, if any, shall be paid as follows: The City of Toronto, fifteen (15) per cent.; The Toronto St. R. Co., fifteen (15) per cent.; the C.P.R. Co., thirty-five (35) per cent.; the C.N.O.R. Co., twenty-five (25) per cent.; and the G.T.R. Co. (Belt Line), ten (10) per cent. 4. That, upon completion, the said bridge shall be maintained by the Applicant; the cost of such maintenance, with the exception of the cost of the maintenance of the roadway and sidewalks on said bridge and approaches, shall be paid as follows: By the City of Toronto, seventy (70) per cent.; by the C.P.R. Co., ten (10) per cent.; by the C.N.O.R. Co., ten (10) per cent.; by the G.T.R. Co., ten (10) per cent.; the cost of the maintenance of the roadway and sidewalks on said bridge and approaches shall be borne entirely by the Applicant. 5. That any matter in dispute between any of the parties hereto with regard to the carrying out of the provisions of this order, shall be determined by the chief engineer of the Board.

IMP.

P. C.

TORONTO R. CO. v. CITY OF TORONTO.

Viscount Finlay.

On September 10, 1909, the Toronto R. Co. gave notice of application to the Railway Board, under sec. 56 (3) of the Railway Act, R.S.C. 1906, ch. 37, for leave to appeal to the Supreme Court, on the ground that, as a matter of law, the Company should not have been ordered to pay any portion of the cost of construction. This application was on September 15, refused by the Railway Board. On the 21st of the same month the Company applied, under sec. 56 (2) of the Railway Act, for leave to appeal to the Supreme Court on the question whether there was jurisdiction to make the order. This application was refused by Duff, J., and no attempt was made to get leave to appeal from this refusal.

The second order appealed against, for payment to be made on account, was not made till November 30, 1917, and is subsidiary to the principal order of July 3, 1909; it was made a rule of the Supreme Court of Ontario under sec. 46 of the Railway Act, R.S.C. 1906, ch. 37, in January, 1918. The third order appealed against—that of February 4, 1918—is a refusal to stay execution.

A petition for special leave to appeal was presented in July, 1918, 9 years after the date of the principal order appealed against. The petition for special leave contains the following paragraph, which has reference to the great lapse of time which had taken place:—

19. That since the year 1909 the whole question involved has been in dispute between your Petitioners and the City of Toronto; that until the year 1917 your Petitioners were unaware whether and to what extent the City of Toronto would finally press for payment of the expenses of the said bridge by your Petitioners; that after the judgment given in the case of the *B.C. Electric R. Co.* v. *Vancouver, Victoria and Eastern R. Co.*, 19 D.L.R. 91, [1914] A.C. 1067, upon appeal to Your Majesty in Council (the reasons for which judgment, in your Petitioners' submission, shew that there is no jurisdiction in the said Board to order your Petitioners to pay such expenses) your Petitioners hoped that no further attempt would be made by the City of Toronto to obtain an order for such payment; that matters remained still in dispute pending any attempt by the City of Toronto to get a final order, and, further, pending the settlement of all outstanding disputes (of which there are several) upon the expiration of your Petitioners' franchise in the year 1921; but that by the procedure now adopted the City of Toronto have sought to obtain a very large sum of money from your Petitioners, to payment of which your Petitioners submit the City of Toronto are not entitled.

At the opening of the case Mr. Geary made a preliminary objection to the jurisdiction, decision on which was reserved until the case should have been heard. Mr. Geary contended that it was not competent to grant special leave to appeal to

IMP.

P. C.

TORONTO R. CO. v. CITY OF TORONTO.

Viscount Finlay.

His Majesty in Council direct from the Railway Board. Their Lordships, after full consideration, have arrived at the conclusion that the Railway Board is not exempt from the prerogative of the Crown to grant special leave to appeal. The Railway Board is not a mere administrative body. It is a Court of Record, and it may be of importance that in some special cases its decisions on points of law should be taken on special leave direct to His Majesty in Council. The prerogative of granting special leave to appeal is, *primâ facie*, applicable to all Courts in His Majesty's Dominions, and their Lordships cannot see any ground which would warrant them in holding that the Railway Board is exempt from the general rule. At the same time, their Lordships must add that, in their opinion, this is a power which, in the case of the Railway Board, should be very sparingly exercised. There is by the Railway Act a general power conferred on the Governor-in-Council, either on his own motion or upon petition, to vary or rescind any order of the Railway Board (sec. 56). By the same section there is given an appeal to the Supreme Court on any point of law, leave being obtained from a Judge of that Court, and provision is also made for an appeal to the Supreme Court, with leave of the Railway Board, on any question of jurisdiction.

Having regard to these provisions, it would appear that the power of granting special leave to appeal from orders of the Railway Board should be cautiously exercised and only under special circumstances.

Mr. Geary further contended that the special leave in the present case ought to be rescinded, on the ground of inaccuracy in the statements made in par. 19 of the petition. This point will be dealt with at a later stage of this judgment.

Their Lordships proceed to consider the case upon its merits. It depends upon the terms of the Railway Act, and the relevant enactments are contained in the Act of 1906, with the amendments introduced by the Railway Act of 1909. The most material sections are sec. 59 and secs. 237 and 238, both of which latter are amended by the Act 8-9 Edw. VII. 1909, ch. 32.

Section 59, R.S.C. 1906, ch. 37, by its first sub-section, provides in effect that when the Board, in the exercise of any power vested in it by that Act or by the special Act, by order directs any . . . works . . . it may order by what company, municipality or

IMP.
P. C.
TORONTO R. Co. v. CITY OF TORONTO.
Viscount Finlay.

person interested in or affected by such order the same shall be constructed. Sub-section (2) provides that the Board may order by whom, in what proportion, and when, the expenses of such works shall be paid.

This section applies to every case in which the Board by any order directs works, and gives it power to "order by what company, municipality or person interested in or affected by such order" they shall be constructed, and to order by whom the expenses of construction shall be paid. There is not in sub-sec. (2) any definition of the class of persons who may be ordered to pay such expenses, but it seems clear that sub-sec. (2) must be read with reference to the immediately preceding provision and that such an order may be made only on a company, municipality or person interested in or affected by the order directing the works. It appears to their Lordships that where the Board, in the exercise of its statutory powers, makes such an order as was made in the present case on July 3, 1909, that is a case in which the Board by order directs works to be constructed within the meaning of sec. 59. It would be reading the words "by any order directs" in that section too strictly if they were held to apply only to cases in which the order takes the form of a command for the execution. They are satisfied by an order of the Board giving authority for the construction to a municipality or other applicant and containing directions with regard to it such as are contained in this order of July 3. It follows that in such a case the Board may order by what company, municipality or person interested in or affected by the order directing the works the expenses should be paid.

Where a responsible public body applies for leave to construct the works, no formal command for their execution is wanted; leave is enough, such as was granted by clause 1 of the present order. But clause 2 orders the submission of detailed plans by September 15, 1909, and that the bridge be ready for traffic by July 1, 1910. The applicant takes the leave with the orders in clause 2, and these orders might be enforced by the Board. To treat completion by July 1, 1910, as merely a condition on which the leave was granted is to ignore the fact that completion by that date is in terms ordered, and such a construction would leave the Board and the public with no redress except the cancelling of the leave. The same observations apply to the filing of the plans.

It is impossible to treat this order as merely permissive; it is mandatory.

Sections 237 and 238, as they stood in the Act of 1906, made provision for the case of a railway crossing a highway, or *vice versâ*, but did not contain any provision as to the payment of expenses of the works. Section 59 would apply to the case of any order made under either of these sections, as being made under the Act of which sec. 59 forms part.

These sections are, however, repealed by the Act 8-9 Edw. VII. 1909, ch. 32, and replaced by the new secs. 237 and 238 as they now stand in the Railway Act.

The new sec. 237 deals with the case of an application for leave to construct a railway upon, along or across a highway, or a highway along or across a railway. It provides for the submission to the Board of plans and profiles, and empowers the Board by order to grant the application on such terms as it thinks proper, or to order that the railway be carried over, under or along the highway, or *vice versâ*, or that there should be a diversion of either, or that protective measures, by employment of watchmen or the execution of other works, be taken to diminish the danger of the crossing.

The new sec. 238, 8-9 Edw. VII. 1909, ch. 32, deals in its first sub-section with the case of a railway already constructed upon, along or across any highway, and provides that in such case the Railway Board may, of its own motion or on application on behalf of the Crown or any municipality, or other corporation, or any person aggrieved, order the Company to submit plans to the Board, and may make orders such as are authorised by sec. 237 for the avoidance of danger. Sub-section (3) contains a provision for the payment of the expenses which is applicable to orders alike under sec. 237 and sec. 238. The words of this sub-section should be quoted:—

> Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of sec. 238A of this Act, order what portion, if any, of cost is to be borne respectively by the Company, municipal or other corporation, or person in respect of any order made by the Board under this or the preceding section, and such order shall be binding on and enforceable against any railway company, municipal or other corporation, or person named in such order.

Whatever be the construction of this sub-section, there is nothing in it to put an end to the application of sec. 59 to orders

IMP.
P. C.
TORONTO R. CO. v. CITY OF TORONTO.
Viscount Finlay.

under secs. 237 and 238. The power given by sec. 59 applies in the case of any order made by the Board in the exercise of any power vested in it by the Railway Act. As secs. 237 and 238 are part of the Railway Act, it follows that sec. 59 applies to orders made under them. The order is, therefore, good by virtue of sec. 59, and it is unnecessary to consider how far it might also be supported under sec. 238 (3).

The Toronto R. Co.'s lines ran along the surface of Queen St. East and crossed on the level the lines of the three Dominion Railway Companies. The order of the Railway Board involved carrying the highway, with the lines of the Toronto R. Co. upon it, by a bridge over the lines of the Dominion railways. The Toronto R. Co. was, therefore, beyond all question interested in or affected by the works ordered. How far the Toronto R. Co. benefited by these works, and what proportion of the costs it was fair to throw upon that Company, was entirely a matter for the Railway Board to decide.

The first objection raised by the appellants to the order as to costs was that the railway of the Toronto R. Co. is a provincial railway, and that any enactment giving power to throw upon it the costs of works would be *ultra vires* of the Dominion Parliament. Reference was made to sec. 92 of the B.N.A. Act, which gives the Provincial Legislature the exclusive right of making laws with regard to local works or undertakings not declared by the Parliament of Canada to be for the general advantage of two or more of the Provinces. It was also urged that the provincial railway company was not interested in or affected by the works in question. Both of these objections are answered by the decision of this Board in the case of *Toronto Corporation* v. *Canadian Pacific Railway Company*, [1908] A.C. 54. The order of the Railway Committee of the Canadian Privy Council to which that case relates had been made in 1891, under the Dominion Railway Act, 1888. It directed gates and watchmen at certain level crossings on the C.P.R., within the area of the Municipality of Toronto, and provided that the cost should be borne, as to one-half, by the Corporation. The Toronto Corporation paid their annual contributions under the order down to 1901. They then refused further payment, and the action was brought by the C.P.R. Co. to enforce it. The sections under which the order was made were secs. 187 and 188 of 51 Viet.

1888, ch. 29 (the Railway Act of 1888). Section 187 gave the Railway Committee power in the case of level crossings to direct works or protection by a watchman or by a watchman and gates. Section 188 was as follows:—

> The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof, and of any such measures of protection, between the said company and any person interested therein, as appear to the Railway Committee just and reasonable.

It was decided in that case by the judgment of this Board, affirming the Canadian Courts, that the enactment throwing the expenses in part on parties interested was *intra vires* of the Canadian Parliament. Lord Collins in giving judgment said that there was nothing *ultra vires* in the ancillary power conferred by secs. 187 and 188 to make an equitable adjustment of the expenses among the parties interested (page 58). Corporations interested in such works are subject to the legislation of the Dominion Parliament as to their cost though generally subject only to the Provincial Legislature. On the second contention, viz., that the provincial railway company was not a person interested, Lord Collins, after pointing out that the word "person" includes a municipality, said, [1908] A.C. at 59: "And their Lordships fully concur in the conclusion and reasoning of Meredith, J.A., in the Court below, that in this case the municipality was a person interested." The municipality was interested in respect of its guardianship of the safety of the public, and the interest of the Toronto Railway Company in the present case is obvious on the mere statement of the facts.

The two sections on which the decision in the Toronto case in 1908 proceeded were replaced in the Railway Act of 1903 by secs. 186, 187 and 47 of that Act, and in the Act of 1906, originally and as amended in 1909, by secs. 237 and 238 and sec. 59. The reasoning of the judgment in the case of 1908 is just as applicable to cases arising under these substituted enactments. The contention of the appellants that it is *ultra vires* of the Dominion Parliament in legislating for a Dominion railway to make incidental provision affecting provincial municipalities or railway companies, appears to their Lordships to be based on no principle. It is not a case in which there is any meddling by the Dominion Parliament with the working of a provincial railway company; there is only

IMP.
P. C.
TORONTO R. CO. v. CITY OF TORONTO.
Viscount Finlay.

a provision that it shall bear cost of works in relation to the Dominion railways which affected the provincial line. To hold that such a provision was *ultra vires* would give rise to very great difficulty in dealing with railways by legislation under any scheme of federation.

The authority chiefly relied upon by the appellants was the judgment of Lord Moulton in the *Vancouver* case, 19 D.L.R. 91, [1914] A.C. 1067, reversing a decision of the Supreme Court of Canada reported in (1913), 13 D.L.R. 308, 48 Can. S.C.R. 98.

In that case there were certain streets in Vancouver which were crossed on the level by the lines of the Vancouver, &c., Railway Co., a Dominion company. On application made by the Corporation of the City of Vancouver, the Railway Board, on October 14, 1912, made an order authorising the applicant to carry these streets across the tracks of the Vancouver, &c., Railway Co. by means of overhead bridges, as shewn on the plans filed with the Board (detailed plans to be submitted). There is nothing in this order, as in the case now under consideration, directing that the works should be completed by a particular date. In this respect the order in the *Vancouver* case stands in marked contrast to the terms of the order in the present case. The lines of the B.C.E.R. Co., a provincial railway, ran along certain of these streets, crossing the Dominion R. Co.'s lines, before the bridge was constructed, on the level, and afterwards by the bridge. The order contained a direction that part of the cost of constructing the bridge was to be paid by the Electric R. Co., and on appeal by the Electric R. Co. from this part of the order, it was held by the Supreme Court of Canada that it was *intra vires* (Duff, J., and Brodeur, J., dissenting).

In the Judicial Committee it was held on appeal to be bad as regards the directions as to costs, and the *ratio decidendi* appears on pages 94 to 96 (19 D.L.R.). Their Lordships would particularly refer to the following passages in the judgment delivered by Lord Moulton, 19 D.L.R. at 94:—

Their Lordships entirely agree with the remarks of Duff, J., as to the ground and reason of the application of the corporation to the Railway Board. Referring to the statement made at the hearing by Mr. Baxter, who represented the corporation, he says:—"Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question,

he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised." It follows, therefore, that the application was a matter between the corporation and the railway company alone.

And at page 96:—

It is sufficient to point out that the order is not made under sec. 59 nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of sec. 59 relate to a wholly different class of cases.

Lord Moulton treats the order of the Board as merely permitting the corporation to make a municipal improvement in the grading of the streets. The order is not regarded as proceeding on any consideration of danger arising from the level crossing or as having anything to do with the railways as such. The matter was treated as one merely of street improvement for which a permissive order was given by the Railway Board. The keynote of the judgment is struck in one sentence on page 95: "It follows therefore that the application was a matter between the corporation and the railway company alone." The judgment proceeds on the principle that the assent of the Board was asked merely because the viaduct would cross the Dominion railway, and that this gave no jurisdiction to make the Electric Co. pay the costs of construction. The order was treated as not falling within either sec. 59 or sec. 238 of the Railway Act; indeed, the latter section is not even mentioned in the judgment.

In *Toronto Railway Co.* v. *City of Toronto and C.P.R. Co.* (1916), 30 D.L.R. 86, 20 Can. Ry. Cas. 280, 53 Can. S.C.R. 222, the Supreme Court had to deal with a case in which the tracks of the Toronto R. Co. in Avenue Rd., Toronto, crossed the tracks of the C.P.R. Co. on rail level. The Chief Engineer of the Railway Board had reported to the Board that the crossing was dangerous, and the Board of its own motion ordered that the street be carried under the C.P.R. Co.'s tracks. It was held that the order was made for the protection, safety and convenience of the public; that the

IMP.

P. C.

TORONTO R. Co. v. CITY OF TORONTO.

Viscount Finlay.

Toronto R. Co. was a company interested in or affected by the order, and that the Board had jurisdiction to direct that it should pay a portion of the cost of the subway. The Chief Justice treated the order as being made under the provisions of sec. 238. He pointed out that the substantial reason for the order was the elimination of dangerous crossings, and that it could make no difference that occasion was taken for abolishing these crossings when the separation of grades on a neighbouring street was decided upon, and said that the facts were wholly different from those in the *Vancouver* case. Davies, J., said, 30 D.L.R. at 91, that the controlling ground for the order was the safety and protection of the public, while in the *Vancouver* case it was merely a matter of street improvement. Anglin, J., said, at 109, that the Judicial Committee in the *Vancouver* case viewed the matter as one of street improvement merely, in which the municipal corporation and the Dominion R. Co. were alone concerned.

In the present case the order appears to their Lordships to be in substance mandatory, and to be made for the protection and convenience of the public with regard to the crossings of the railways. What was done may have improved the streets, but it was certainly not a mere matter of street improvement. Their Lordships therefore think that the *Vancouver* case is distinguishable from the present.

Their Lordships are of opinion that sec. 46 of the Railway Act, R.S.C. 1906, ch. 37, is not *ultra vires*, and that the objection taken to the procedure followed in making the order a Rule of Court fails. On this point they are content to refer to the judgment of Middelton, J., 43 D.L.R. 739, 42 O.L.R. 82.

For these reasons, in the opinion of their Lordships, the appeal fails on the merits.

There is, however, another aspect of the case on which it appears desirable that some observations should be made.

The substantive order against which leave was obtained to appeal was made so long ago as July 3, 1909. The orders of November 30, 1917, and February 4, 1918, were merely subsidiary. The fact that so long a period had elapsed since the order was made was one which would militate strongly against the granting of special leave. It must have been to meet this difficulty that paragraph 19 was introduced into the petition. It appears to

IMP.
P. C.
TORONTO R. CO. v. CITY OF TORONTO.
Viscount Finlay.

their Lordships that the allegations in that paragraph are not borne out by the documentary evidence to which their attention was drawn by the counsel for the respondents.

There is a correspondence between the corporation and the Toronto R. Co. set out in the respondents' appendix of documents. Their Lordships have been referred particularly to the letters dated October 6 and 7, 1910, May 9 and 11, 1911, April 23, 1912, September 4, 1912, October 25 and 30, 1912, April 11, 1913, May 13, 1913, June 17 and 19, 1913, July 24, 1913, August 7, 1913, July 25, 1914, August 20, 1914, September 2 and 30, 1914, October 20, 1914, and December 8 and 13, 1915. Attention has also been called to the application to the Railway Board by the corporation on July 21, 1915 (R. p. 161), the answer of the Toronto R. Co., dated August 13, 1915, challenging the jurisdiction (R. p. 161), the reply of the Corporation dated August 18, 1915 (R. p. 162), the order of the Railway Board dated October 20, 1915 (R. p. 163), the letters of October 26, 28 and 30, 1915 (R. p. 164-5) and the final order on this application of the Railway Board, November 13, 1915, directing the Toronto R. Co. (appellants) and other companies to pay their proportions on account and rescinding the order of October 20 from which the appellants had been omitted.

Paragraph 19 of the petition for special leave opens with the statement "that since the year 1909 the whole question involved has been in dispute between your petitioners and the City of Toronto." Their Lordships cannot find that before the above-mentioned answer by the appellants on August 13, 1915, to the respondents' application to the Railway Board dated July 21, 1915 (R. p. 161), the appellants ever disputed their liability for their share of the expenses of construction after the dismissal of their applications for leave to appeal to the Supreme Court in September, 1909. On the contrary, the correspondence proceeds on the footing of their liability.

Paragraph 19 goes on to allege "that until the year 1917 your petitioners were unaware whether and to what extent the City of Toronto would finally press for payment of the expenses of the said bridge by your petitioners."

Their Lordships are unable to find anything in the correspondence that could lead the petitioners to doubt that the City would press for payment. Indeed, the liability of the petitioners is

IMP.
P. C.
TORONTO R. CO. v. CITY OF TORONTO.
Viscount Finlay.

constantly asserted and there are many letters pressing for payment.

It is incumbent on the petitioners in any case in which special leave is applied for to see that the facts are correctly brought to the notice of the Board, and if at any stage it is found that there has been failure to do so, the leave may be rescinded.

In the present case no reflection is made upon the good faith of those who represented the Toronto R. Co. on the application for special leave. The terms of par. 19 of the petition would appear to be due to ignorance of the facts without any intention to mislead. But it is of great importance that the rule laid down by Lord Kingsdown in *Mohun Lall Sookul* v. *Bebee Doss* (1861), 8 Moo. Ind. Ap. 193, should be maintained. He said:—

> Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is just the same, if this Court has been induced to make an order which, if the facts were fully before it, it would not or might not have been induced to make.

Their Lordships desire to express their agreement with the observations made in the judgment in *The Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. 321. Lord Hobhouse, in delivering the judgment of the Board, said at 328:—

> At the same time, their Lordships desire it to be distinctly understood that an order-in-council granting leave to appeal is liable at any time to be rescinded with costs if it appears that the petition on which the order was granted contains any misstatement or any concealment of facts which ought to be disclosed. In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. . . . Still, if there had been any material misstatement, it is not sufficient to clear the case of bad faith.

Lord Hobhouse then quoted the passage from Lord Kingsdown which has been cited above, and, after examining the facts of the case before him, said:—

> Their Lordships are of opinion that the petition is very faulty, and that due care was not shewn in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed.

In that case, therefore, the appeal was heard and allowed, but without costs.

In that case the misstatement related only to one of three grounds, the other two being sufficient to justify leave. In the

present case par. 19 is addressed to the delay in presenting the petition which, if unaccounted for, might, and probably would, have led to the refusal of leave.

Owing to the course which the case has taken it is not necessary now to deal further with this point, but their Lordships think it proper to say that, if the occasion had arisen for deciding on this objection, it would have been a matter for their grave consideration whether the leave should not be rescinded, however innocent the misrepresentation.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

IMP.
P. C.
TORONTO R. Co. v. CITY OF TORONTO.
Viscount Finlay.

TORONTO R. Co. v. CITY OF TORONTO.

IMP.
P. C.

Judicial Committee of the Privy Council, Viscount Finlay, Viscount Cave and Lord Shaw. January 20, 1920.

MUNICIPAL AND RAILWAY BOARD (§ I—1)—POWERS OF — ONTARIO RAILWAY ACT (8 GEO. V., CH. 30, SEC. 4)—JURISDICTION—IMPOSITION OF FINES AND PENALTIES.

The Railway Board has power to impose penalties for non-compliance with their orders, but only "for the purpose of enforcing compliance," and this expression points, not to an imposition for a past breach, but to the imposition of a penalty in advance, and so procuring obedience to the order. The Board should not impose penalties except after a warning that after a specific period penalties would be imposed, and so giving an opportunity of avoiding the same by compliance.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario, 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381, dated December 20, 1918, confirming an order of the Ontario Railway and Municipal Board dated April 19, 1918, which ordered the appellants to pay to the respondents the sum of $24,000. Reversed. Statement.

The judgment of the Board was delivered by

VISCOUNT CAVE:—The appellants, the Toronto Railway Company, are the holders of an exclusive franchise to operate street railways in the City of Toronto for a period of 30 years from September 1, 1891. The franchise is held under an agreement made between the respondents the Corporation of the City of Toronto, and the predecessors in title of the appellants, dated September 1, 1891, and confirmed by an Act of the Legislature of the Province of Ontario passed on April 14, 1892 (55 Vict., ch. 99). Viscount Cave.

In the year 1911, the appellants' cars having become over-

IMP.

P. C.

TORONTO R. CO. v. CITY OF TORONTO.

Viscount Cave.

crowded, the respondents applied to the Railway and Municipal Board of Ontario for an order compelling the appellants to provide more cars; and on November 6, 1914, that Board made an order that the appellants should have in operation an additional 50 double truck motor cars not later than June 1, 1915. These cars have been provided, although not within the period prescribed. Early in the year 1917 the Corporation renewed the application for more cars, and on February 27, 1917, the Board made an order "that the respondent (the Company) do place in operation on its system 100 additional double truck motor cars not later than January 1, 1918, and a further 100 double truck motor cars not later than January 1, 1919." Some doubt appears to have arisen as to whether this order was within the powers conferred upon the Board by the Railway Act, R.S.O. 1914, ch. 185, and the Railway and Municipal Board Act, R.S.O. 1914, ch. 186, for on April 12, 1917, the Legislature of Ontario, on the petition of the Corporation, passed an Act, 7 Geo. V. 1917, ch. 92, whereby the order of February 27, 1917, was ratified and confirmed.

The order so made and confirmed was not carried out by the Company, and on January 1, 1918, no part of the additional 100 cars ordered to be provided by that date had in fact been provided or placed in operation; and accordingly, on January 30, 1918, the Company and the Corporation were summoned to appear before the Railway and Municipal Board. The notice or summons issued for this purpose is not forthcoming, and its terms must be inferred from the statement made by the Chairman of the Board at the commencement of the hearing, as follows:—

> This is a hearing initiated by the Board on its own motion with the view of bringing together the City of Toronto and the Toronto Railway Company to determine what progress has been made in the execution of the order of the Board made on February 27, 1917, directing the Railway Company to furnish 200 additional cars, 100 deliverable on January 1, this year and 100 on January 1, 1919.

The Company and the Corporation accordingly attended by counsel before the Board on January 30, 1918, when some arguments were heard and evidence taken. The "hearing" so instituted was continued on February 13 and 20, and March 5 and 18, and on the last-mentioned date was further adjourned.

During the adjournment last referred to the Legislature of Ontario, on the petition of the Corporation, passed an Act, 8 Geo.

V. 1918, ch. 30, whereby it was provided, sec. 4, that the Ontario Railway Act should be amended by adding the following as sec. 260A:—

260A.—(1) The Board, for the purpose of enforcing compliance with any order heretofore or hereafter made by it, requiring any railway company, operating a railway or street railway in whole or in part upon or along a highway under an agreement with a municipal corporation, to furnish additional cars or equipment for its service, in addition to any other powers possessed by it, may order such company to pay to the corporation of the municipality in which the company so operates a penalty not exceeding $1,000 a day for non-compliance with any such order.

(2) Appeal from any such order or from the refusal by the Board to make an order shall lie to the Appellate Division of the Supreme Court of Ontario at the instance of either the said corporation or the said company as fully in all respects as from the judgment of a Judge at the trial of an action in the Supreme Court; and the judgment of the said Appellate Division shall be final and binding, and no further appeal shall be allowed.

The Royal Assent was given to this statute on March 26, 1918.

The "hearing" or inquiry above referred to was resumed before the Board on April 19, 1918, on which date, after a short conversation on some recent efforts on the part of the Company to procure the cars required, and notwithstanding a request by counsel for the Company that he might be allowed to submit evidence on the point, the Chairman of the Board proceeded to give judgment. He said that the Board had come to the conclusion that it was the duty of the Company to have placed orders for the 100 cars, and that if contracts had been promptly placed the cars might have been obtained; that the Board did not propose that their orders should be treated lightly; and that the Board proposed to use the powers conferred upon them by the recent Act in the hope that the Company having experienced the disposition of the Board to insist on performance, would act with greater diligence and promptitude and with a real intention to carry out the orders of the Board in future. An order was accordingly made in the following terms:—

The Ontario Railway and Municipal Board.

D. M. McIntyre, Esq., K.C., Chairman, and

A. B. Ingram, Esq., Vice-Chairman. Friday, April 19, 1918.

Between:—

The Corporation, the City of Toronto,

Applicant.

and

The Toronto Railway Company,

Respondent.

The Board having called upon the above-named respondent to shew cause why the order herein of the Board dated February 27, 1917, requiring

IMP.
P. C.
TORONTO R. CO.
v.
CITY OF TORONTO.
Viscount Cave.

the respondent, a street railway company operating a railway or street railway upon or along certain highways under an agreement with the applicant, a municipal corporation, to furnish additional cars for its service, had not been complied with, and upon hearing the evidence adduced and upon hearing counsel for the applicant and the respondent.

And it appearing that the said respondent had not complied with the said order of February 27, 1917, and that in the opinion of the Board there had not been proper excuse or justification for such non-compliance by the respondent.

And it appearing that, for the purpose of enforcing compliance with the said order, the Board should order the respondent to pay to the applicant a penalty for non-compliance with the said order.

1. This Board doth order that the respondent do forthwith pay to the applicant a penalty of $1,000 per day from March 27, 1918, to the date hereof, both days inclusive, being the sum of $24,000.00 in all.

D. M. MCINTYRE,
Chairman.

(Seal)

An appeal from the above order to the Appellate Division of the Supreme Court of Ontario was dismissed, 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381, and thereupon the Company applied for and obtained special leave to appeal from the decision of the Supreme Court to this Board.

On the argument of the appeal before this Board four points were taken on behalf of the appellants.

First, it was contended that the Act, 8 Geo. V. 1918, ch. 30, if it is to be construed as authorizing the imposition of a penalty for a past offence, deals with a criminal matter and was therefore beyond the powers of the Provincial Legislature, exclusive legislative authority in relation to the criminal law (including the procedure in criminal matters) having been reserved by sec. 91 (27) of the B.N.A. Act, 1867, to the Parliament of Canada. In their Lordships' opinion this contention should not prevail. It is true that in a series of cases, commencing with *Hearne* v. *Garton* (1859), 2 El. & El. 66, and ending with *Ex parte Schofield*, [1891] 2 Q.B. 428, it has been held that the imposition of a fine or penalty (not being by way of reimbursement) for the breach of an order of a public authority is matter of criminal and not civil procedure. But in construing the B.N.A. Act it is necessary to read secs. 91 and 92 together; and regard must be had to the fact that par. (15) of the latter section gives to a Provincial Legislature exclusive power to make laws in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province

made within the scope of its powers. It appears to their Lordships that the Act now in question falls within the latter provision and was therefore within the powers of the Legislature of Ontario.

Secondly, it was contended that, as under the order of February 27, 1917, the first 100 additional cars were to be placed in operation not later than January 1, 1918, there was a complete breach of the order on that date, and accordingly there could not after that date be such a non-compliance with the order as to subject the company to the penalties authorised by the Act. Their Lordships are unable to agree with this contention. The substance of the thing to be done was, as pointed out by Meredith, C.J.O., 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381, in giving the reasons for the decision of the Supreme Court, that the additional cars should be put in service. The limit of time was a further and subsidiary provision, and notwithstanding the breach of this latter provision, the direction to provide the cars remained in force.

But, thirdly, it was argued on behalf of the appellants that the order of April 19, 1918, was not authorised by the Act of 1918, as it was an order not for enforcing compliance with the order of February 27, 1917, but for punishing a past breach of the order; or, in other words, that the only order contemplated by the Act of 1918 (8 Geo. V., ch. 30) was an order fixing a period within which some existing or future order should be complied with and imposing a penalty for every day of default after that period had elapsed. In their Lordships' opinion this is the true construction of the Act of 1918. The Board are authorised by sec. 260A to impose penalties for non-compliance with their orders, but subject to the condition that such penalties must be imposed "for the purpose of enforcing compliance" with those orders; and this expression points, not to the summary imposition of a penalty for a past breach without previous warning, but to the imposition of a penalty in advance and for the purpose of procuring by means of such an inducement obedience to the order. The word "enforce" is ambiguous, and may according to its context refer either to the imposition of a fine or damages or to some process for procuring specific performance; but the expression "enforcing compliance" is more readily susceptible of the latter meaning (*cf. In re Royle* (1881), 50 L.J.Q.B. 656, where the expression was "enforce obedience"). Further, it is plain that the Act of 1918 (8 Geo. V., ch. 30), although general in

IMP.
P. C.
TORONTO R. CO. v. CITY OF TORONTO.
Viscount Cave.

its terms, was passed with special reference to the liabilities of the Toronto R. Co. under the order of February 27, 1917; and it cannot be supposed that the Legislature of Ontario, knowing that a breach of that order had occurred and could not be remedied without some further allowance of time, intended to authorise the imposition of a daily penalty commencing from the day following that on which the Act became law. The Act, if construed so as to have that effect, would bear too great a resemblance to *ex post facto* legislation. In their Lordships' opinion it was not the intention of the Legislature that the Board should be authorised to impose penalties except after giving to the Railway Company a warning that after a specified period penalties would be imposed and an opportunity of avoiding them by compliance, within that period, with the requirements of the Board, and accordingly the order of April 19, 1918, was not authorised by the Act.

Apart from the above considerations, the procedure adopted by the Railway Board in making the order under appeal is open to question. The Railway Company appeared before the Board on April 19, 1918, for the purpose of pursuing the inquiry instituted by the Board on January 30, and for no other purpose. No claim had been made by the Corporation for penalties under the recent Act, no notice or summons had been given or issued by the Board which indicated that the question of penalties would come under consideration, nor was this question even referred to at any time before judgment was delivered. Their Lordships accept the view of the Railway Board that the Company were not prevented by war conditions from supplying the cars and were therefore gravely in default; but even so they were entitled, before being subjected to a heavy penalty, to have notice of the claim and an opportunity of meeting it. Whatever view, therefore, might be taken as to the construction of the Act, it seems doubtful whether the present order could stand.

The fourth point raised on behalf of the appellants was that, having regard to the powers conferred by statute on the Railway and Municipal Board, that body must be regarded as a "Superior Court" within the meaning of sec. 96 of the B.N.A. Act, and accordingly that the members of the Board should have been appointed by the Governor-General and not (as provided by sec. 5 of the Railway and Municipal Board Act of Ontario, R.S.O. 1914,

ch. 186, by the Lieutenant-Governor in Council.) This question was fully considered by the Supreme Court and was decided by that Court against the appellants. But in consequence of the view taken by their Lordships on other points in the case it became unnecessary for them to consider it; and accordingly the point was not argued before the Board, and their Lordships express no opinion upon it.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order of the Railway Board dated April 19, 1918, and the order of the Supreme Court affirming that order should be set aside. The respondents will pay the costs of the appeal to the Supreme Court and of this appeal. *Appeal allowed.*

TAYLOR v. DAVIES.

Judicial Committee of the Privy Council, Viscount Finlay, Viscount Cave, Lord Sumner, Lord Parmoor. December 19, 1919.

TRUSTS (§ I D—22)—MORTGAGEE—ASSIGNMENT FOR BENEFIT OF CREDITORS—CONVEYANCE OF EQUITY OF REDEMPTION TO HIM BY ASSIGNEE—CONSTRUCTIVE TRUSTEE—LIMITATIONS ACT, R.S.O., 1914, CH. 75.

A mortgagee of land which formed part of an estate assigned for the benefit of creditors is not, either by virtue of the Assignments and Preferences Act (R.S.O. 1897, ch. 147), or his appointment by the creditors as one of the inspectors of the estate, constituted an express trustee, nor is he under the same liability as an express trustee in respect to the equity of redemption conveyed to him by the assignee. He is at the most a constructive trustee, and the Statute of Limitations runs in his favour, and may be pleaded as a defence in an action to recover the property conveyed to him by the assignee.

[*Beckford* v. *Wade* (1805), 17 Ves. 87, applied; *Soar* v. *Ashwell* [1893] 2 Q.B. 390, applied; *Taylor* v. *Davies* 41 D.L.R. 510, 41 O.L.R. 403, which reverses 39 O.L.R. 205, affirmed.]

Statement.

APPEAL from a judgment of the First Appellate Division of the Supreme Court of Ontario (1917), 41 D.L.R. 510, 41 O.L.R. 403, reversing the judgment of Lennox, J. (1917), 39 O.L.R. 205, in favour of the plaintiff, and directing judgment to be entered dismissing the plaintiff's action with costs. Affirmed.

The judgment of the Board was delivered by

Viscount Cave.

VISCOUNT CAVE:—The action was brought by Isabella Taylor on behalf of herself and all other persons entitled under the trusts of a deed of assignment for the benefit of creditors, made by William Thomas Taylor (the husband of the plaintiff), George Arthur Taylor and John Frederick Taylor, and dated June 14,

IMP.
P. C.
TAYLOR v. DAVIES.
Viscount Cave.

1901. The principal defendant was Robert Davies, who will be referred to as "the defendant;" and the object of the action was to set aside a release by the trustee of the deed to the defendant of certain property forming part of the trust estate on the ground that the defendant being in a fiduciary position was disabled from acquiring such property from the trustee. The plaintiff's allegations were disputed, and it was pleaded that the action was brought too late, and was barred by the plaintiff's laches and the Limitations Act.

The material facts may be stated as follows:—Prior to June 14, 1901, the firm of Taylor Bros., consisting of the 3 persons abovenamed, owned, among other property, 144¼ acres of land in the valley of the River Don, within 3 miles of the centre of the City of Toronto. Upon part of this land the firm had carried on since 1891 the business of brick-making. By a deed dated November 28, 1894, the land was mortgaged to the defendant Davies for a sum of $73,362 with interest, the total sum owing on this mortgage at the date of the assignment hereafter mentioned being a little over $100,000. Towards the middle of the year 1901, Taylor Bros. became financially embarrassed, and on June 14, 1901, the firm made an assignment for the benefit of its creditors under the Act respecting Assignments and Preferences by Insolvent Persons then in force in Ontario (R.S.O. 1897, ch. 147). By this deed the partners granted and assigned all their real and personal property to the respondent E. R. C. Clarkson (a chartered accountant) upon trust to sell and convert the same into money, and to apply the proceeds, first to the payment of expenses (including advances made by the assignee and his remuneration); secondly, in payment to the creditors of their debts rateably in compliance with the above-mentioned Act, and to pay the balance (if any) to the debtors.

The Act provided (by sec. 17) that it should be the duty of the assignee within 5 days from the date of the assignment to convene a meeting "for the appointment of inspectors and the giving of directions with reference to the disposal of the estate" by mailing a notice of the meeting to every creditor known to him, and by advertisement in the Ontario Gazette, and that all other meetings to be held should be called in like manner. There was no express provision as to the duties of the inspectors. The

rights of secured creditors were dealt with by sec. 20, of which sub-sec. (4) was as follows:—

Every creditor, in his proof of claim, shall state whether he holds any security for his claim or any part thereof; and, if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon; and the assignee, under the authority of the creditors, may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of 10% upon the specified value to be paid out of the estate as soon as the assignee has realised such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate.

On or shortly after the date of the execution of the assignment, Clarkson prepared a statement of affairs shewing the assets and liabilities of the firm. Among the secured liabilities he included the liability to the defendant on his mortgage, and estimated the approximate value of the security at $35,000, leaving a net liability to the defendant of about $65,000. The statement shewed a total estimated deficiency of about $135,000. On June 21, 1901, the defendant made an affidavit of claim in which he put his claim under the mortgage at $100,164, but did not value his security as required by the statute. On June 25, 1901, an agreement was entered into between the defendant and Clarkson by which, after reciting that the amount due to the defendant on his mortgage exceeded the value of the property covered by it, it was agreed that the defendant should rent the brickyard from Clarkson for a month at $25. The defendant held possession of the land under this agreement until the delivery of the release hereafter mentioned. On July 5, 1901, there was a meeting of creditors of the firm at which the defendant was present, and on the motion of one of the creditors it was resolved that 6 persons, of whom the defendant was one, "be appointed inspectors of the estate with power, in conjunction with the assignee, to realise upon the assets to the best advantage." On July 31, 1901, the solicitors for the defendant wrote to the assignee stating that the defendant desired to retire from the position of inspector, and on September 3 the defendant himself sent to the assignee a formal letter of resignation. But it appears that Davies' resignation did not then take effect, as he afterwards, in June, 1902, executed a deed as inspector and attended a meeting of inspectors. Further,

IMP.
P. C.
TAYLOR
v.
DAVIES.
Viscount Cave.

on July 3, 1902, he signed and forwarded to the assignee a formal instrument of resignation as inspector of the estate; and it would appear that his retirement was not complete until the last-mentioned date.

The property containing 144¼ acres (including the brickyard) had considerable potential value, containing as it did brick-earth of good quality and of such variety as to enable the owner to manufacture and supply the different kinds of bricks required for building purposes. The land was well situated near the centre of Toronto, where there was a large and growing demand for bricks. The assignee caused the land to be valued by two surveyors named Stewart and Galley, and they valued the land, buildings and machinery at $45,000; but it seems that this valuation was somewhat hastily made, and that the valuers had no special knowledge as to the brick-making business. In the month of February, 1902, the deed of release which the plaintiff in this action claims to have set aside was prepared by the defendant's solicitor and forwarded to the trustee for execution. By this deed, which was dated February 10, 1902, and was made between Clarkson of the first part and the defendant Davies of the second part, after reciting (among other things) that "it had been agreed by and between the parties thereto that the party of the first part would assign and convey to the party of the second part all his interest in the land above-mentioned, upon condition that the party of the second part would accept the said lands in satisfaction of a certain amount of the monies secured by the said mortgage and for which the party of the second part would be entitled to prove against the estate of Taylor Brothers," it was witnessed that in consideration of $1 paid by the defendant to Clarkson the latter granted and released to the defendant in fee simple the above-mentioned land amounting to 144¼ acres. On April 22, 1902, there was a meeting of the inspectors of Taylor Bros., at which the defendant was present, and the following extract appears in the minutes of this meeting:—

> On the motion of Mr. Worrell it was agreed to accept the valuation of $45,000 for the brickyard and plant covered by mortgage to Mr. Robert Davies for $100,000. Mr. Davies was to rank on the estate for the balance of the claim, and the release of the equity of redemption was given to Mr. Worrell to pass upon.

On April 24, Davies wrote to Clarkson as follows:—

Pursuant to the arrangement made with you, I beg to notify you that in consideration of your having given me a Quit Claim Deed of the property comprised in the Don Valley Brick Works, I have agreed to waive my right to rank on the above estate for $45,000 of the claim of $100,000 proved by me in respect of the mortgage which I hold from Taylor Brothers. The sum of $45,000 is the valuation which has been made of the said property.

On April 30 Worrell, who had been requested to "pass upon," *i.e.*, to advise upon, the form of release, wrote to Clarkson that it was in somewhat different form from that generally given by an assignee, and that it would be better to follow the procedure of the Act, and if necessary to have the transaction confirmed by the creditors. On June 7, doubtless in pursuance of this advice, the assignee sent to the creditors a notice in the following form:—

Toronto, 7th June, 1902.

In the matter of The Estate of Taylor Brothers.

Notice is hereby given that a meeting of Creditors of the above will be held at the office of the undersigned, on Wednesday, 18th June, at 3 o'clock p.m., to consider the settlement and ranking of secured claims and such other business as may come before the meeting.

E. R. C. CLARKSON,
Assignee.

This notice was perhaps in form sufficient to cover the proposed confirmation of the release to the defendant; but it appears to their Lordships that it did not give to the creditors any real or effective information as to the transaction which it was proposed that they should sanction. The notice was not, as required by the Act, advertised in the Ontario Gazette. A meeting was duly held on June 18, but the minutes have been lost. It appears from the evidence that very few creditors attended the meeting, and that a resolution approving the release to the defendant was carried with little or no dissent. On or about September 15, 1902, the release dated February 10, 1902, was executed by the trustee and delivered to the defendant, who thenceforth remained in possession of the property under the release. He proceeded to develop the brick-field, spending considerable sums in the provision of plant and machinery, and there is no doubt that it turned out to be a property of considerable value. The dividend paid to the creditors of Taylor Bros. was less than 3 cents in the dollar.

In the year 1909 the James Bay Railway Co. (now the Canadian Northern Ontario Railway Co.) in exercise of their statutory powers took part of the brickfield containing 11.85 acres for railway purposes; and in an arbitration as to the amount of

IMP.
P. C.
TAYLOR
v.
DAVIES.
Viscount Cave.

compensation to be paid to the defendant in respect of this land he was awarded in the month of May, 1912, no less than $238,583. It seems probable that the publication of this award called the attention of the plaintiff (who was the wife of William Thomas Taylor, one of the partners, and the executrix of another partner, John Frederick Taylor, and was herself a creditor on the estate for $6,000) to the value of the property, and on July 21, 1914, the writ in this action was issued by her against Davies, Clarkson and the Railway Company. By the statement of claim, which was delivered on October 15, 1914, the plaintiff alleged that the land was of much greater value than the amount due to the defendant Davies under his mortgage, and that the defendant as an inspector of the estate was disqualified from purchasing the property; and the plaintiff claimed to have the trusts of the assignment for the benefit of creditors enforced, to have the conveyance to Davies dated February 10, 1902, set aside and cancelled, and to have the amount of the award paid into Court, or in the alternative to redeem the mortgage of November 28, 1894. No claim was made against Clarkson personally. The defendant Davies denied the allegations and pleaded among other defences the Limitations Act and the plaintiff's delay. At the trial there was very little evidence as to the value of the property in question in 1902, but 2 witnesses called on behalf of the plaintiff stated that in their opinion the property was then worth not less than $500,000. Stewart and Galley were not called as witnesses. Davies was in bad health and could not be called as a witness. He has since died.

The action was tried by Lennox, J., who determined the issues both of fact and of law in favour of the plaintiff, 39 O.L.R. 205. He held that the property was worth far more than the value that had been put on it for the purposes of the deed of release; that the defendant Davies was disabled by his position as inspector from becoming the purchaser of the property; that the plaintiff was not barred by acquiescence from impeaching the transaction; and that the Limitations Act did not apply. He accordingly made an order setting aside the release of the equity of redemption (subject to the title of the Railway Company to the land taken by them) and directing full accounts and consequential relief upon that footing. On an appeal by the defendants to the Appellate

Division of the Supreme Court of Ontario, that Court reversed the decision of Lennox, J., 41 D.L.R. 510, 41 O.L.R. 403. The Judges of the Supreme Court were not agreed in their views as to the position of the defendant at the time of his purchase; but they were unanimously of opinion that the Limitations Act applied and afforded a defence to the action, and they accordingly dismissed the action with costs. From this decision the present appeal is brought.

Upon the argument of the appeal before this Board, the appellant was heard upon the whole case; but, having regard to the view which their Lordships were disposed to take of the defence of the Limitations Act the respondent was content to rest his case upon the statute and was not heard upon the facts. In these circumstances their Lordships must assume for the purposes of this judgment only that the facts are as stated above; and upon that assumption it follows that at the date of the transaction which is impeached the defendant, although not a trustee of the estate, was still an inspector, and as such was under an obligation to keep a watch upon the assignee and to see that the assets were realised to the best advantage. If so, he was beyond question in a fiduciary relation to the general body of creditors and was disabled (under the ordinary rules of equity) from becoming a purchaser of any part of the estate or making any other arrangement with the assignee for his own benefit, except upon the condition of making full disclosure of all material facts within his knowledge; giving full credit for the value of his bargain; and obtaining the consent of the creditors. It has been suggested that the transaction in question was not a transaction of sale and purchase, that the defendant was entitled as a secured creditor to exercise the power conferred upon him by sec. 20 of the Assignments and Preferences Act, R.S.O. 1897, ch. 147, by valuing his security and (with the consent of the assignee) retaining it at the value so specified, and that the release can be upheld as having been made under that section; but their Lordships are unable to accept this view of the transaction. Doubtless the defendant was not treated as an ordinary purchaser, and some regard was had in the form of the assignment to his position as a mortgagee, but the requirements of the statute relating to a secured creditor

IMP.
P. C.
TAYLOR v. DAVIES.
Viscount Cave.

were not complied with. He did not (as required by the Act) put a specified value on his security so as to give the assignee an opportunity of taking it over at an advance of 10% of such value; nor did the assignee, before consenting to the defendant retaining the security at the price of $45,000 and ranking for the excess of his claim, duly obtain the authority of the creditors. It is true that at the meeting of June 18 some resolutions purporting to give such authority, appear to have been passed; but having regard to the insufficient notice given to the creditors of the nature of the proposals which were to be put before the meeting and to the absence of the advertisements required by the statute, their Lordships cannot regard these resolutions as effective consent within the statute. In effect there was an arrangement between the assignee and the defendant under which, without complying with the formalities required by law, the defendant obtained a release of the equity of redemption on releasing the estate from part of his secured debt; and to such an arrangement the disabilities imposed upon the defendant by his fiduciary position apply.

Now it is clear that the conditions under which alone such a transaction can be upheld were not fulfilled. The character and prospects of the brickfield, although probably well known to the defendant who was in possession under his agreement of tenancy, were never properly ascertained by the assignee or communicated to the creditors. It is not shewn that full value was given for the property, and the evidence (so far as it goes) points to the conclusion that if the property had been offered publicly a much larger price would have been obtained for it. Doubtless some of the creditors assented to the transaction, but these were a small minority of the whole body, and it is doubtful whether, when they gave their assent they did so with knowledge of the material facts. In these circumstances, it appears to their Lordships that the arrangement, if impeached at the time, could not have stood but must have been set aside. It is not shewn that the plaintiff only shortly before she brought her action had such knowledge of the facts as to be barred by laches or acquiescence from seeking such remedy as she may have. It follows that the true and only defence to the action (if any) is a plea of the Limitations Act, and that defence must now be considered.

IMP.

P. C.

TAYLOR v. DAVIES.

Viscount Cave.

The Limitations Act (now consolidated as R.S.O. 1914, ch. 75) provides (by sec. 5) that no person shall bring an action to recover any land or rent but within 10 years after the time at which the right to bring such action first accrued to him or to some person through whom he claims; and (by sec. 20) that where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring any action to redeem the mortgage but within 10 years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the mortgagor's title or of his right of redemption has been given. Section 47 of the Act (which corresponds with sec. 8 of the English Trustee Act, 51 & 52 Vict., 1888, ch. 59), contains the following provisions:—

(1) In this section "trustee" shall include an executor, an administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee, and shall also include a joint trustee. (2) In an action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee. (*b*) If the action is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

The interval between the delivery of the release to the defendant in September, 1902, and the date of the commencement of these proceedings exceeded 10 years, and the defendant accordingly relied upon the above provisions as a sufficient defence to the action.

It was contended on behalf of the appellant that the plaintiff's claim was excepted from the provisions of sec. 47 of the Act as being (in the words of sub-sec. 2) a claim "to recover trust

IMP.
P. C.
TAYLOR
v.
DAVIES.
Viscount Cave.

property or the proceeds thereof still retained by the trustee," and this on two alternative grounds. First, it was said that, having regard to the terms of the resolution of July 5, 1901, under which the defendant was appointed an inspector, he was an express trustee of the estate who at the time when the action was brought still retained part of the trust property, and that he fell as an express trustee within the exception above-mentioned. Their Lordships are unable to agree with this contention. It is true that the inspectors were empowered by the resolution in question to "realise upon the assets" in conjunction with the assignee; but the assets were not vested in them, and the assignee remained the sole trustee of the assets and was entitled to realise them subject only to the supervision of the inspectors.

Secondly, it was said that the defendant, having acquired the property in question at a time when he was disabled by his fiduciary position from so doing, became at all events a constructive trustee of the property, and so fell within the same exception, and this argument requires careful examination.

In order to ascertain the effect of the Trustee Act, 1888, and the corresponding Canadian statute, it is necessary to refer to the antecedent law of limitation as it applied to trustees. It is clear that apart from these statutes an express trustee could not rely, as a defence to an action by his beneficiary, either upon the statutes of limitation or upon the rules which were enforced by Courts of Equity by analogy or in obedience to those statutes. The possession of an express trustee was treated by the Courts as the possession of his *cestuis que trustent*, and accordingly time did not run in his favour against them. This disability applied, not only to a trustee named as such in the instrument of trust, but to a person who, though not so named, had assumed the position of a trustee for others or had taken possession or control of property on their behalf, such (for instance) as the persons enumerated in the judgment of Bowen, L.J., in *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, or those whose position was in question in *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; *Re Sharpe*, [1892] 1 Ch. 154; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; and *Reid-Newfoundland Company* v. *Anglo-American Telegraph Company*, [1912] A.C. 555. These persons though not originally trustees had taken upon themselves the custody and adminis-

tration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named. It followed that their possession also was treated as the possession of the persons for whom they acted, and they, like express trustees, were disabled from taking advantage of the time bar. But the position in this respect of a constructive trustee in the usual sense of the words—that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a Court of Equity—was widely different, and it had long been settled that time ran in his favour from the moment of his so taking possession. This rule is illustrated by the well-known judgment of Sir William Grant, M.R., in *Beckford* v. *Wade* (1805), 17 Ves., 87, at 97, where he says:—

> It is certainly true, that no time bars a direct trust, as between *cestui que trust* and trustee; but, if it is meant to be asserted, that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened, out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who after long acquiescence comes into a Court of Equity to seek that relief.

So in *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, at 393, Lord Esher, M.R., stated the rule as follows:—

> If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee becomes so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitations to be vouched.

And in the same case Bowen, L.J., at 395, speaking of constructive trusts of this kind, said: "That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established."

As to the pre-existing law, then, there is no question; but it is contended for the appellant that the recent statute has altered the law in this respect. Section 47 (1), it is said, defines a trustee as including "a trustee whose trust arises by construction or implication of law," and accordingly the exclusion from sec. 47 (2) of a claim to recover "trust property or the proceeds thereof

IMP.
P. C.
TAYLOR v. DAVIES.
Viscount Cave.

still retained by the trustee" must apply to property in the hands of a constructive trustee or of any person claiming under him otherwise than by purchase for value without notice. If this contention be correct, then the section, which was presumably passed for the relief of trustees, has seriously altered for the worse the position of a constructive trustee, and (to use the words of Sir William Grant in the case above cited, 17 Ves. at 97), a doctrine has been introduced which may be "fatal to the security of property." It does not appear to their Lordships that the section has this effect. The expressions "trust property" and "retained by the trustee" properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction. The exception no doubt applies, not only to an express trustee named in the instrument of trust, but also to those persons who under the rules explained in *Soar* v. *Ashwell*, *supra*, and other cases are to be treated as being in a like position; but in their Lordships' opinion it does not apply to a mere constructive trustee of the character described in the judgment of Sir William Grant.

It is to be noticed also that, while sec. 48 of the Limitations Act prescribes the time at which a right to recover land is to be deemed to have accrued in the case of an express trustee, and provides that subject to sec. 47 "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations," there are no similar provisions in respect of a constructive trustee; and it is to be presumed, therefore, that such a trustee remains entitled to such protection as he had before the passing of the Act.

For the above reasons it appears to their Lordships that in the present case time ran in favour of the defendant Davies as from the date of the delivery to him of the release in question, and accordingly, that the Limitations Act afforded a good defence to that defendant in this action. They will accordingly humbly advise His Majesty that this appeal fails, and should be dismissed with costs. *Appeal dismissed.*

EMERSON-BRANTINGHAM IMPLEMENT Co. v. SCHOFIELD. IMP.

P. C.

Judicial Committee of the Privy Council, Viscount Finlay, Viscount Cave, Lord Shaw and Lord Parmoor. December 9, 1919.

APPEAL (§ XI—720)—PRIVY COUNCIL—SPECIAL LEAVE GRANTED—MATERIAL LEGISLATION ON SUBJECT OF APPEAL NOT BEFORE THE COURT—ORDER GRANTING LEAVE RESCINDED.

When there is existing legislation on a subject which is very material in the consideration of granting leave to appeal, and the same was not before the Court when leave was granted, the Court may rescind the order granting leave.

[*Emerson-Brantingham Implement Co.* v. *Schofield*, 43 D.L.R. 509, affirmed.]

Statement.

SPECIAL leave to appeal to the Privy Council from the Supreme Court of Canada, (1918), 43 D.L.R. 509, 57 Can. S.C.R. 203, was granted in March, 1919. The leave is now rescinded and the appeal dismissed.

The judgment of the Board was delivered by

Viscount Finlay.

VISCOUNT FINLAY:—In this case the petition for special leave to appeal contained this averment in paragraph 6: "The question is of importance as it affects the construction of contracts in general, especially those relating to the supply of machinery, affecting the suppliers thereof, and the large class of farmers who are purchasers of agricultural machinery." Legislation was passed in Saskatchewan, 6 Geo. V. 1915 (Sask.), ch. 28*, before that petition was presented with regard to the sale of farm implements, which prescribed a statutory form of contract, and required that any such contract should be in that statutory form. Section 21 contained the enactment to which attention has been drawn, providing that:—

No contract, order, or security made or taken in connection with the sale of agricultural implements shall contain any statement to the effect that the vendor is not responsible for the representations of his agents, or any other language in anywise limiting or modifying the legal liability of the vendor as provided in this Act, or in the forms in the schedule hereto; and the insertion of any such statement, or the use of any such language, shall be of no effect.

Then sub-sec. 2 is: "Any breach of the provisions of this section shall render the contract order or security void at the option of the purchaser." The existence of such legislation in the Province of Saskatchewan was a most material circumstance on the question of whether special leave should be granted. It is obvious that the statement contained in par. 6 was likely to have some effect on their Lordships in determining whether they should advise His Majesty that leave should be granted. The counsel applying for leave was in entire ignorance of the existence of this legislation,

*Repealed 8 Geo. V. 1917 (Sask., 2nd Sess.), ch. 56.

IMP.
P. C.
EMERSON-BRANTINGHAM IMPLEMENT CO. v. SCHOFIELD.
Viscount Finlay.

but the manufacturers, the petitioners, cannot possibly have been in the same ignorance. It was their business to know of such legislation, and they ought to have seen that those in England who were instructed to attend to the matter for them should have their attention directed to all the relevant facts, so that the case might not be presented to their Lordships in an incorrect or insufficient form. The statement which ought to have appeared as to the existence of this legislation might have made all the difference with regard to the granting or refusing of special leave. The Board think it probable that if the facts had been known at the time when the application for special leave to appeal was made to their Lordships such leave would not have been granted; but there is no doubt whatever that the matter was of great importance, and one likely to influence the opinion of those who had to decide as to the advice that should be given to His Majesty as to granting or withholding special leave to appeal.

In these circumstances their Lordships will humbly advise His Majesty that the order granting the special leave to appeal should be rescinded and the appeal dismissed with costs.

Judgment accordingly.

IMP.
P. C.

MONTREAL TRAMWAYS Co. v. SAVIGNAC.

Judicial Committee of the Privy Council, Viscount Finlay, Viscount Cave, Lord Sumner and Lord Parmoor. December 8, 1919.

MASTER AND SERVANT (§ II—275)—WORKMEN'S COMPENSATION (R.S.Q. 1909, ART. 7334)—"INEXCUSABLE FAULT" OF EMPLOYEE—LIABILITY OF EMPLOYER.

The Workmen's Compensation Act has, as far as the liability of the employer towards his men and employees is concerned, in no way set aside the common law, and the employer is liable for the "inexcusable fault" of all those employed by him in whatsoever capacity.

[*Poulin v. Grand Trunk Ry. Co.* (1917), 37 D.L.R. 792, 27 Que. K.B. 141, approved.]

Statement.

APPEAL from a judgment of the Court of King's Bench of Quebec (1917), 27 Que. K.B. 246, affirming with a modification the judgment of Tellier, J., in an action for compensation under the Workmen's Compensation Act of Quebec, R.S.Q. 1909, art. 7321 ff.

The judgment of the Board was delivered by

Viscount Cave.

VISCOUNT CAVE:—The Act in question provides, by art. 7321, that accidents happening by reason of or in the course of their work to workmen, apprentices and employees engaged in certain

IMP.

P. C.

MONTREAL TRAMWAYS CO. v. SAVIGNAC.

Viscount Cave.

occupations (including the repairing or maintenance of railways or tramways) shall entitle the person injured or his representatives to compensation ascertained in accordance with the Act. Art. 7322 declares that the person injured is to be entitled to a rent (or annuity) the amount of which is fixed with reference to the degree of incapacity produced by the accident and to the wages of the person injured; but it provides that the capital of the grant or annuity to which the person injured is to be entitled shall not in any case, except in the case mentioned in art. 7325, exceed $2,000. Art. 7325 is as follows: "No compensation shall be granted if the accident was brought about intentionally by the person injured. The Court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it is due to the inexcusable fault of the employer." The question to be determined in this appeal is whether on the facts of this case the power given to the Court by art. 7325 to increase the compensation beyond $2,000 arose.

The facts of this case are shortly as follows: The appellants, the Montreal Tramways Co., own and work the tramways in the City of Montreal, and the respondent, Savignac, was a plumber in their employ. At about 9 o'clock in the evening of May 3, 1916, in in consequence of a call to repair a broken electric cable at the corner of Ontario and Amherst Streets, an emergency wagon with the necessary materials was despatched from the appellants' premises. The wagon was of considerable weight, and was drawn by two horses. The driver of the wagon was a servant of the Company named Pettigrew. One of the Company's foremen, named Morin, sat by his side, and the respondent, who was to carry out the actual repairs required, had a seat at the back of the wagon. The wagon was driven at full speed, and apparently at a gallop, warning of its approach being given by means of a bell which was fixed near the driver, and was rung at intervals by Morin. It was a rainy evening, and the streets were slippery. In order to reach its objective it was necessary for the wagon to be driven eastwards down Dorchester St., and across St. Denis St. Dorchester St. is about 21 ft. in width and, at the point where it approaches St. Denis St. from the west, has a slight incline. St. Denis St. is a wide and frequented thoroughfare, running on an incline from north to south, and carrying considerable traffic,

IMP.

P. C.

MONTREAL TRAMWAYS CO. v. SAVIGNAC.

Viscount Cave.

including two lines of tramways belonging to the Company. Pettigrew, when approaching the point where Dorchester St. crosses St. Denis St., made no attempt to check the pace of the wagon, but endeavoured to drive his horses at full speed across that thoroughfare. It is not surprising to find that his attempt resulted in a serious accident. At the moment when Pettigrew's wagon reached the junction of the two streets, a tramcar belonging to the appellant Company, and driven by one Lalonde, was approaching the same point from the north. The evidence as to the speed at which this tramcar was travelling is conflicting, but it was found by both the Canadian Courts that it was being driven at an excessive speed, and certainly at a speed above the maximum of 8 miles an hour allowed by law. Dorchester St. being a narrow street and the buildings at its junction with St. Denis St. being high neither driver saw the other vehicle or had notice of its approach until it was too late (having regard to the speed at which they were travelling) to avoid a collision. The tramcar ran into the rear part of the wagon with such violence that the latter was driven a distance of 33 feet to the pavement on the east side of St. Denis St. The car was stopped at a distance of about 20 feet from the point of contact. As a result of the collision, the respondent was thrown to the ground, fell under the wheels of the tramcar and suffered most serious injuries, both his legs having to be amputated.

These proceedings were thereupon brought by the respondent, claiming $15,000 as compensation, and in the result, Tellier, J., found that the driver of the emergency wagon had been guilty of "inexcusable fault," within the meaning of art. 7325, and assessed the compensation at $14,192.50. On appeal to the Court of King's Bench that Court, by a majority (Cross, J., dissenting) confirmed the decision, 27 Que. K.B. 246, but for reasons different to those which commended themselves to Tellier, J., but reduced the compensation to $9,000. The majority of the Court of Appeal appear to have thought that the great speed at which the emergency wagon was driven was in the special circumstances of the case excusable, owing to the fact that the broken cable was dangerous to life, and that it was usual in such cases to proceed at great speed to repair the damage. They therefore acquitted Pettigrew of "inexcusable fault," but they held that Lalonde, the driver of the tramcar, who

IMP.

P. C.

MONTREAL TRAMWAYS CO. v. SAVIGNAC.

Viscount Cave.

was also a servant of the Company, had been guilty of "inexcusable fault" in driving at an excessive speed, and accordingly that the Company was liable for the damage. Against this decision the present appeal is brought. There is no cross-appeal in respect of the reduction of the amount of compensation, and nothing turns in this appeal on such reduction.

The first question to be determined is whether there was "inexcusable fault" on the part of the driver of the emergency wagon. It is plain from all the evidence that the wagon was driven at full speed, not only along Dorchester St., but also at the moment when it was approaching St. Denis St., at right angles, in order to cross it. At that moment the wagon was travelling at such a pace that it was plainly impossible for the driver, in the event of any tramcar or other vehicle passing along St. Denis St., at the time when he reached it, to check his horses and so avoid a collision. He drove recklessly into and across this frequented thoroughfare and trusted to good fortune to escape a serious accident. It is suggested that his action was excusable because it was desirable, in order to protect the public from serious and perhaps fatal injury from the broken cable, that the wagon should reach the scene of the breakdown at the earliest possible moment, and that it was therefore allowable for the driver to disregard all precautions and travel at the highest possible speed. Their Lordships are unable to accept that view. It was no doubt desirable that the wagon should proceed at the highest possible speed consistent with the safety of the public and of the occupants of the wagon itself; but this fact by no means justified the driver in throwing aside all prudence and putting the lives of others in imminent peril. On the contrary, the exceptional nature of the call made it his duty to take proper precautions to avoid an accident to the wagon, as it was plain that the result of such an accident might be to prevent him and his fellow workmen from going to the repair of the cable; and this is what, in fact, occurred. If Pettigrew had checked his wagon on approaching the crossing, so that he might be able, in the event of traffic approaching, to avoid a collision, he would have done his duty, and his journey would not have been delayed for more than a few seconds. It is unnecessary, and probably undesirable, to attempt a definition of the expression "inexcusable fault." Each case must be judged on its own facts, and their Lordships find no

IMP.
P. C.
MONTREAL TRAMWAYS CO. v. SAVIGNAC.
Viscount Cave.

difficulty in saying that the conduct of Pettigrew in this instance fell within that descr ption.

It has next to be determined whether the "inexcusable fault" of Pettigrew is to be attributed to the appellant Company as his employers so as to give occasion for an increase of the maximum compensation under art. 7325; or, in other words, whether, according to the maxim "*Respondeat superior*," the fault of a workman is, for the purpose of that article, to be attributed to the emp'oyer. This question was considered by the Quebec Court of Appeal in the recent case of *Poulin* v. *Grand Trunk R. Co.* (1917), 37 D L.R. 792, 27 Que. K.B. 141, and was there decided in the affirmative. Their Lordships agree with that decision, and with the reasons given by the late Chief Justice, Sir Horace Archambeault. It is plain that the words "the employer," in art. 7325 cannot be confined to the employer personally; for in that case a company, which can only act through its agents, would escape altogether from the effects of the article. Counsel for the appellant, recognising this difficulty, suggested that according to the true construction of the article, the fault giving rise to an increase must be that of the employer or of some person or persons entrusted with the management of the concern. If this be the meaning of the article, then its effect is similar to that of art. 20 of the French law of April 9, 1898, which empowers the Court to increase the compensation if the accident is due to the inexcusable fault of the employer "ou de ceux qu'il s'est substitués dans la direction" Their Lordships are unable to accept this construction. It appears to them that if (as is admitted) the article must be read as extending to the act of some agents of the employer, there is no sufficient reason why the ordinary rule under which a principal is made responsible for the acts of all his agents acting within the scope of their employment should not be applied. This construction is supported by the form of the enactment of 1909, in which there is introduced at the head of the article relating to Workmen's Compensation a reference to "art. 1053 and following,"—art. 1054 C.C. including the following provision: "He (*i.e.*, a person) is responsible, not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control, and by things which he has under his care. . . . Masters and employers are responsible for the damage caused by their servants and

workmen in the performance of the work in which they are employed."

Support is also given to the same conclusion (as pointed out by Archambeault, C.J., in the case above cited, 37 D.L.R. 792, 27 Que. K.B. 141) by art. 7334 of the Code, which provides that "the person injured or his representatives, shall continue to have, in addition to the recourse given by this sub-section, the right to claim compensation under the common law from the persons responsible for the accident other than the employer, his servants or agents." For this article appears to deprive the injured workman of his common law remedy against a servant or agent of the employer whose misconduct or gross negligence may have been chiefly responsible for the accident, and it would be a hardship if that remedy were taken away without substituting a special remedy against the owner of the concern.

The result is that their Lordships are satisfied that Pettigrew, an agent of the appellant Company, was guilty of an "inexcusable fault" giving rise to the accident, and that such fault is imputable to the appellant Company and justifies an increase, under art. 7325, of the compensation payable under the Act. This being so, it becomes unnecessary to consider the further question whether the driver of the tramcar was also guilty of an "inexcusable fault"; for if any one of the Company's servants was guilty of "inexcusable fault" giving rise to the accident, the liability of the Company is clear. It is also unnecessary to consider the question which was discussed by the Canadian Courts, whether in this case there was "inexcusable fault" on the part of those responsible for the management of the Company's affairs. For having regard to the view which their Lordships have taken of the law of Quebec, that question becomes irrelevant.

For the reasons already given their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

IMP.

P. C.

CANADIAN PACIFIC R. Co. v. S.S. "STORSTAD."

Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Sumner. December 5, 1919.

ADMIRALTY (§ I—1)—COLLISION—CLAIMS FOR LIFE AND PROPERTY—FUND IN COURT—DIVISION OF FUND PRO RATA AMONG ALL PROVED CLAIMANTS.

The proceeds of the sale of a ship sold under a Court order to satisfy claims for loss of life and property due to a collision should be divided among all the claimants pro rata in proportion to the amount of their respective proved claims.

[Imperial Merchant Shipping Act, 57-58 Vict. 1894, ch. 60, sec. 503, distinguished.]

Statement.

APPEAL from the judgment of the Supreme Court of Canada, (1918), 40 D.L.R. 615, 56 Can. S.C.R. 324, which varied the decision of the Exchequer Court, (1917), 34 D.L.R. 1, 16 Can. Ex. 472, which confirmed the report of the Deputy District Registrar as to the distribution of the fund representing the proceeds of the sale of the S.S. "Storstad," following a judgment of the Exchequer Court, (1915), 40 D.L.R. 600, 17 Can. Ex. 160, which held her alone to blame for a collision with the S.S. "Empress of Ireland," and consequent loss of life and property. The appeal was allowed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—This appeal arises out of the disastrous collision between the "Storstad" and the "Empress of Ireland," which occurred in the St. Lawrence on May 29, 1914. The "Empress of Ireland" foundered, with much loss of life; the "Storstad" proceeded to her destination—Montreal. There she was arrested, and an action *in rem* was begun at the suit of the C.P.R. Co., owners of the "Empress of Ireland." Those who were entitled to make personal claims in respect of loss of life were in a position of some embarrassment, for the Maritime Conventions Act does not apply to Canada, and the "Storstad" was the property and the only property of a single ship company—the Aktieselskabet Maritime—incorporated and domiciled in Norway. Pending a decision as to the responsibility for the collision they held their hands.

On April 27, 1915, the Exchequer Court of Canada, by the judgment of Dunlop, L.J.A., held the "Storstad" to have been alone to blame, 40 D.L.R. 600, 17 Can. Ex. 160. Against this decision there was no appeal. The ship was sold by order of the Court for $175,000, which sum was deposited in Court, and the question of the amounts of the claims was referred to the Registry, the owners of the "Storstad" taking no further part in the inquiry.

The claimants for loss of life then intervened in the action, and on March 22, 1916, an order was made in the terms and under the circumstances which are thus set out in the Report to the Court made by the Deputy District Registrar in Admiralty.

Whereas on the 22nd day of March, 1916, at one of the adjournments of the reference, a large number of solicitors on behalf of the plaintiff intervenants and claimants, representing majority in number and amounts claimed, agreed and consented, that the Deputy District Registrar do forthwith accept the claims of all the parties as being duly recorded and proved, that is to say, "It is hereby admitted that the loss and damage of each of the said parties resulting from the sinking of the "Empress of Ireland" amount to the said sums" (referring to them) "but without prejudice to the rights of any or all the parties as to their contentions, that the claims of any of them were filed too late, or as to their pretensions that some of the claims are entitled to payment in whole or in part by priority over others, and without waiver of any other rights, except only as to the amount of the said loss and damage in each case."

The proved claims amounted in the aggregate to $3,069,483.94, of which $469,467.51 were for loss of life, and the residue was for loss of property. An acute conflict thus arose between the two interests, and in the result it has been held by the Admiralty Judge and by a majority of the Supreme Court of Canada (1918), 40 D.L.R. 615, 56 Can. S.C.R. 324 (with a variation not at the moment material) that the claimants in respect of life lost have an absolute priority against so much of the sum in Court as is taken to represent £7 per ton of the "Storstad's" registered tonnage, and further rank *pari passu* with the claim of the C.P.R. Co. against the remainder of the fund. The registered tonnage of the "Storstad" was 6,028 tons gross.

No proceedings were ever taken by the owners of the "Storstad" for limitation of their liability, and the fund in Court, which was one sum and one fund and not two, was simply the proceeds of the sale with some accrued bank interest, and had no connection with the gross registered tonnage of the ship or the amounts of £15 per ton or £8 per ton or with the law relating to limitation of liability. Furthermore, the order above recited only admitted the now respondents as claimants on the fund in the action *in rem*, and gave them the benefit of the finding that the "Storstad" was alone to blame, and made no admission whatever as to the character of the fund in Court or as to any prior claim to it in favour of the life claimants. Their rights must rest and were only rested in argument on the effect of the limitation of liability

IMP.

P. C.

CANADIAN PACIFIC R. CO. v. S. S. "STORSTAD."

Lord Sumner.

sections in the Merchant Shipping Act, 57 & 58 Vict., 1894 (Imp.), ch 60. Before their Lordships the appellants abandoned part of the contentions raised below, and admitted that this statute and these sections alone are material.

The following passages from the judgment of Anglin, J., conveniently give the reasoning which prevailed with the majority of the Judges of the Supreme Court, 40 D.L.R., at 626, 56 Can. S.C.R. at 338:—

> Section 503 is not merely an enactment for the shipowner's benefit limiting his liability. It contains a substantive provision for the advantage of claimants in respect of loss of life and personal injuries, upon whom it confers valuable rights of priority. A construction, which would make the existence and enforceability of those rights entirely dependent upon the shipowner's seeking and obtaining a judgment under section 504 declaratory of the limitation of his liability and fixing the amount thereof, would seem so utterly unreasonable and so contrary to what Parliament apparently intended should be the effect of the statute, that in my opinion it should not prevail. Whether loss of life and personal injury claims are to have a limited preference over loss of property claims or are to rank *pari passu* with them on the entire fund available was not left to be determined by the action or the inaction of the shipowner, whether prompted by interest or purely spontaneous . . . (40 D.L.R. at 627). Were the Court to distribute the money now available *pro rata* amongst all the claimants, as the plaintiff contends for, the policy of sec. 503 of the Merchant Shipping Act would be defeated. It would be equally disregarded were the entire proceeds of the sale of the ship devoted to a fund available exclusively to satisfy demands in respect of loss of life and personal injury. The statute does not give them any such priority. It provides for the concurrent establishment of two distinct funds, in which it defines different rights.

Their Lordships are unable to accept this reasoning. Limitation of liability is the creation of statute. It is a provision in favour of the shipowner, and operates to restrict the rights of those to whom he is liable. Incidentally the sections furnish the rule by which to determine the rights of parties interested in the fund created by the operation of the sections themselves, but if the shipowner, for whatsoever reason, does not bring the sections into operation, no one else can do so, and they do not in such case have effect. This is the result of the enactment itself, for it expressly provides for procedure to limit the shipowner's liability, and sets up no principle or rule as to the rights of different classes of claimants apart from such limitation. The owners of the "Storstad" took no proceedings for limitation of their liability. If she had turned out to be of such value that the amount ultimately paid into Court equalled the aggregate amount

of the proved claims, they would have been paid in full, no matter how many pounds per gross register ton that amount represented. If the tonnage of the ship had been so small that the amount in Court exceeded £15 per ton, the whole of it would, nevertheless, have been available in satisfaction of the proved claims. Nothing would have prevented the claimants as a body from enjoying their full rights, arising out of the faulty navigation of the ship and the damage caused thereby, unless the shipowners had availed themselves of the statute. As they have not done so, nothing prevents a particular class of these claimants—in this case the appellants—from enjoying the full benefit of their legal rights. It is an accident, and an unfortunate one, that there is not money enough for all, but this accident gives the respondents no more and the appellants no less right than if the fact had been otherwise. If, instead of being made intervenants in the Canadian proceedings by consent, the respondents had found it worth their while to sue the shipowners in Norway *in personam*, they would have been entitled, if successful, to a judgment for the full amount of their claim, notwithstanding the fact that the result of the proceedings *in rem* in Canada had withdrawn a part of their opponents' assets beyond the reach of execution on their judgment.

Since the sections do not apply, no more need be said now upon their construction and operation. Their Lordships will only add, that they are unable to find any ground for assuming a policy or intention on the part of the Legislature to establish a general preference applicable to all circumstances in favour of life claimants, or to treat any sum, which may happen to be in Court in a collision action generally, as if it had been brought into Court in one particular way under the statute.

The appellants contended further that the limitation of liability sections had no application, because it had not been shewn that the loss of the "Empress of Ireland" happened without the actual fault or privity of the owners of the "Storstad." Their Lordships refrain from discussing this point because it appears to them to be devoid of any substance. It was neither proved nor suggested that the "Storstad" was in any respect ill found. She belonged to an incorporated company and not to natural persons, and it was proved at the trial that the whole cause of the collision was the bad navigation of the officer of the

IMP.

P. C.

CANADIAN PACIFIC R. CO. v. S. S. "STORSTAD."

Lord Sumner.

watch. In such circumstances what room can there be for discussion of the actual fault or privity of the Aktieselskabet Maritime?

In the result the appeal succeeds, and with costs; nor is there any ground for allowing the appellants' costs to be taken out of the fund in Court as suggested by the respondents. The judgments of the Court of Exchequer and of the Supreme Court must be set aside, and the case must be remitted in order that judgment may be entered, directing a division of the fund in Court among the different claimants, appellants and respondents, *pro rata*, in proportion to the amounts of their respective proved claims. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

N. S.

S. C.

INGRAHAM v. HILL.

Nova Scotia Supreme Court, Harris, C.J., Drysdale, J., Ritchie, E.J., and Mellish, J. January 13, 1920.

WILLS (§ III G—128)—RESIDUARY ESTATE IN TRUST—PROVISIONS FOR DISTRIBUTION—SALE OF PORTION BY TRUSTEE—INTERPRETATION OF WILL—NATURE OF ESTATES CREATED.

The Court will set aside the sale of a portion of the residue of an estate by a trustee, where it is clear from the will that the testator intended the beneficiaries to have a vested interest in such residue on certain conditions which have been fulfilled.

Statement.

APPEAL from the judgment of Longley, J., in favour of defendant, trustee under the last will of Charles W. Hill, in an action at the suit of one of the beneficiaries under said will, claiming a decree to set aside, vacate and declare null and void an instrument dated December 4, 1917, purporting to be a division and apportionment of property devised to defendant in trust to be apportioned between himself and other beneficiaries under the terms of said will, and for a reference and other relief. Reversed.

T. R. Robertson, K.C., for appellant; *L. A. Lovett*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—Charles W. Hill of Sydney, in the County of Cape Breton, died on February 10, 1917, having made a will dated June 9, 1909, which contained the following clause:

From and after the decease of my said wife it is my will and I give devise and bequeath to my said brother Arthur E. Hill all other the rest and residue of my estate and property as the same shall then be and whether real personal or mixed and wherever found and however situated upon the trust that he do and shall divide and apportion the same between himself and the said

Alfred Harrison and the said Emily Ingraham in such proportions as to my said brother shall seem equitable and prudent but should either the said Alfred Harrison or the said Emily Ingraham die leaving no heirs of their bodies then my said brother Arthur E. Hill and his heirs shall take the same absolutely it being the intention of my will that the provisions herein made for the said Alfred Harrison and Emily Ingraham shall not enure or descend to the next of kin of them or either of them.

By an instrument in writing dated December 4, 1917, the said Arthur E. Hill purported to apportion and divide the residue of the estate of the late Charles W. Hill pursuant to the power conferred by his said will, and he thereby gave to Alfred Harrison the sum of $60 yearly during his life and a like sum to Emily Ingraham (the plaintiff) during her life; and he declared that he held certain of the real estate belonging to the deceased "in trust for securing the payment out of the rents and profits or income arising therefrom of the said yearly payments." The balance of all the property he allotted to himself.

The estate was a considerable one and one of the properties—real estate on the corner of Wentworth and Bentinck Streets—was valued in the inventory of the estate at $7,900 and was said to be worth at least $12,000 at the present time. The evidence of Hill was taken under commission in British Columbia and he stated that he claimed this property to be his under a verbal agreement with his brother, the deceased Charles W. Hill, but it is quite clear that it is, and must be treated as, a part of the estate of the deceased.

The evidence of Hill shews that in making the division and apportionment of the residue of the estate he left out of consideration this very large and valuable part of the estate and it is clear that Hill has not divided and apportioned the whole of the estate in his hands, and the attempted distribution is manifestly in bad faith.

In the instrument made by Arthur E. Hill there is a recital of the concluding part of the paragraph from the will of the deceased and on the argument counsel contended that under this provision the intention of the testator was that if Harrison and Emily Ingraham eventually died leaving no heirs of their bodies their interest in the residue passed to Hill; or, in other words, that Harrison and Emily Ingraham if alive on the death of the wife of the deceased did not take a vested interest in any portion of the residue.

N. S.

S. C.

INGRAHAM v. HILL.

Harris, C.J.

I am of the opinion that the words "but should either the said Alfred Harrison or the said Emily Ingraham die leaving no heirs of their bodies" are to be construed as referring only to the death of these parties during the lifetime of the widow, and on the death of the widow the said Harrison and Emily Ingraham being alive took a vested interest. The instrument of division was evidently based on a misconception of the meaning of this clause of the will.

For these reasons I think the appeal should be allowed and there should be a decree setting aside and declaring to be null and void the instrument dated December 4, 1917, and an order for a reference to determine the particulars and value of the residuary estate and that Hill shall divide and apportion the whole of the estate between himself and the said Harrison and Emily Ingraham in such proportions as to him shall seem equitable and prudent in accordance with the terms of the will—such division and apportionment to be submitted to the Chambers Judge, sitting as a Court, for approval within 3 months from date, and the case should be remitted to the Chambers Judge to be further heard by him sitting as a Court when such division and apportionment is submitted with full power to deal with the same in every way, as fully as if the case was being tried before him.

The defendant, Hill, should pay the costs of the appeal and of the action. The further costs of the reference and the hearing before the Chambers Judge will be in his discretion.

Drysdale, J.

DRYSDALE, J.:—I concur.

Ritchie, E.J.

RITCHIE, E.J.:—I agree with the opinion of Harris, C.J., and I am inclined to go further and agree with my brother Mellish, but I prefer not to decide that the will contemplates an equal division at this stage. The Judge at Chambers will have the new division and apportionment before him and the report of the referee. Upon this added material he will hear counsel and be, I think, in a better position to deal with the point than I am at present. I think that this question was not fully argued, if it was argued at all, on the hearing of this appeal. I fully agree with my brother Mellish that the division must be in fact equitable.

I may add that so far as I am concerned it is fortunate for the trustee that an application has not been made to remove him from the office of trustee, because the obviously inequitable division

which he has attempted to make has convinced me that he does not regard the trust as binding upon his conscience.

MELLISH, J.:—I agree with all that has been said in the judgment of Harris, C.J., and with the conclusions he has arrived at.

However, I wish to say further that, in my opinion, the executor and trustee, Hill, has made no apportionment according to the terms of the will, whether Harrison and Emily Ingraham take only a life interest or, as I think, an absolute interest in the property given them by the will. The residue is valued at $30,000. The trustee has kept everything for himself and all the beneficiaries have, in effect, under the so-called apportionment, is the personal undertaking of the trustee to pay them each $60 a year for life secured upon the trustee's property.

I cannot therefore regard the statement of the trustee in the document purporting to create such a liability on his part, that in doing so he is making an apportionment which to him "seems equitable and prudent" as being made in good faith.

I am further disposed to think that on a proper interpretation of the will under discussion the trustee is not given an absolute discretion to divide the property as he may see fit, or in such a way as to especially favour himself, even though he might give the other parties interested shares which would not be considered "illusory." I rather think the trustee's discretion, if he has any, is fettered by the terms of the will itself, and that he must make an "equitable," *i.e., primâ facie* at least, an equal division. Having regard to the nature of the property to be divided it may be 'prudent" that one party should have one portion rather than another, but I do not think that the testator expected that the trustee would give, or be empowered to give, the word "equitable" a meaning beneficial to himself and detrimental to the other *cestuis que trust*.

The testator in the first part of the will requests the trustee "at all times to advise and protect . . . my adopted children, Alfred Harrison and Emily Ingraham, to the utmost of his power and according to their necessity;" and the testator would naturally expect any "discretion" which would be exercised by him would be in favour of the adopted children rather than in favour of himself.

Subject to such discretion, I am disposed to think that the

N. S.
S. C.
INGRAHAM v. HILL.
Mellish, J.

testator intended that the residue should be equally divided and that the trustee should be empowered to make such an equitable division upon a proper valuation and prudent distribution.

I think the division should be in fact equitable.

If the power reposed in the trustee is carried to any greater extent he will be placed in a very undesirable position where his interest and duty will so conflict that one shrinks from concluding the testator had any such intention. Such a position would necessarily preclude the exercise of any sound discretion. And the trustee accepts a duty binding on his conscience. He is not the mere donee of a power.

Consequently, even if the testator is not to be held as giving an equal interest to the parties, I think the trustee would be in a position where his interests necessarily conflict with his duty, and, considering this, and in view of what he has already done, if he is not prepared in the proposed scheme to divide the residue equa ly to the parties entitled, he should retire; failing which he should be removed. *Passingham* v. *Sherborn* (1846), 9 Beav. 424, at 436; *Babbitt* v. *Babbitt* (1875), 26 N.J. Eq. 44; *Gower* v. *Mainwaring* (1750), 2 Ves. Sen. 87, at 89; *In re O'Flanagan and Ryan's Contract*, [1905] 1 I.R. 280, at 284, 285.

Appeal allowed.

CAN.
EX. C.

THE KING v. THE ONTARIO POWER Co. AND THE TORONTO POWER Co.

Exchequer Court of Canada, Cassels, J. December 29, 1919.

DISCOVERY AND INSPECTION (§ IV—20)—ADVERSE PARTY—LIMITATION OF EXAMINATION—RIGHT TO REFUSE TO ANSWER IMPROPER QUESTIONS.

An adverse party can be examined for discovery under the rules of the Court but the examination must be limited to the issues to be tried in the action as between the parties. A witness submitting himself for examination is not bound to answer all questions whether properly put or not.

Statement.

APPLICATION to compel the witness, Clark, the chief engineer for the Toronto Power Co., to attend for examination at his own expense. The examination is intended as an examination for discovery.

The Crown was not notified that this examination was to take place.

C. S. MacInnes, K.C., and *Mr. Robinson*, for the Ontario Power Company.

Mr. McKay, K.C., for the Toronto Power Company.

CAN.

EX. C.

THE KING v. THE ONTARIO POWER CO. AND THE TORONTO POWER CO.

Cassels, J.

CASSELS, J.:—The information in this case is filed by His Majesty on the information of the Attorney-General of Canada. The defendants are the Ontario Power Company, and the Toronto Power Company.

The Crown alleges certain claims made by the Toronto Power Co. against the Ontario Power Co. in respect of power furnished under the directions of the power controller. The seventh clause of the information reads, as follows:—

7. By indenture made the 28th day of March, 1919, the defendant, the Toronto Power Company, Limited, assigned, transferred and set over unto His Majesty The King and his successors in right of the Dominion of Canada any right or interest the Toronto Power Company, Limited, may have in or to any claim or claims, demand or demands, against any and all person or persons, firm or firms, corporation or corporations, including the defendant, the Ontario Power Company of Niagara Falls, in respect of the matters in said Orders-in-Council referred to, and the Attorney-General, in addition to any other right of action which His Majesty may have against the said defendant, the Ontario Power Company of Niagara Falls, claims against said Company as assignee as aforesaid.

I confess, as I have stated on two or three occasions, that with this allegation on the pleadings, it is difficult to see why the Toronto Power Co. should be a party to the action. All their rights have passed to the Crown. However, it was arranged that the questions should all stand over to the trial of the action when the evidence would be forthcoming and the rights of all parties determined.

The Toronto Power Co. filed a defence to the action. They make no claim whatever as against the Ontario Power Co. The sole action so far as the pleadings are concerned is an action between the Crown as assignees of the claim of the Toronto Power Co. against the Ontario Power Co.

The Ontario Power Co. issued a subpoena and notice calling upon the officer of the Toronto Power Co. to submit to examination for discovery. Clark attended and was examined at considerable length, but when the questions which he refused to answer were put to him, on the advice of his counsel he declined to answer as not being relevant to the issues raised between the defendants.

There is no question but that an adverse party can be examined under the rules of the Court, but an examination for discovery must be limited to the issues to be tried in the action as between the parties.

The rule of the Exchequer Court, No. 154, reads as follows:—

CAN.

EX. C.

THE KING v. THE ONTARIO POWER CO. AND THE TORONTO POWER CO.

Cassels, J.

Any party may, at the trial of an action or issue, use in evidence any part of the examination for the purposes of discovery of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

Where any departmental or other officer of the Crown, or an officer of the corporation has been examined for the purposes of discovery, the whole or any part of the examination may be used as evidence by any party adverse in interest to the Crown or corporation; and if a part only be used, the Crown or corporation may put in and use the remainder of the examination of the officer, or any part thereof, as evidence on the part of the Crown or of the corporation.

I may mention the Crown, the informant, in the action were not notified of the examination. How can this evidence be utilized at the trial as against the Crown who are the parties suing as assignees of the Toronto Power Co.? Of what relevancy can it be as between the Ontario Power Co. and the Toronto Power Co. at the trial, the Toronto Power Co. making no claim whatever as against the Ontario Power Co.?

It is said that because the Toronto Power Co. submitted their officer to examination they are estopped from raising this question. The argument is that where a defendant appears in an action, he is estopped from disputing the jurisdiction of the Court. In that case he attorns to the jurisdiction of the Court. It is an entirely different question to say that because he submits for examination for discovery that therefore when a question is asked not open to the examining party that because he has submitted to examination he is bound to answer all questions whether they are questions properly put or not.

I would refer to the late case of *Aktiengesellschaft für Autogene Aluminium Schweissung* v. *London Aluminium Company, Ltd.*, [1919] 2 Ch. D. 67. See the language of Swinfen Eady, M.R., at page 76. There, of course, the examination was by interrogatory, but this can in no way affect the principle.

Judgment accordingly.

ALTA.

S. C.

REX v. PETERSON.

Alberta Supreme Court, Simmons, J. February 9, 1920.

ANIMALS (§ ID—35)—AT LARGE—MEANING OF.

Animals in charge of a herdsman are not "at large" within the meaning of 4 Geo. V., 1913 (Alta. 2nd Sess.), ch. 27, as amended by 9 Geo. V., 1919 (Alta.), ch. 4, sec. 37.—An Act for restraining Dangerous and Mischievous Animals.

ALTA.

S. C.

REX v. PETERSON.

Simmons, J.

APPEAL from the conviction of a magistrate, for unlawfully permitting animals to run at large in an unorganized district. Conviction quashed.

W. F. W. Lent, for plaintiff; *G. F. H. Long*, for defendant.

SIMMONS, J.:—The defendant was convicted before a magistrate at Brooks, in the Province of Alberta, on January 24, 1920, for unlawfully permitting and allowing a number of sheep to run at large in unorganized territory and prohibited area, contrary to sec. 8, 4 Geo. V., 1913 (Alta. 2nd Sess.), ch. 27, as amended in 9 Geo. V., 1919, ch. 4, sec. 37, which section provides:—

8. The Minister of Agriculture may by order published in the Alberta Gazette prohibit in any specified area in such order defined (no part of which shall be within a municipal district) the running at large of any live stock in greater numbers than one hundred head of cattle or horses or five hundred sheep, or a proper proportionate number of any two or three such classes, for every one hundred and sixty acres of land owned or occupied by the owner of such live stock within the area so defined. (2) Every such order upon its publication as aforesaid shall unless and until repealed by subsequent order published in like manner be of the same force and effect as if enacted by the Legislature of the Province, and any violation thereof shall be an offence punishable on summary conviction by a penalty not exceeding $100.00 and costs for each offence.

By an order-in-council dated August 18, 1919, the certain areas were prescribed as prohibited areas within said sec. 8. It is admitted that the band of sheep in question were in charge of a herdsman within the prohibited area, and counsel for the defendant submitted on behalf of the defendant that the animals were not running at large within the meaning of the said sec. .

The Act in question does not give an interpretation of the term "running at large." The Stray Animals Ordinance, being ch. 80 of the N.W.T. Ords., 1911, interprets the expression "run at large" as follows (sec. 2):—

The expression "run at large" or "running at large" means without being under control of the owner, either by being in direct or continuous charge of a herder, or by confinement within any building or other enclosure or fence whether same be lawful or not.

Ch. 81 of the N.W.T. Ords., 1911, in an Act cited as "The Herd Ordinance," gives the same interpretation to the expression "run at large" or "running at large."

These two Acts are dealing with cognated subjects, and in which statutory interpretation has been given to these two expressions.

ALTA.

S. C.

REX v. PETERSON.

Simmons, J.

There is nothing in the Act in question repugnant to that interpretation, and in view of this it seems to me that the Legislature must have intended that the interpretation already given to these expressions should apply to the Act in question. In the result then there was no ground for the charge that was preferred against the defendant. The evidence adduced for the prosecution established that the animals were in the charge of a herdsman. There was, therefore, no evidence upon which the magistrate could make a conviction, and that is equivalent to finding that the magistrate had no jurisdiction under the Act in question. The conviction will therefore be quashed.

So far as I am informed, it is the first time this question has been raised in the Courts of the Province and it is a complaint laid under the recent amendment of the Act, and I do not think it is a case where costs should be given against the complainant or the Crown.

The order will be then, that the conviction be quashed without costs and the magistrate and complainant given the usual protection from further action, and the deposit of $25 paid by the complainant, pursuant to this complaint, returned to the complainant's solicitor, Mr. Long, as well as the fine and costs.

Judgment accordingly.

QUE.

S. S.

THE KING v. PILON.

Quebec Court of Special Sessions of the Peace, Hazin, J. February 3, 1920.

GAMING (§ I—1a)—GAMBLING MACHINE—WHAT CONSTITUTES—ELECTRIC AMUSEMENT MACHINE.

An electric amusement machine which is placed in a public place to be played by inexperienced persons, absolutely ignorant of its mechanism and having no idea of electricity, by which the operator deposits a coin in the machine which the machine keeps if the operator loses, is a gambling machine within the meaning of sec. 235 of the Criminal Code, although after long practice it is possible to acquire skill in operating such machine.

Statement.

TRIAL of accused on a charge of keeping a common betting house, and with having kept in a place under his control a gambling machine.

Hazin, J.

HAZIN, J.:—The accused was tried before me on an indictment containing the following counts:

It is presented upon oath that Joseph Pilon on October 29, 1919, at the City of Montreal, kept a common betting house at No. 283 of St. Lawrence Boulevard. And it is presented upon oath that Pilon on October 29, 1919,

at the City of Montreal kept a common gaming house at No. 283 of said St. Lawrence Boulevard.

It is presented upon oath, that at the City of Montreal, District of Montreal, on October 29, 1919, Joseph Pilon used and knowingly allowed parts of premises under his control, to wit: 283 St. Lawrence Boulevard, to be used for the purpose of recording or registering bets, wagers, or selling pools; also kept, or employed, or knowingly allowed to be kept, exhibited, employed in any part of premises under his control, to wit, in house 283 St. Lawrence Boulevard, devices or apparatus for the purpose of recording bets, wagers or selling pools, or gambling, wagering or betting machines.

The charges under these heads are drawn from secs. 226-227 and sub-secs. (a) and (b) of sec. 235 of the Cr. Code.

The proof shews that on October 29, 1919, the accused was the occupier of the premises mentioned in the indictment, and that he kept, exposed and employed an apparatus or device produced in Court, and called "Canadian Electro Magnetic Amusement Machine."

As the name indicates, it is an electrical apparatus, which is operated by 4 persons. Each of these 4 persons inserts in the machine a piece of Canadian money of the value of 10 cents, and the insertion of these 4 pieces of money starts the electric current which produces the phenomenon of advancing the 4 metallic horses affixed to the apparatus; these 4 horses have the same starting point, and have to run the same distance in a determined time. The operator who succeeds in bringing in his horse first to the point determined will receive 2 of the coins deposited, which the machine will pay out to him automatically. It is the same for the second winner.

What would happen if 3, or even 4, succeed? Do they divide the money in 3 if 3 have succeeded, or in 4 if 4 have succeeded? The evidence does not say. However that may be, the point is of no importance, the apparatus having only 4 coins to pay, and the 4 coins are paid when 2 horses reach the goal; only the operators are interested in determining in what manner the division will be made in case of 3 or 4 winning.

On the other hand, if only one operator wins, the apparatus will keep 2 of the coins, that is, 20 cents, and if all fail, the apparatus will keep all the money wagered, that is, 40 cents; in both cases for the benefit of the proprietor.

Now, is the object of this apparatus a gaming contract, or a bet? Mignault, in his work on Canadian Civil Law, says on page 315 of vol. 8:—

QUE.

S. S.

THE KING v. PILON.

Hazin, J.

The Civil Code does not define a gaming contract or a bet. Baudry Lacantinerie gives the following definition, which we may accept:—"Gaming is an agreement by which each player, in case he loses, obliges himself to pay to the winner a certain sum of money or other consideration, which forms what we call the wager of the parties. A bet is an agreement entered into between two persons who disagree on any subject, by which each of them oblige themselves, if his opinion is ill-founded, to pay to the other a certain sum or thing agreed upon."

The same author makes a distinction between gaming and a bet, in considering the viewpoint from which the parties approach the final event on which the agreement depends. If these parties are to play an active role in the event; that is to say, if the one of them who shall be the author of the event is to be the winner, there is gaming; on the contrary, if the event be independent of the will and actions of the parties, there is a bet.

Applying these ideas to the case which I have to consider, it seems evident that the object of the apparatus produced in this case is for gaming, and not for betting. It seems to me also evident that there is gaming only between the operators of this apparatus.

As to the proprietor he wagers nothing. He does not oblige himself to pay to any other person any sum of money or any determined object, and the operation of the apparatus does not entail any *alea*, does not entail any risk on his part; and risk is the very essence of gaming or betting.

Now, as to the operators there is no bet between them, because they play an active role in attaining the object on which the agreement depends, but there is between them a gaming contract in virtue of which each risks 10 cents with the expectation of gaining 20 of the 40 cents placed in the machine by the 4 operators.

Is this operation specially prohibited by the Cr. Code?

The game in itself is not immoral or condemnable; it becomes so only by its abuse, made through the undue enthusiasm when the players are interested on a monetary basis, and look upon it as a means of gain and speculation.

It is true that civil law refuses to sanction gaming and wagering by denying to players and wagerers right of action either to recover or restore the money or any other thing claimed under a gaming contract or a bet, but this does not mean that the game is thereby criminal.

Civil law makes an exception (art. 1928 C.C. (Que.)) "in favour of exercises for promoting skill in the use of arms and of horse and foot races, and other lawful games which require bodily activity or address."

Further, the Cr. Code does not prohibit the game itself, whether it be a game of chance or a mixed game of chance and skill; it prohibits the game only when it is played in a common gaming house.

Two kinds of houses are considered in sec. 226: 1st.—That which is kept by a person for gain from the game which is therein played. 2nd.—That where one or more of the players derives a gain by means of a bank or by reason of the fact that the chances in the game are more favourable to them than to the other players.

But these houses are only those in which games of chance, or games of mixed chance and skill are played.

Our Cr. Code does not define these kind of games. One can easily form an idea as to what is a game of chance, but it is not so easy to define what is a game of both chance and skill.

However this may be, the question of determining if a game is one of skill or one of chance, or a mixed game of chance and skill, is a question of fact which is left to the appreciation of the jury.

Now, what is the proof made in regard to the apparatus produced in this case?

It is very simple to appreciate. The Crown only has heard witnesses, who call themselves electrical experts, and they are unanimous in saying that the game in question is not a game of chance, or a mixed game of chance and skill. They maintain that the game is one of pure skill.

If this be the case, the house in which this game is played would not be considered as a common gaming-house, because, in spite of the gain that the proprietor might derive from the game, he does not derive such gain from a game of chance or from a mixed game of chance and skill.

No doubt the opinions of the experts may have considerable weight, and it is the duty of the presiding Judge to carefully consider them. But again, these opinions must not be contrary to logic or to common sense. In the present case, the witnesses compare this apparatus to a telegraphic instrument. There is some affinity between the two in this sense, that in both cases the operator presses upon a lever or key to establish a certain electric current. The telegraph operator, by holding this current for either a long or a short time, obtains a long or short connection, which may form different signals.

QUE.

S. S.

THE KING v. PILON.

Hazin, J.

It is this operation which transmits messages. The message can be transmitted with more or less regularity or more or less dexterity according to the skill of the operator.

The telegraph operator, we cannot deny, follows a trade, an art, if we wish to call it so, and this art can be exercised by him only after certain practice and certain study.

What is the time necessary to turn out an able, experienced operator? The time will be more or less according to the aptitude of the subject but it necessarily follows that, during a certain time, the apprentice will be unable to handle the instrument at all, and that a further time must elapse before he can handle it skilfully. How many are there here present who would attempt to send a telegraph message? What telegraph company would take into its employment for the transmission of messages a man who has no notion or idea of telegraphy?

The same remarks evidently apply to the apparatus before us. Just as the telegraph operator, the one who operates this apparatus is perhaps not held to have made special study in electricity, but I cannot admit that the first comer could skilfully operate it without studying it, understanding its mechanism, and without serious practice. And if I have well understood the working of this apparatus, I find that it entails a certain difficulty which we do not encounter in the telegraphic instrument.

The telegraph operator has definite rules for the working of his instrument. One of these consists in pressing down a lever until the electric current is started. It is not thus in the apparatus now before us; in pressing the lever or the key to the point of connection the operator closes the current; he also closes the current if he holds the key stationary at the point where the contact should be made. The manipulation of this key will produce the alternative current, in which the potentiality and the power change rapid y and periodically, and this current produces in its turn the magnetic effect, the phenomonen, which advances the horse.

Is it possible to manipulate this key in such a manner as to obtain with each pressure a certain determined effect? I do not think so. In any case, the dexterity or skill necessary to success is acquired only by study and practice.

The expert witnesses heard in this case say nothing of the length of time necessary for this study or practice. It seems evident

that they have taken as granted, that the apparatus in question will be played by persons who are familiar with its working, by those who have studied and practised the game, and have become skilful in playing it. But that is not what the inventor had in view when he made his machine.

The machine is to be placed generally in public places, such as stores, hotels, etc. It will be played by inexperienced persons, absolutely ignorant of its mechanism, having no idea of electricity, even ignoring how to operate the key which produces the movement necessary to carry the horse to the finishing point.

For persons of this class, the game can not be considered as a game of skill. The game will be played by them mechanically, without any exercise of their faculties. For them the game will be entirely one of chance.

Can it be anything but a game of pure chance? Yes, if we believe the witnesses, but it would cease to be such only after long practice and study. During the time of this practice and study, the duration of which would be problematical, and, as to its duration, dependent on the aptitude of the subjects who wished to undertake it, it would always be a game of chance for the player. And, what are the means for practice and study upon which the public may count? There is no one to inform him in regard to the construction of the apparatus, its mechanism, or working. The game alone would teach him. But he has to pay to play, and what length of time and what amount of money his learning, experience and skill will cost him, is not determined.

It is, at least, on all this that the proprietor of the machine depends in getting his profits out of it.

I go further; I believe that this game will always depend upon an element of chance. It is contrary to all reason to believe that the public generally will make a study and a practice of this game in order to use it as a relaxation or an exercise.

There is another point to be decided. The indictment alleges that the accused kept, exposed, employed, or knowingly allowed to be kept, exposed or employed, in a certain part of a house under his control, a gambling machine. This count is taken under sec. 235 of the Cr. Code as amended by 3-4 Geo. V., 1913, ch. 13, sec. 13.

What then, is gambling? We find this definition in Bouvier's

QUE.

S. S.

THE KING v. PILON.

Hazin, J.

Law Dictionary, Rawles, 3rd ed.: "To engage in unlawful play, to play games for stakes or bet in them. It is the most apt word to express these ideas."

And Wharton's Law Lexicon, 12th ed., page 389: "The playing of any game of chance, as cards, dice, etc., for money, or money's worth."

If it sufficed to add to the word "gambling" as defined by these authors, the word "machine," in order to know what is a gambling machine under sec. 235, the difficulty would soon be overcome. A gambling machine would be one used to play for a wager. But, as I have said previously, games, even those of chance or of mixed chance and skill, are not necessarily those forbidden under the Cr. Code.

So, the game of poker, whatever may be wagered upon it, is not a crime; it would be a crime only if the game were played in a house used to play games of chance or games of mixed chance and skill contrary to the provisions of sec. 226 Cr. Code.

It is therefore necessary to determine if the apparatus in this case constitutes a game covered by sec. 226.

The constituting elements of the offence referred to under sec. 235 differ from those under sec. 226. In order that there be an offence under the terms of sec. 226 it is necessary, among other things, that the games played be played in a house held or used for the playing of games of chance or mixed games of chance and skill, and that these games be played for gain; it is only in these cases that they are unlawful.

It is not the same with sec. 235 which calls it an offence when a person keeps, exposes, or employs or permits to be kept, exposed or employed in any part of his establishment, any gambling machine.

And I consider as a gambling machine any machine which operates the class of game referred to in sec. 226, because the machine then plays an unlawful game.

Sec. 226, par. (b), sub-par. (2), Cr. Code, declares unlawful "any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed."

There is, therefore, no question of a game of chance or a game of mixed chance and skill; the law includes all games, even those

QUE.

S. S.

THE KING ex r. 4 PILON.

Hazin, J.

of skill when the chances are not alike favourable to all the players.

It must not be said that the law refers to a game in which the chances of being the winner are equal to all the players; it is evident that the chances are those of gaining the stake, or wager, since the winner may be one who does not necessarily take part in the game, that is, the banker, or other person by whom the game is managed.

If, therefore, even games of skill in which the chances are not alike favourable to all the players are unlawful when they are played in a house which is kept for the purpose of playing games of chance, or mixed games of chance and skill, the apparatus used to play such a game replaces and plays a similar part to the house and is also prohibited.

Now, we know that 4 players take part in the game, and their bet is of 10 cents each. On the other hand, what role does the apparatus play in attaining the object aimed at by the players?

Nothing whatever but pocketing the wager of the loser, of the unlucky player. The proprietor of the apparatus, therefore, the person by whom the game is managed, makes no wager, and runs no risk. He gives nothing if the players win, and he keeps all if the players do not win.

The chances of the game, therefore, are much more favourable to him than to the players. In fact, they are all in his favour.

The principle of this game, therefore, violates the provisions of the Cr. Code, that is sub-par. (2) of par. (b) of sec. 226, and I have no hesitation in considering the apparatus as being one of those referred to in par. (b) of sec. 235.

The defence have compared this apparatus to another which has already been the subject of a decision rendered by myself on December 16, 1916, namely the "Clown." There is no similarity in the 2 machines, or in attaining the object aimed at by the players.

At a first glance, one understands the operation of the "Clown." The player knows what he has to do to win, and if he is skilful enough he will win. I do not pretend the game is an easy one, but the difficulties in working it do not change its nature. In the "Clown," in contrast to "The Canadian Electro Magnetic

QUE.

S. S.

THE KING v. PILON.

Hazin, J.

Amusement Machine," the proprietor wagers. The wager is a double one, at times a quadruple one to that placed by the player, and that no doubt is to equalise the chances on account of the difficulties of the game. In the "Clown," the chances seem to be as favourable to the player as to the proprietor of the machine. In any event this is what the proof shews.

The defence has also maintained that the gain made by the proprietor of the apparatus is not unlawful, that it is simply a lawful compensation for the use of the apparatus, the cost of the electricity, etc.

If this is so the proprietor of a house who is paid by persons who frequent it to play games of chance, or mixed games of chance and sk ll, may also, with equal reason, maintain that the money wh'ch he receives from the players is given for the use of his house, his light, his heating, the use of his instruments for gaming, etc. This pretension is evidently ill-founded.

The defence has also compared this with the case of the proprietor of a hall where games are played, on payment of a determined sum, such as billiards, pool, and bowling. There is a notable difference between the two. In the first place there is a gaming contract, and in the second place there is simply amusement and recreation.

The game played upon this apparatus would also be one of simple recreation if the players were called upon to pay the sum of 10 cents for recreation alone, without any hope of gain.

The accused is found guilty of keeping a common gaming-house, and also of having kept, exposed or employed in a place under his control a gambling machine.

Judgment accordingly.

ONT.

S. C.

Re LUNNESS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell' Latchford and Middleton, JJ. November 28, 1919.

WILLS (§ III E—106)—DISTRIBUTION OF PROPERTY AMONG CHILDREN—DISPOSITION OF "PROPERTY SITUATED IN ONTARIO"—TESTATOR DOMICILED THERE—SHARES OF DOMINION RAILWAY STOCK—SITUS OF INCORPOREAL PROPERTY.

The will of the testator, who died having his domicile in Ontario, and which disposed of his "property situated in Ontario" held to refer only to his real property, as incorporeal property can have no situs, and it could not be assumed that the maxim *mobilia sequuntur personam,* applied.

ONT.

S. C.

RE LUNNESS.

Statement.

MOTION by William T. Worthy, surviving executor of the will of James Lunness, deceased, for the advice and direction of the Court on the proper construction and interpretation of the will of the deceased, with reference to certain questions set out below.

The will, omitting formal parts, was as follows:—

This is the last will and testament of me, Joseph Lunness, of the city of Toronto, in the county of York, drover, made this fourth day of March in the year of our Lord one thousand nine hundred and fifteen.

1. I revoke all wills or other testamentary dispositions by me at any time heretofore made and declare this only to be and contain my last will and testament.

2. I direct all my just debts, funeral and testamentary expenses, to be paid and satisfied by my executors and trustees hereinafter mentioned as soon as conveniently may be after my decease.

3. I bequeath to my wife Mary Lunness all my furniture books pictures provisions and all my other household effects for her own absolute use.

4. I devise and bequeath to each of my daughters Annie L. Jackson, Beatrice Sophia Webster, and Jessie C. Johnston two hundred and fifty shares of stock in the Canadian Pacific Railway Company and to my son Joseph Readman Lunness fifty shares of stock in the Canadian Pacific Railway Company such stock to be transferred to my said children within six months after my decease.

5. I devise and bequeath the sum of one thousand dollars to be paid free of legacy duty to each of the six sons of my sister Sophia Worthy; should any of my said nephews predecease me the share which would have gone to such deceased nephew shall go and belong to his brothers in equal shares.

6. I devise and bequeath the sum of one thousand dollars to be paid free of legacy duty to each of the four children of my nephew the late William J. Lunness; should any of said children predecease me the share which would have gone to such child shall go and belong to the survivors in equal shares.

7. I devise and bequeath all my real estate of every kind and all my personal estate and effects whatsoever not otherwise disposed of by this my will unto my executors and trustees hereinafter named and the survivor of them and his successors their

ONT.
S. C.
RE LUNNESS.

and each of their heirs executors and administrators respectively according to the nature thereof, upon the following trusts:—

(1) To pay the taxes and insurance and keep in a reasonable state of repair for the use of my wife during her natural life my dwelling-house in the township of Etobicoke near Long Branch, and the lands appertaining to and now used in connection with same.

And to pay to my said wife free of all legacy duty and income tax if any an annuity of one thousand dollars per annum payable quarterly the first payment thereof to be made at the expiration of one month after my death.

The said provisions heretofore made for the benefit of my said wife shall be accepted by her in lieu of all claims which she might have against my estate for dower.

(2) After providing for the bequests hereinbefore set forth in this my will to sell and dispose of any or all of my property situated in the Province of Ontario at any time in their discretion within ten years from the date of my decease and to divide the proceeds thereof equally amongst my three daughters Annie Lunness Jackson, Beatrice Sophia Webster, and Jessie C. Johnston; and after the expiration of five years after my decease to sell and dispose of all my property situated in the Provinces of Saskatchewan and Alberta and to divide the proceeds thereof equally amongst my four children Annie Lunness Jackson, Beatrice Sophia Webster, Joseph Readman Lunness, and Jessie C. Johnston.

Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive me then in every such case the last mentioned child or children shall take and if more than one, equally between them, the share which his her or their parent would have taken of my said estate if such parent had survived me and if any of my said children shall die without issue then the share or shares which should have gone to such deceased child shall be divided equally amongst my said children share and share alike.

(3) That until the said partial division of my said estate takes place my executors shall after making payment of the legacies hereinbefore provided for and making the advances and payments to or for the benefit of my said wife pay the balance of the income derived from my said estate equally amongst my said four children.

ONT.
S. C.
RE LUNNESS.

(4) My said executors and trustees shall assume my interest in the firm heretofore carried on by me and my partners under the name and style of "Lunness Rogers and Halligan" and carry on the same as it was carried on in my lifetime and if they deem it advisable in their discretion they may appoint my son to look after the interest of my said estate in the said business paying to him such salary as they may deem reasonable and all share or profit received from the said business shall be divided equally amongst my said four children.

(5) After the death of my said wife the said real estate which was retained for her benefit and the balance of my property real and personal shall be sold and divided equally among my said children as hereinbefore set forth.

(6) I give my executors and trustees full power and authority to sell call in and convert into moneys all my real and personal estate and to execute conveyances thereof and from time to time to change any investments and to re-invest the moneys belonging to my estate in any investments authorised by law for executors to invest money in.

I nominate and appoint my nephew William T. Worthy, of the city of Toronto, salesman, any my son-in-law Sidney C. Johnston, of the said city of Toronto, to be the executors and trustees of this my last will and testament.

R. U. McPherson, for the executor.

R. McKay, K.C., for J. R. Lunness, the son of the testator.

T. R. Ferguson, for the daughters of the testator.

The judgment appealed from is as follows:—The testator, Joseph Lunness, made his will in the Province of Ontario, bearing date the 4th March, 1915, and died on the 3rd November following, when temporarily absent therefrom. Letters probate were granted to his nephew, William T. Worthy, and his son-in-law, Sidney C. Johnston, the executors therein named. The latter died on the 23rd November, 1918, and the widow of the testator on the 5th May, 1919.

The estate was of about $300,000 in value, of which, roughly speaking, $240,000 has been administered, and the accounts in connection therewith were passed on the 23rd December, 1918.

It comprised, amongst other things: real estate in Ontario of about $8,600 in value, being the dwelling-house of the testator

ONT.
S. C.
RE LUNNESS.

in his lifetime and the lands appertaining thereto; real estate in Alberta, valued in the inventory filed upon application for probate at $5,000, and in Saskatchewan at $40,000. There were also 1,191 shares of Canadian Pacific Railway Company stock; and 7 shares of Minneapolis St. Paul and Sault Railroad Company stock. In addition, there were household goods and furniture, farming implements, an interest in the firm of Lunness Rogers & Halligan, some horses, cattle, sheep and swine, and farm produce, and some notes, mortgages, and cash in bank.

In the earlier clauses of the will there is a direction for the payment of debts, funeral and testamentary expenses, a bequest to his wife of the furniture, books, pictures, provisions, and household effects, a bequest to each of his daughters, Annie L. Jackson, Beatrice Sophia Webster, and Jessie C. Johnston, of 250 shares of the Canadian Pacific Railway Company stock, and to his son, Joseph Readman Lunness, of 50 shares thereof, to be transferred to them within six months after the testator's decease, and a bequest of the sum of $1,000 to each of the six sons of his sister Sophia Worthy and of $1,000 to each of the four children of his nephew, William J. Lunness, deceased. Other clauses are as follows:—

[The learned Judge then quoted clause 7, with all its sub-clauses, as set out above.]

By agreement of the members of the family interested, all of whom are adults, an arrangement, it is said, was made by which the annuity to the widow was increased and paid to her till the time of her death.

The surviving executor upon this motion desires the advice and direction of the Court on the proper construction and interpretation of the will, with reference to certain questions as follows:—

"Q. 1. Is stock of the Canadian Pacific Railway Company property in Ontario or in Saskatchewan or in Alberta, or in any of them, within the meaning of sub-clause 2 of clause 7 of the will?"

The certificates for the shares of the Canadian Pacific Railway Company stock had been placed by the testator in his lifetime in a box in a safety deposit vault, in the Province of Ontario, and were there at the time of his death.

It is argued on the one hand, on behalf of the three daughters, Annie Lunness Jackson, Beatrice S. Webster, and Jessie C. Johnston, that the word "property" in sub-clause 2 of clause 7 is wide enough to include and does include the said shares of stock, which are therefore claimed by them. On the other hand it is argued on behalf of the son, Joseph Readman Lunness, that in the first place the word "property," particularly when modified or limited by the associated word "situated," has application only to real estate in Ontario, and in the next place that the shares of the Canadian Pacific Railway Company, whose head office is at the city of Montreal, in the Province of Quebec, cannot be said to be property in any other Province in the Dominion of Canada.

In many of the cases dealing with wills, in which the scope of the word "property" was in question, the point often was whether it covered real estate at all or was simply a term used with reference to personal estate. The word "property" is one of wide scope.

In Jarman on Wills, 6th ed., vol. 1, p. 990, the learned text-writer puts the matter broadly thus:—

"If a testator gives all his 'estate,' or all his 'property,' these words will *primâ facie* carry his real estate, for they are sufficient to include both real and personal estate."

And again at p. 999:—

"'Property' is a word of almost, if not quite, as strong operation as the word 'estate.' But a testator may shew by the context that he uses the word 'estate' or 'property' in a restricted meaning. Thus if he disposes of his 'personal estate and property,' or 'personal property, estate and effects,' the word 'personal' will as a general rule override the whole."

In Halsbury's Laws of England, vol. 28, para. 1332, pp. 711, 712, note (*g*), it is said:—

"In gifts such as a gift of 'my property' the words *primâ facie* include the testator's real and personal estate and the whole of the testator's interest therein (*Doe d. Wall* v. *Langlands* (1811), 14 East 370)."

In the present will there are no words indicating that the word "property" is restricted in any way unless it can be said that the word "situated" has that effect. It is argued that that word is applicable to real estate, and cannot properly be used with reference to personal estate, and that in consequence, when

ONT.

S. C.

RE LUNNESS.

associated in the clause in question with the word "property," it necessarily means "real property."

I cannot think, having regard to the whole will, that the word "situated" after the word "property" really makes any difference in the construction to be given to the word "property," or that it must be confined to real property only.

In *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573, Mr. Justice Fry points out, at p. 576, that personal property can have a locality as well as real property: "Lastly, in the case of *Earl of Tyrone* v. *Marquis of Waterford* (1860), 1 D.F. & J. 613, 625, the Court of Appeal had to consider the meaning of the expression 'land and property' of the testator in the county of Northumberland, and it was held that debts due to the testator in respect of collieries in the county of Northumberland, passed as property in that county. The Lord Chancellor, in delivering judgment in that case, said: 'The word "property" used in this will appears to me to have its most extensive signification. Personal property may have a locality, as we well know from the cases in the books respecting *bona notabilia*; and in the late case of *Horsfield* v. *Ashton* (1856), 2 Jur. N.S. 193, *Ashton* v. *Horsfield* (1860), 6 Jur. N.S. 355, the House of Lords gave full effect to the doctrine of the locality of personalty, where the subject of the gift is intelligibly described.'"

I am of opinion, therefore, that the words "property situated" include all the real and personal property which the testator owned in the Province of Ontario after providing for the bequests mentioned.

A number of succession duty cases were cited in support of the contention that the Canadian Pacific Railway Company stock could not be said to be property situated in Ontario. In such cases, however, the decisions turned largely on the special words in the statutes in question, and the judgments were not altogether in accord, because the statutes of the different Provinces are not identical. I am inclined to think they have not much application.

The case of *Toronto General Trusts Corporation* v. *The King* (1919), reported in 35 Times L.R. 450, [1919] A.C. 679, is a late and interesting one. It was there held that "the rule that the locality of a mortgage at the time of the creditor's death is the place where the mortgage is then found has no application where

the mortgage has been created or is evidenced by two or more deeds of collateral value, which are found in different jurisdictions. In such cases regard must be had to other circumstances, such as the residence of the mortgagee, the place of payment, and the situation of the mortgaged property."

Reference may be made also to *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82, at p. 84, as to the legal effect of the maxim *mobilia sequuntur personam*.

I am of the opinion that the Canadian Pacific Railway Company stock must be taken to be situated in Ontario and covered by the word "property" in sub-clause 2.

Perhaps I should say a word about another matter. The question in expounding a will is: "What is the meaning of the words used by the testator therein?" An affidavit of Joseph Lunness was sought to be read on the motion, with a view of shewing that the testator ordinarily meant "real estate" when using the word "property." But, if a word in a will is definite, and not susceptible of doubt, as I think in the case of the word "property," evidence is inadmissible to shew that it has a different or restricted meaning: *Dawson* v. *Higgins*, [1900] 2 Ch. 756, *Higgins* v. *Dawson*, [1902] A.C. 1; Jarman on Wills, 6th ed. (1910), vol. 1, pp. 485 and 506; Wigram's Extrinsic Evidence in Aid of the Interpretation of Wills, 5th ed. (1914), pp. 11 and 12; Hawkins on Wills, 2nd ed. (1912), p. 14. I therefore, rule out the evidence offered.

The first question will, therefore, be answered as follows:—

"The stock of the Canadian Pacific Railway Company is property in Ontario."

Question 2 is as follows: "Which of the children of the testator are entitled to the stock of the Canadian Pacific Railway Company belonging to the said estate, which is disposed of by sub-clause 2 of clause 7 of the will?"

The answer is: The testator's three daughters, Annie Lunness Jackson, Beatrice Sophia Webster, and Jessie C. Johnston.

The third question is: "Does Joseph Readman Lunness take any share or interest, and if so what, under sub-clause 2 of clause 7 of the said will, in the property of the testator situated within the Province of Ontario?"

It seems to me that, after the partial division of the estate

ONT.
S. C.
RE LUNNESS.

referred to in clause 7, sub-clauses 2 and 3, of the will, there would be left of the estate in Ontario to be dealt with under clause 7, sub-clause 5, upon the death of the wife of the testator, the fund which had been set aside to create the annuity in her favour and the homestead property. Apart from the interest which Joseph Readman Lunness had in the balance of the income hereinbefore referred to, and that he would take upon the death of his mother, I am of opinion that he takes no other share or interest in the property of the testator situated within the Province of Ontario. All other property in Ontario belongs equally to his three sisters and passes to them under clause 7, sub-clause 2, of the will. Upon the death of the testator's widow, sub-clause 5 of clause 7 of the will applies, and the four children of the testator, namely, Annie Lunness Jackson, Beatrice Sophia Webster, Joseph Readman Lunness, and Jessie C. Johnston, share equally in the residue of the real and personal property of the testator, the expressions in that sub-clause, "divided equally" and "as hereinbefore set forth," having that meaning.

Question 4 is as follows: "Provided that such of the defendants as are entitled to the property mentioned in sub-clause 2 of clause 7 of the will so agree, (a) may the executors divide such property in specie among them instead of selling it and dividing the proceeds?" All the persons interested being *sui juris*, I am of opinion that this question should be answered in the affirmative.

"(b) When should the division of such property be made?" I am also of opinion that for the same reason it may be made at any time. Besides, as to the property situated in the Province of Ontario, and referred to in the first part of sub-clause 2 of clause 7, there is a discretion placed in the hands of the executors as to the time.

"Q. 5. May the executor divide the property in the Provinces of Saskatchewan and Alberta, mentioned in sub-clause 2 of clause 7 of the will, among those of the defendants who are entitled thereto, before the expiration of the period of five years specified in sub-clause 2?" The parties being *sui juris*, this question may be answered in the affirmative.

While the answers to the questions already given dispose of the substantial matters referred to upon the argument, certain further questions are asked in the notice of motion, as follows:—

"6. Are mortgages of lands within Ontario property of the testator situate in the Province of Ontario within the meaning of sub-clause 2 of clause 7 of the said will?"

"(a) When such mortgages were held by the testator at the time of his death?"

"(b) When such mortgages were taken for moneys invested by the executors?"

"7. Will the lands comprised in either class of mortgages mentioned in the preceding question, or the proceeds thereof, be divisible as lands in Ontario under the provisions of the will after default in payment of the mortgages, and (a) sale of land under the powers of sale in the mortgages, (b) after such mortgages are foreclosed?

"8. If lands in Ontario held by the estate under said mortgages are sold under the powers of sale in the mortgages or are foreclosed, how should the proceeds thereof or the lands foreclosed be divided among the defendants?"

The material filed is not sufficiently explicit to enable me to deal with and dispose of some of these. It may be that the parties interested can now deal with them without further interpretation of the will or advice. If not, I may be spoken to after vacation, and after the further material necessary has been supplied.

The costs of all parties to the motion thus far will be payable out of the residuary estate.

The three daughters of the testator appealed from the judgment of SUTHERLAND, J.; and Joseph Readman Lunness, the son, also appealed from the judgment in so far as it declared that the shares of the Canadian Pacific Railway Company owned by the testator were property situated in the Province of Ontario.

T. R. Ferguson, for the three daughters.

R. McKay, K.C., for the son.

R. U. McPherson, for the surviving executor.

Riddell, J.

RIDDELL, J.:—The will in question first makes certain specific bequests, and then devises and bequeaths "all my real estate of every kind and all my personal estate and effects whatsoever not otherwise disposed of by this my will" to the executors and trustees named upon trust:—

[The Judge then quoted the six sub-clauses of clause 7 of the will, as above set out.]

ONT.

S. C.

RE LUNNESS.

Riddell, J.

The specific legacies are paid, and the widow is dead; the four children of the deceased are all *sui juris*.

The deceased had in Ontario real estate amounting to over $8,000 in value; in Alberta, one lot worth about $5,000; and in Saskatchewan, land worth about $40,000. His domicile at the time of his death was Ontario; he had lived for some eleven years near Toronto, and had a place of business in Toronto.

A few years before his death, he had given to his son some $43,000; at the time of his death he had 1,191 shares of Canadian Pacific Railway Company stock, the certificates for 219 of which he had in a safety deposit box in Toronto; and the question on this appeal is concerning these 219 shares, the daughters claiming that it is "property situated in the Province of Ontario" within the meaning of sub-clause 2 of clause 7 above set out, the son disputing this interpretation.

In the interpretation of wills the Court is not troubled with many puzzling questions which arise in private international law—the conflict of laws, as it is called, deals with property from an entirely different point of view and with an entirely different object. So, too, in cases of taxation of decedents' estates, the point of view and the object are wholly different.

In the interpretation of this, as of every other will, we must place ourselves in the testator's arm-chair and determine from the language itself, under the circumstances, what he meant—in this very little assistance can be derived from other wills. If, from the language employed and the circumstances, the meaning of the testator can fairly be made out, effect must be given to that meaning—unless it violates some rule of law—whatever may have been the interpretation placed by Courts upon the words of other wills in the same or similar language.

From an examination of the will as a whole I am satisfied that when the testator speaks of property "situated in the Province of Ontario," he means his real estate. No doubt "'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have:" Langdale, M.R., in *Jones* v. *Skinner* (1835), 5 L.J.N.S. Ch. 87, 90—and no doubt in a proper case the word will be so interpreted. But here I cannot think that the testator thought of his Canadian Pacific Railway Company stock as being

ONT.

S. C.

RE LUNNESS.

Riddell, J.

"situated" anywhere—"the expression of situation . . . is hardly apt for personal estate. I do not mean to say that personal estate is not situate somewhere—of course it is—but you do not find that word usually used in a will (as) passing personal estate:" Lindley, L.J., in *Hall* v. *Hall*, [1892] 1 Ch. 361, at pp. 363, 364.

I think that in this will the testator, having real estate which could be and was in every sense situated in the Province of Ontario, meant that real estate by the expression employed.

The four children then, in my opinion, should divide this stock equally.

The son's appeal should be allowed; the costs may well be borne by the fund, as the litigation has arisen from the language employed by the testator himself.

Middleton, J.

MIDDLETON, J.:—Joseph Lunness died on the 3rd November, 1915. His will, bearing date the 4th March, 1915, was duly admitted to probate. His widow, who survived him, died on the 5th May, 1919.

His estate, according to the inventory submitted upon the application for probate, amounted to the sum of about $335,000, comprising among other things: 1,191 shares of stock in the Canadian Pacific Railway Company, valued at $221,377; lands in Etobicoke (Ontario), valued at $8,600; lands in Edmonton (Alberta), valued at $5,000; and lands in Saskatchewan, valued at $40,000. The remainder of the estate consisted of mortgages, cash, stocks, and cattle.

By his will the testator gave to his widow his furniture and household effects. He then gave to each of his three daughters 250 shares of stock in the Canadian Pacific Railway Company, and to his son 50 shares of the same stock. After some pecuniary legacies, not now of any importance, he devised and bequeathed all his real estate and all his personal estate, not otherwise disposed of by his will, to his executors and trustees upon trust to allow his widow to occupy his dwelling-house and lands appertaining thereto during her life, and upon the further trust to pay her an annuity. Then follow the clauses giving rise to the present difficulties:—

[The learned Judge quoted sub-clauses 2, 3, 4, and 5 of clause 7 of the will, as above set out.]

The daughters contend that, under the provisions of the will

ONT.
S. C.
RE LUNNESS.
Middleton, J.

above quoted, the stock of the Canadian Pacific Railway Company is to be regarded as *situated* within the Province of Ontario, and that the proceeds of it, as well as the proceeds of the residence, are divisible among them. The son contends that the second sub-clause above quoted applies only, so far as the provision in favour of the daughters is concerned, to property situated within Ontario in a narrower sense, and is confined to realty within Ontario other than that set apart for the benefit of the widow during her life-time; and that, upon the death of the widow, this real estate and all the testator's personal property, save that specifically bequeathed, is divisible among the four children equally.

Mr. Justice Sutherland, in a very carefully considered judgment, has concluded that the Canadian Pacific Railway Company stock is property situated within Ontario, and is therefore divisible among the daughters to the exclusion of the son, but that the proceeds of the residence fall under clause 4, and are divisible among the four children. The son and daughters both appeal from the portions of the judgment adverse to their respective contentions.

I have come to the conclusion that the appeal of the son should be allowed and the appeal of the daughters should be dismissed.

As I understand the will, the intention of the testator was that the great bulk of his estate should be divisible upon the death of his wife He does not set apart a fund for the purpose of securing to her the annuity, but until she dies the bulk of the estate is to remain intact.

It is common ground that the testator was on most affectionate terms with all the members of his family, and that he had conferred some benefits upon his son. There is some conflict as to the extent of these benefits so conferred, but there is nothing to lead one to suppose that he intended to discriminate against the son beyond what was necessary to produce a condition of equality, having regard to the transactions which had taken place during his life-time. This is the probable explanation for the greater benefits conferred upon the daughters by the clause dealing with the partial distribution of the Canadian Pacific Railway Company stock held by him.

It is, I think, erroneous to assume that the effect of sub-clause 2 is, that the testator intended to classify all his property as being

situated either in the Province of Ontario or in the Provinces of Saskatchewan and Alberta. He might have owned real estate within the Province of Quebec, and it clearly was not his intention that he should die intestate as to any part of his property. The devise to his executors and trustees is expressed in the widest possible terms. The true significance of sub-clause 2 is, as I think, to provide for a minor benefit to the daughters by permitting them to receive, at what he evidently thought was a comparatively early date, the proceeds of the property situate within Ontario. This I take to be realty, not because I attribute any narrow meaning to the word "property," but because the testator speaks here of *property situated in Ontario*. This word "situated" is properly used only in connection with realty: see the judgment of Lord Justice Lindley in *Hall* v. *Hall*, [1892] 1 Ch. 361, where, dealing with a gift of "effects wheresoever the same may be situate," he says (pp. 363, 364): "The expression of situation, 'wheresoever the same may be situate,' is hardly apt for personal estate. I do not mean to say that personal estate is not situate somewhere—of course it is—but you do not find that word usually used in a will passing personal estate."

The "property" situated in the Provinces of Saskatchewan and Alberta, which is to be divided among the four children, I take to mean the realty situated in these Provinces. It may also well include the cattle and farm implements owned in connection with the ranch; concerning these no question has been asked, and I express no opinion.

The third sub-clause speaks of the division authorised by the second clause as a "partial division of my estate," and provides that the balance of the income is to be equally divided amongst the four children. This, I think, again points to the fact that the great bulk of the estate is yet to remain in the hands of the executors.

The fourth sub-clause, authorising the continuance of the business, is again followed by the same provision, "all share or profit received from the said business shall be divided equally amongst my said four children."

The fifth sub-clause, which, as I have already said, is, I think, the main provision of the will, provides that, after the death of the wife, the "real estate which was retained for her benefit and the

ONT.

S. C.

RE LUNNESS.

Middleton, J.

balance of my property real and personal shall be sold and divided equally among my said children as hereinbefore set forth." I can attribute no meaning to these words other than an intention that the proceeds of all of this property shall be divided equally among the testator's children as hereinbefore set forth.

Much was said upon the argument as to the effect to be given to the words "as hereinbefore set forth." I do not think that the testator intended these to conflict with the word "equally," just as I would find in the proviso at the end of sub-clause 2 an explanation of their use. That proviso is, "that if any child of mine shall die in my lifetime leaving a child or children who shall survive me then in every such case the last mentioned child or children shall take and if more than one, equally between them, the share which his her or their parent would have taken of my said estate if such parent had survived me and if any of my said children shall die without issue then the share or shares which should have gone to such deceased child shall be divided equally amongst my said children share and share alike."

Throughout the will there is a clear distinction between the daughters, who are only referred to as a class once, and the four children, who are referred to in almost every clause. Had the testator intended any particular property to be divided among his daughters, he would have said so, and not referred to them as his "children." Where he intended the four to share, he invariably used the word "children."

Underlying the argument made on behalf of the daughters is, I think, the fallacious assumption that incorporeal property must be deemed to have a situs. That argument was based almost entirely upon the maxim "*mobilia sequuntur personam*" That maxim is used as a convenient statement of the rule of private international law with reference to the descent of personal property. The law of the domicile, the personal law, is to apply to those who take upon the death of the testator. In the same connection a situs is attributed to things that cannot have any real situs. Here the testator, when he used the word "situated," intended to use that word in the sense in which it is used and understood by ordinary people, equivalent to "located" or "placed with regard to its surroundings." The idea of a situs attributable to an incorporeal thing probably never crossed his mind, and it is

as fallacious to me to suggest that he thought that the Canadian Pacific Railway Company stock was situated in Ontario, because perchance the script was in his strong box in Toronto, as to suggest that he regarded this stock as having a situation in the Province of Quebec, because the head office of the railway company was there.

I think it our duty to interpret the will by attributing to the words used their plain meaning, probably well-understood by the testator, rather than by attempting to attribute to these words an inaccurate and highly technical meaning, only vaguely understood by most lawyers.

For these reasons, I think the appeal of the son should be allowed, and that it should be declared that the Canadian Pacific Railway Company shares and the proceeds of the homestead are divisible under the provisions of the fifth sub-clause of clause 7 of the will, that is, among the four children.

The appeal of the daughters should therefore be dismissed. Costs of all parties may well be paid out of the estate.

Latchford, J.

LATCHFORD, J., agreed with MIDDLETON, J.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (dissenting):—Substantially stated, the questions involved in this appeal are:—

1. Who take, under the will in question, the testator's land, in Ontario, in which his widow had a life-estate under the will? and

2. Who take, under the will, that part of the testator's stock in the Canadian Pacific Railway Company not specifically bequeathed in it?

The first step in considering these questions should be a careful perusal of the whole will, which is in these words:—

[The learned Chief Justice then set out the whole will, except the formal parts, as above.]

The testator died in the year 1915, leaving his wife and his children, three daughters and one son, surviving him. His widow died in the year 1919, a few days only before these proceedings were formally begun. The four children are all living.

The daughters contend that all of this property is part of the testator's "property situated in the Province of Ontario," which, under sub-clause 2 of clause 7 of the will, goes to them in equal shares.

ONT.

S. C.

RE LUNNESS.

Meredith, C.J.C.P.

For the son it is now contended that the property in question is not within the provisions of sub-clause 2; and that under sub-clause 5 of clause 7 it goes to the four children of the testator in equal shares.

To this contention the daughters reply that, even if sub-clause 5 applied, and sub-clause 2 did not directly apply, still they alone should take, the words "as hereinbefore set forth" at the end of sub-clause 5 governing it; and that those words mean "as set forth in sub-clause 2."

It is to be observed at the outset that no such contention as is now made in the son's behalf was made until after these proceedings had been launched: and that no such question as that which that contention raises is set out in these proceedings. The questions set out, regarding the construction of the will, are: whether the stock in the railway company is part of the testator's property situated in Ontario; which of the children are entitled to it; and whether the son takes under sub-clause 2 any share or interest in the property situated in Ontario: there was no suggestion that sub-clause 2 related to land only.

Sub-clause 5 is not referred to. And it is also to be observed that, if the son's present contention prevail, all that has been done under the will in the way of selling the testator's personal property and dividing the proceeds under sub-clause 2 was a breach of trust, for which the executors are answerable.

And it is said that in that family court most competent to know the testator's real intentions—the whole of his family, the executors, and the family solicitor who drew the will—it was never suggested or thought of, by any one, that the son had any share in the land that went to the widow for life or in any of the testator's property in Ontario; and that indeed the son joined in a deed of the land to make it plain that he had no claim upon it.

These things may not preclude him: and it may be proper to widen the scope of these proceedings so that any question, which any of the new legal advisers of any of the parties may now raise, should be considered, notwithstanding that they may cause a reversal of the position taken unitedly by all concerned and always acted upon from the time of the testator's death down almost to the present day, and may also cause great difficulty and confusion in giving effect to this newly-thought-of interpretation of the will:

yet it would be a strange thing if we should be obliged now to tell them that they were all wrong in their confident judgment as to their own husband's, father's, and client's intentions.

In clause 7 of the will the property in question is, among all of the testator's real estate of every kind and all his personal estate and effects whatsoever and wheresoever, not otherwise disposed of by the will, given to his executors upon the trusts set out in the six sub-clauses of that clause. *Contemporanea expositio est fortissima in lege* is a maxim which may well be applied to this case. As to deeds it has long sagely been said: "Tell me what you have done under such a deed and I will tell you what that deed means:" with greater force it may be said, in such a case as this: "Tell me what the whole household considered the meaning of his will to be and I will tell you what the head of the household meant by his will:" see *Watcham* v. *Attorney-General of the East African Protectorate*, [1919] A.C. 533.

Under sub-clause 2 the executors are—after providing for the bequests before set out in the will—to sell "any or all of my property situated in the Province of Ontario at any time in their discretion within ten years," from the date of the testator's death, and to divide the proceeds equally among his three daughters.

All such bequests having been provided for, and the widow being dead and the ten years being unexpired, why should not the lands in question be sold and the proceeds divided equally among the testator's three daughters, as this sub-clause provides? Like the family court's mind, mine does not contain a doubt of the daughters' rights to this property under that sub-clause of the will.

Unless the mind desires to make sub-clause 5 repugnant to sub-clause 2, how can any real conflict between them appear or seem to be?

Naturally, in minds ignorant of all things that actuated the testator, except that he has given much to his daughters and comparatively little to his son, there is a strong repugnance to the unequal division and a natural inclination to transfer that repugnance from the mind to the will, especially when nothing is said against the ability or character of the child who gets the smaller portion: though in truth it may be that it was just because of good ability and good character, and the father's faith in his

ONT.
S. C.
RE LUNNESS.
Meredith, C.J.C.P.

son's ability to be as successful in life as the father had been, or more so, that the lesser gifts to the son were made; so that his ability and ambition should be spurred into action rather than cloyed with the honey of idleness and self-indulgence—good or bad—induced by "found," not earned, money.

But though knowledge of such things is generally in the family court, it is not here; and all that this Court should do is to guard against any speculations regarding them, and against giving effect to anything but the will of the testator expressed in his words which I have read at length.

The controlling words of sub-clause 5 are: "as hereinbefore set forth;" and those words are really made of no effect unless they are read as referring to sub-clause 2. There is no escape from that; the words "as hereinbefore set forth" are useless unless they mean as set forth in sub-clause 2: whilst, if read as referring to the provisions of that sub-clause, there is not a shadow of repugnance, but the whole scheme of the will, and every clause in it, work together in harmony. It cannot be said even that sub-clause 5 is superfluous; because, although sub-clause 2 is very wide in the power and direction to sell and divide the estate, contained in it, yet it does not provide for a sale or division of that part of the estate which must have remained undisposed of if the widow had outlived the space of ten years, the time-limit of the power to sell and divide under sub-clause 2.

The objections now made to this interpretation of the will seem to me to be insignificant.

It is true that the word "equally" in sub-clause 5 is not really necessary for that interpretation of the will, but it is at least quite as superfluous in any other interpretation of it. Giving it the meaning of, "according to the equalities set out in sub-clause 2"—that is, as to property in Ontario equally between the three daughters only, and as to property in Saskatchewan and Alberta equally between the four children—its use is more than excusable: and it is always to be borne in mind that the will was drawn by a member of the legal profession who has, for a number of years, been a practising barrister as well as solicitor.

On the other hand, if sub-clause 5 were intended to provide for a division the same as is provided for in sub-clause 4 or sub-clause 3, the introduction of the word "equally" as well as the words

"as hereinbefore set forth" could have no purpose or effect—one or other is superfluous and inexcusable.

Sub-clause 4 does not aid the son, it accentuates the testator's intention throughout to give the much greater portions to the daughters: so much greater, as to the bulk of the estate which was specifically bequeathed, as 750 shares of stock, valued at $185.87\frac{1}{2}$ each share, to the daughters, and only 50 to the son. The testator's interest in the business mentioned in this sub-clause had a value in money of only $200, as appears in the papers under oath which led to the grant of probate of the will; so that all the profit which might be derived from that business would come from the son's management of it, and yet the profits so earned were to be equally divided between him and each of his three sisters, in equal shares.

It is true that in sub-clause 3 the division of the testator's estate is called a "partial" division; but until some one is able to suggest a single word that would better express it, whatsoever interpretation may be placed on sub-clause 2, fault cannot reasonably be found with the draftsman of the will for employing it

The division must be partial until complete; and, as the property would be sold and divided from time to time extending over the 10 and the 5 years, for some length of time, the word "partial" might seem to have too wide a ring, though quite accurate; and it must not be forgotten that if the widow outlived the space of 10 years there never could be anything but a partial division under sub-clause 2. The more minute one becomes in discussing this will the more one should become impressed with the vision of the draftsman.

It may be well now to deal directly with the new contention made in the son's behalf, to give effect to which would substantially nullify the provisions of sub-clause 2: and to give concisely some direct reasons why I am unable to give any effect to it.

The contention is that the sub-clause relates only to the testator's land. But why?

It cannot be because the learned draftsman of the will and the testator have said "any or all of my property." It ought not to be necessary to refer any one, learned or unlearned, to the statement made by the Lord Chancellor and repeated by Lord Justice Cotton,

ONT.

S. C.

RE LUNNESS.

Meredith, C.J.C.P.

in the case of *In re Prater* (1888), 37 Ch. D. 481, 483, 486, that "the word 'property' is as wide as anything can be."

In an affidavit of the son, filed in this matter, he states that he has no recollection of his father ever having used the word "property" in relation to anything but real estate.

The learned Judge who heard this case in the first instance properly rejected this evidence: there is no ground of any kind for the introduction of such testimony: and, if there were, that introduced would be useless: the plain meaning of a plain word could not be perverted upon such an affidavit by one so interested in perversion.

There is no ground for the assertion that any one, not to speak of the capable testator or the learned draftsman of the will, thinks the word "property" applicable only to land; if there were any ground for believing that any ignorance exists respecting its meaning, it may be that that ignorance would be in thinking the opposite. Let any one test it by asserting to any owner, however unlearned, and whether male or female, that his or her cow, or household furniture, bought and paid for, is not his or her property, and await the result.

If there could have been any excuse for attributing such inconceivable ignorance to any one concerned in the making of this will, the will itself should have presented it, for, in it, far more than such knowledge is made plain in the words "my property real and personal" contained in the short sub-clause 5 so much relied upon in the son's behalf.

That the testator could not have meant land only seems to me to be very evident: because, to reach that conclusion, the plain meaning of a plain word written by a competent writer must be distorted; because the whole will shews an intention that the whole estate was to be converted into money and the money given to the beneficiaries without any needless delay: except to protect the widow's interests, there was no reason for any delay; because he had no land in Ontario that could be sold—all that he had was the homestead estate which was willed to the widow for life; and because he could not have meant that his farms in Saskatchewan and Alberta should be sold and their livestock, farming implements, and other farm chattels retained: he would have provided that the chattels also should be sold within the five years: and most likely would "give the tail with the hide."

The contention that the words "as hereinbefore set forth" refer to sub-clause 2, but only to the latter words of it, is very like a surrender of the son's claim; for, if to that sub-clause at all, why not the whole of it, what justification for separating the latter from the former, when the learned draftsman of the will did not with more than a comma, and has connected them inseparably by the words "provided always," etc., and it is impossible for me to believe that the learned draftsman of the will could have drawn it as it is if what is contended for were intended. At the least he must have said, "but in case of the death of any of them in my lifetime leaving children such children are to take in the manner hereinbefore set out." There is no ground for attributing to him illiteracy.

I find no difficulty in reaching the conclusion that the provisions of sub-clause 2 must govern, whether the rights of the parties arise directly under it or indirectly under the words "as hereinbefore set forth," contained in and which govern sub-clause 5: and accordingly I am in favour of allowing the appeal.

The cross-appeal raises the second question before set out; and as to it I find no difficulty in reaching the same conclusion as that reached and given effect to by the Judge of first instance.

The shares of the stock in question were represented by stock certificates held by the testator, and, for safekeeping, deposited with his bankers in Toronto.

When such shares are sold, the transaction is ordinarily closed by the seller's broker handing to the buyer's broker the certificates with the printed form of assignment always on the back of them, signed without being filled in, and payment of the price: the next seller concludes the sale by mere delivery of the certificates so endorsed, and so on: and it is not until some purchaser buys for investment, and desires to be registered as owner, that the registration is changed, which is done by the simple process of filling his name in the blank assignment endorsed on the certificate and sending it to the company for registration. So that, for practical purposes, the certificates are properly treated as if they were the shares: and few concern themselves with the technical legal aspect of ownership. To say to a business-man that his certificates are not his "property," situated wherever they may be kept, could but excite derision. They are, for all practical purposes, his

ONT.

S. C.

RE LUNNESS.

Meredith, C.J.C.P.

certificates, his shares and his stock in the company. The stock is personal property, and the owner of shares can, when he pleases, compel registration: see *Canada National Fire Insurance Co.* v. *Hutchings*, 39 D.L.R. 401, [1918] A.C. 451.

This question does not depend upon any technical rule of law, but is to be determined by that which the testator meant. And, if it did, how could there be anything extraordinary in applying to a case of testacy the same rule as is applied in a case of intestacy? It is wrong to say that the daughters base their claim upon technical rules: it is right to say that, if the son rely upon the technical rule that movable property generally, or such property as that in question in particular, can have no abiding place, the daughters reply that then the property in question followed the domicile of the testator, and was therefore property situated in Ontario. But, as I have said, the only governing question in this case is: whether the intention of the testator, expressed in his will, is that the stock in question should pass as part of all his "property situated in Ontario:" and that he did so intend, seems to me to be plain.

The great bulk of his estate consisted of such stock, and it was all represented by the certificates in his possession, which could be transferred almost as readily as if they were bank-notes, "bearer-bonds," or other like property.

Then it is obvious that the testator intended to dispose of all his property by his will; and equally plain to me that he thought all his property of every nature and kind was "situated" in one or other of the three Provinces named in his will; and, that being so, to him the shares of the stock in question must have been "situated" in Ontario.

The word "situated" is one of very wide meaning; and may quite as well be applied to goods as lands, indeed is, I have no doubt, rather more generally applied here to goods, the more favoured words connected with land being "located" and "locatee," as the mining and Crown lands enactments of this Province, among many things, shew.

It is impossible to read the whole will and to retain even the most flickering suspicion that the testator knew or had any thought that the bulk of his property was situated in the Province of

Quebec, and I am far from being able to find, or consider, that it was.

In fact a very great part of the railway is situated in Ontario, a fact of which no one can be in ignorance, or can forget, because it is everywhere to be seen and heard, and is in constant use, by the inhabitants of the Province.

These things must be considered in a practical manner: and can any one doubt that if the testator had been told that the bulk of his property was situated in the Province of Quebec he should have thought, even if he had the knowledge of a lawyer, that his informant was a very unpractical person?

It may be observed that the word "situated" is a superfluous word: the meaning of the sub-clause would be just the same without, as it is with, it.

The case to which I have referred—*In re Prater*, 37 Ch. D. 481—is distinctly in the daughters' favour, though decided in England, where formalities are perhaps more adhered to than here.

In that case the Court of Appeal, presided over by the Lord Chancellor, unhesitatingly decided that the words, "my property at Rothschilds' bank" included shares in the stock of a company; and in that case Lord Justice Cotton (p. 486) made use of these words, which are singularly appropriate to this case: "Property is a word of the very largest description, and looking at this will I see nothing to cut it down to 'money' so as to make it pass only the bankers' balance. Though people would not ordinarily describe a cash balance at their bankers as property at their bankers, yet they might do so, but why may not the testator so describe these shares, which are not really property at his bankers, but are so in this sense, that the certificates without which the title to these shares cannot be asserted are in the hands of the bankers?" And again (p. 487): "There is a wide difference between real estate having a particular locality, and shares, which may, I think, be described by any person not having any great legal knowledge as in the place where the certificates are."

Under all the circumstances of the case, the costs of all parties might not unjustly come out of the estate "situated in the Province of Ontario."

Judgment below varied.

N. S.

S. C.

THE KING v. KEEPER OF AMHERST JAIL; Ex parte DROSBECK.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. December 19, 1919.

INTOXICATING LIQUORS (§ III G—87)—PURCHASE AND SALE ON PREMISES OF ACCUSED—AUTHORITY OF ACCUSED—BURDEN OF PROOF—N.S. TEMPERANCE ACT, 8-9 GEO. V., 1918, CH. 8, SEC. 46.

When liquor is bought or sold on the premises of the party charged with a breach of the N.S. Temperance Act, the burden of proof lies upon such party to rebut the presumption that the sale or purchase was made with his authority or under his direction.

Statement.

APPEAL from the judgment of Chisholm, J., dismissing an application for the discharge of Peter Drosbeck, a prisoner confined in the common jail of the County of Cumberland, at Amherst in said county, under a conviction for a violation of the Nova Scotia Temperance Act. Affirmed.

W. H. O'Hearn, K.C., for appellant.

No one contra.

The judgment of the Court was delivered by

Mellish, J.

MELLISH, J.:—This is an application for the discharge of the accused, Peter Drosbeck, a prisoner held under a conviction for selling liquor in violation of the N.S. Temperance Act, 8-9 Geo. V., 1918, ch. 8.

It is urged on behalf of the prisoner that the findings of the magistrate shew that the accused had not committed an offence for which such conviction could be made. I am unable, in view of the conviction which the magistrate has in fact made, to come to such a conclusion. His findings are as follows:—

> The accused was convicted by me for violation of sec. 46 of the N.S. Temperance Act in buying liquor from one Wallens on the premises of the accused and of his knowledge of the sale made by Wallens to one Harris on premises occupied by the accused and not for any personal sale by accused. There was no proof that Wallens was the agent or employee of accused.

The evidence *inter alia* discloses that one Harris, on the prisoner's premises, purchased for $30 a can of rum. He asked Wallens who was then on the premises for the rum. The rum was produced from the prisoner's barn, and Harris there paid the purchase-price for it to George Drosbeck, a lad of 17 years, and son of the prisoner. Harris swears that the prisoner was sitting and watching where he could see the whole performance. The prisoner's evidence shews that he previously and subsequently purchased liquor from Wallens on the premises of the prisoner, but he denies seeing the transaction with Harris.

I think the finding of the magistrate shews that he did not believe the prisoner on this latter po'nt, and that the prisoner had

not rebutted the presumption arising under sec. 46 of the Act that the sale took place with the authority or direction of the accused, who was the occupant of the premises. The burden of such proof in rebuttal is by sec. 46 (2) upon the accused, and I think we must take it that in the opinion of the magistrate this burden was not discharged. It is true that the magistrate says: "there was no proof that Wallens was the agent or employee of accused," but sec. 46 (1) expressly makes such proof unnecessary to support a conviction.

I think the application should be dismissed.

Appeal dismissed.

N. S.

S. C.

THE KING v. KEEPER OF AMHERST JAIL; EX PARTE DROSBECK.

Mellish, J.

INTERNATIONAL HARVESTER COMPANY v. McCURRACH.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. December 11, 1919.

JUDGMENT (§ I F—50)—DEFAULT JUDGMENT—ORDER OF MASTER—SETTING ASIDE—ORDER OF JUDGE RESTORING—TIME OF TAKING EFFECT—ALTA. RULES 20,571.

Every order shall take effect from the date on which it is directed, and every judgment is an effective judgment from the day when it is pronounced by the Judge in Court.

[*Holtby* v. *Hodgson* (1889), 24 Q.B.D. 103, referred to].

MOTION upon two grounds to set aside a garnishee summons after judgment.

Statement.

A. H. Goodall, for motion.

R. M. Edmanson, contra.

WALSH, J.:—(1) A default judgment was entered against the defendant which the Master afterwards set aside. On appeal I reversed the Master's order and dismissed the defendant's application. After I had made this order but before it was entered this garnishee summons was issued based upon the original default judgment. The whole contention on this branch of the application is that my order did not become effective until it was entered, that although I had reversed the Master's order that order stood until my order was entered and as the Master's order set aside the judgment upon which this garnishee summons is based the plaintiff had no judgment against the defendant when this summons was issued and, therefore, it cannot stand.

Walsh, J.

Holtby v. *Hodgson* (1889), 24 Q.B.D. 103, cited by Mr. Edmanson is a decision of higher authority than *Metcalfe* v. *British Tea Association* (1881), 46 L.T. 31 and the other cases relied on by Mr. Goodall, being a judgment of the Court of Appeal. Not only

ALTA.

S. C.

INTERNATIONAL HARVESTER COMPANY v. MCCURRACH

Walsh, J.

that but it is more recent than them and much more in point than they are. Our r. 571 provides that every order shall take effect from the date on which it is directed. This rule is broader in its application than is the English rule under which *Holtby* v. *Hodgson* was decided but its effect is exactly the same upon the judgments and orders to which it applies. Under it, to quote Lord Esher, M.R., at page 107: "a judgment is an effective judgment from the day when it is pronounced by the Judge in Court," and under our r. 20 is an order, for that is exactly what the rule directs. I think the plaintiff's judgment was restored as of the date of my order.

(2) The affidavit upon which the summons was issued was made in the proper style of cause by one Smith, an agent of the plaintiff. Paragraph 2 sets out that "by a judgment of this Court given in this action and dated July 25, 1918, it was adjudged that *I* should recover against the above named judgment debtor the sum of $608.35 and costs," the total amount of which as shewn by a subsequent paragraph is $702.56. The second objection is that this proves the recovery of a judgment not by the plaintiff but by the deponent, the argument being that a judgment recovered by Smith cannot be made the foundation for a garnishee summons in this action. The use of this personal pronoun in this paragraph was obviously an error. The whole of the paragraph except the date and amount of the judgment is printed. The draftsman omitted to strike out the printed word "I" and to substitute the plaintiff for it. Rule 648 (a) requires that the affidavit shall shew the nature and amount of the judgment against the judgment debtor and swear positively to the indebtedness of the judgment debtor to the judgment creditor. If par. 2 was all that there is in the affidavit to meet this requirement this objection might be well taken, but it is not. The company is described in the style of cause as the judgment creditor. Smith is described as "collection manager and agent for the above named judgment creditor herein." Paragraph 5 says that "the said sum of $702.56 is due to the judgment creditor by the judgment debtor." The judgment is described in par. 2 as being given in this action and Smith is not a party to it. It is obvious that he could not have recovered a judgment in an action to which he is not a party. If necessary the pronoun "I" in this paragraph might be held to refer to Smith in the capacity in which he makes the affidavit namely as collection manager and

agent for the plaintiff. Reading the affidavit as a whole I think it plainly appears that the plaintiff and not Smith is the judgment creditor and so this objection must also fail. ALTA. S. C. Walsh, J.

The motion is dismissed with costs. *Motion dismissed.*

NELSON v. GRAND TRUNK PACIFIC R. Co.

ALTA. S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck and Ives, JJ. January 31, 1920.

RAILWAYS (§ III—70)—CATTLE KILLED BY TRAIN—ALLEGED NEGLIGENCE OF PLAINTIFF—ONUS OF PROOF ON DEFENDANT.

A plaintiff cannot recover damages for cattle killed by a train, when the defendants prove that these cattle were at large owing to his negligence.

APPEAL by defendant from a District Court Judgment in an action for damages for cattle killed on defendants railway. Reversed. Statement.

N. D. Maclean, for appellant.

F. Ford, K.C., for respondent.

HARVEY, C.J., concurs with Ives, J. Harvey, C.J.

BECK, J.:—I agree with the view of the trial Judge and would dismiss the appeal with costs. Beck, J.

IVES, J.:—This is an appeal from the judgment of Greene, D.C.J. It is admitted that 5 head of the plaintiff's cattle were killed on the defendant's track east of the Village of Holden on July 26, 1918, by one of the defendant's trains. Ives, J.

The liability of the defendant depends on whether these cattle were at large owing to the negligence of the plaintiff, and the burden of proof is upon the defendant. From the evidence it seems clear that the plaintiff owned about 42 head of cattle, of which some 30 were in his pasture-field 6 or 7 miles south of Holden; 6 were on the open range some 3 miles distant from Holden, and 5 or 6 milch cows were kept in a small pasture adjoining the village where the plaintiff lived. The plaintiff says that the 6 head on the open range had not at any time been in the pasture where the 30 were kept.

On August 19, 1918, Saberton, a claims adjuster, went to the plaintiff's place at Holden to obtain such particulars as he could of the loss and the cause. He says he had considerable conversation with the plaintiff and took down in writing the plaintiff's statement verbatim, which he read over to the plaintiff who thereupon signed it. The plaintiff is an illiterate, capable only of signing his name. The body of this document reads as follows:—

ALTA.

S. C.

NELSON v. GRAND TRUNK PACIFIC R. CO.

IVES, J.

Re my cattle killed on July 26/18, 3 steers and 2 heifers and 1 cow. The steers and heifers came from my farm 7 miles south about a week before the accident and my pasture being short at home I let them run on vacant land around town and told my boy to keep them back from track. My boy is 9 years old and the night they were killed he could not find them as usual to bring them home. The cow that was with steers as far as I know had only been out a day or so,—she broke out of my pasture close to the house. I blame the cattle-guards for my stock being killed as animals can quite easily walk over same. If the Company will be reasonable regarding these cattle I will consider settling with them. These steers and heifers when I did not put them in my fence were always herded away south from track.

(Sgd.) A. B. NELSON.

Witness: (Sgd.) D. L. SABERTON.

At the trial the plaintiff on oath denied only his signature. His evidence as to this document is this on cross-examination:—

Q. Is that your signature? A. Yes, that is my signature. Q. The Court: You admit your signature to that document? A. Yes, but that statement is not the way he wrote it to me; I can't read; that is not the way he explained it for me. Q. Mr. MacLean: Mr. Nelson, do you remember where you gave this statement to Mr. Saberton? A. No. Q. Don't you remember that he came over to your farm, then you and he walked over to the station, and you dictated that statement and he wrote it down over in the station? You don't remember the time you gave it to him at all? A. I never heard that writing at all. He wrote that out himself and I signed it. Q. Where did you sign it? A. I don't remember where I signed it. I think I signed it right in the house. Q. Do you remember what you told him when you gave him that statement? A. He told me he should settle it for the cattle; I didn't told that thing at all. Q. And did you tell him anything about how the cattle were killed? A. Well, but I never told him anything like that. Q. Just answer my question. Did you tell him anything about how the cattle were killed? A. Yes, I told him how they was killed on the track. Q. And what did you tell him? A. I don't remember what I told him, but I didn't told him that.

Then in the course of re-examination the plaintiff says:—

Q. What did he (Saberton) say to you when he got there? A. Well, I guess I told him about the cows and the steers. Q. What did he say to you? A. I can't remember that. I told him about the cows, the cows that was in the pasture, but I never told him anything that is in the paper.

In the last answer he is clearly speaking of the milch cows in the small pasture at Holden.

Now that is the whole of the plaintiff's evidence touching his signed statement and it is not a specific denial of the truth of each separate statement contained in the document but a general denial that he told Saberton what was written down, and from his own evidence in chief some of the statements are shewn to be true, viz., that the 4 dead cattle did come from the pasture 7 miles south, and that the cow broke out of his pasture at Holden, and one of

ALTA.

S. C.

NELSON v. GRAND TRUNK PACIFIC R. CO.

Ives, J.

the plaintiff's witnesses, Schmolke, says that a week before the accident he was passing plaintiff's pasture 7 miles south and saw 4 head of cattle escape through the gate before the man who had—unknown to plaintiff—opened it, could close it. Of course, the important part of the plaintiff's written statement is as to the truth of the words contained in the second and third sentences.

There is a direct contradiction between the witness Nelson and the witness Saberton as to the whole document, and clearly the whole document is not false so that I think in the absence of a specific denial of Nelson as to the truth of the words in the second and third sentences and in the absence of a specific finding of fact on the part of the trial Judge of whether the 4 dead cattle did or did not come to plaintiff's hands after they escaped from the pasture but before the accident, that the written statement of the plaintiff must stand as to that issue and the onus upon the defendant of proving negligence is satisfied.

I would allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

Re SIMPSON ESTATE.

N. S.

S. C.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., Ritchie, E.J. December 19, 1919.

WILLS (§ I D—38)—DIVISION OF ESTATE—LEGACY TO EACH OF FOUR SONS—RESIDUE TO FIFTH SON—WILL WRITTEN BY CHIEF BENEFICIARY—UNDUE INFLUENCE—ONUS OF PROOF.

When it is once proved that a will has been executed with due solemnities by a person of competent understanding who is apparently a free agent, the burden of proving undue influence rests on the party alleging the same.

[*Craig* v. *Lamoureux* (1919), 50 D.L.R. 10, 36 T.L.R. 26, followed. *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448, distinguished.]

Statement.

APPEAL from the judgment of W. R. Foster, Judge of Probate for the County of Halifax, in the matter of the proof in solemn form of the last will of Eliza Simpson, holding that the will expressed the real intention of the testatrix and admitting the same to probate.

J. L. Barnhill, for appellant.

L. A. Lovett, K.C., for respondent.

The judgment of the Court was delivered by

Ritchie, E.J.

RITCHIE, E.J.:—On the petition of Oliver Simpson, a son of Eliza Simpson, an application for proof in solemn form of her will was heard by the Judge of the Probate Court for the County

N. S.

S. C.

RE SIMPSON ESTATE.

Ritchie, E.J.

of Halifax. He found in favour of the will and from his decision an appeal is taken to this Court.

The deceased left 5 sons surviving her, namely, John, Oliver, Samuel, Joseph and Henry. The last named is the respondent. The estate was inventoried at $14,284.62. John, Oliver, Samuel, and Joseph were each left $250 and the balance of the estate was left to the respondent. He gets the great bulk of the estate, and he wrote the will. The mental capacity of the testatrix is admitted and the evidence casts no doubt on it. There is no evidence of undue influence. The legal formalities in connection with the execution of the will were fully complied with. When the witnesses arrived the testatrix had the will in her hand, stated that it was her will, and asked them to witness it. The respondent swears that he wrote the will at the dictation of the testatrix; the Judge below must have believed him; he could not have made the findings which appear in his judgment on any other basis. There is a reason why the testatrix may have thought it right to practically give her estate to the respondent, namely, that he remained with her in her old age. The evidence of Lawlor, an independent witness, shews that the old lady had this in mind, and she expressed to him her intention of giving the respondent the bulk of her property. It is true that Oliver Simpson swears that she expressed a contrary intention to him, but this evidence, no doubt, had the consideration of the Probate Judge and he was at liberty to regard the evidence of Lawlor as representing the true intention of the testatrix. There was no objection to this class of evidence here or below, consequently it is not necessary for me to consider the question of its admissibility.

The result of that which I have said is that the case of the appellant must depend on the legal effect of the fact that the respondent takes the bulk of the estate under a will written by himself.

The facts in this case and a recent decision in the Privy Council relieve me from the duty of dealing in this judgment with a very long line of cases on this subject. I refer to *Craig* v. *Lamoureux*, (1919), 50 D.L.R. 10, 36 T.L.R. 26, decided in October of the present year. The head note of that case correctly states the point decided. It is as follows:—

The principle applicable in the case of gifts *inter vivos*, that persons who benefit under a document which they have been instrumental in framing or

obtaining have the burden of proving the righteousness of the transaction, does not apply in the case of wills. When once it is proved that a will has been executed with due solemnities by a person of competent understanding who is apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this.

Applying the law as stated, the appellant cannot succeed.

In this case it was proved that the will was "executed with due solemnities by a person of competent understanding who is apparently a free agent," and, as I have said, there was no evidence of undue influence.

The rule which has heretofore prevailed both in the Supreme Court of Canada, and in the Privy Council (see *Fulton* v. *Andrew* (1875), L.R. 7, H.L. 448, at 472), to the effect that if a man writes, or procures to be written, the will of another in his own favour he has "the onus of shewing the righteousness of the transaction" is not now the law, but it was the law when this appeal was asserted, and therefore I think the costs here and below should be paid out of the estate.

I would dismiss the appeal, disposing of the costs as I have indicated. *Appeal dismissed.*

MAYOR v. THE KING.

Exchequer Court of Canada, Audette, J. November 29, 1919.

HIGHWAYS (§ IV—115)—INJURY TO TRAVELLER—PETITION OF RIGHT—PERSONAL INJURIES—MEANING OF OFFICER OR SERVANT OF THE CROWN—DISCRETION OF MINISTER—EXCHEQUER COURT ACT, SEC. 20.

The suppliant in a Petition of Right asking for damages in order to succeed must bring his case within the ambit of sec. 20 Exchequer Court Act. A Minister of the Crown is not an officer or servant of the Crown within the meaning of this section.

An action which is essentially one in tort or for damages in the nature of *quasi delicto* will not lie against the Crown at common law, and in the absence of any statute making the Crown liable cannot be maintained.

[*Hopwood* v. *The King* (1917), 39 D.L.R. 95, 16 Can. Ex. 419, referred to.]

Statement.

PETITION of Right to recover from the Crown damages alleged to be due to improper maintenance of the King Edward Highway, near the City of Montreal.

E. F. Surveyer, K.C., and *Wm. L. Bond*, K.C., for suppliant.

J. A. Sullivan, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his Petition of Right, seeks to recover the sum of $330 for alleged damages resulting from an accident he met with on the King Edward Highway, on his return trip in his automobile, a large special Maxwell, an old car, from LaPrairie to the City of Montreal, on July 1, 1916.

CAN.

EX. C.

MAYOR
v.
THE KING.

Audette, J.

To properly understand the facts of the case, it is important to refer to the plan filed herein as Ex. A wherefrom it would appear, that at the time in question, the suppliant was travelling from south to north, from what is marked on the plan "plank road" which runs practically due south and north. Arrived at the point A, the suppliant turned to the left, climbed the small hill, 1 in 5, that lies between A and D, when he contends that, at the point marked with a (X) cross, he encountered with the front right wheel, a boulder the size of his head. At the foot of this hill (or slope) he put on more gas, climbed to the top, but when he came to turn to the right at the point marked D, he contends he was unable to do so, his machine refusing to answer—she would not turn. He, however, succeeded in turning her and brought her at standstill at the point marked G, about a foot or a foot and a half from the edge of the embankment to the left. At that point, having stopped his machine, his steering gear being on the right, he leaned over to the left over 2 young girls of 12 and 18 years respectively who were to his left on the front seat and realized that there was between 18 and 12 inches to the edge of the embankment, where he contends the soil suddenly gave way under his left wheels and the machine toppled over down the small embankment.

It must be noted that in the course of his travel from the plank road to the place where the accident happened, from point A to G, that he was not travelling on his side of the road. He was indeed travelling on the left or the wrong side of the highway and very much so, if it is considered that his right wheel struck the alleged boulder at the point marked with a cross on the plan. However, in the view I take of the case it becomes unnecessary to comment upon this point.

It is well to note we have no direct evidence that the machine went wrong as a result of striking the boulder in question. Being asked if he could swear the boulder did damage her, he answers: "No more than the car would not turn after she struck it." It is all surmise and conjecture as to whether or not the machine went wrong from striking the boulder, or whether it went wrong from any other reasons. The boulder was not noticed by anybody else,—although some witnesses were questioned on that point. The piece of road from A to D is stoned or macadamized, stated as not too good but not too bad.

As a result of the accident a claim is made for the sum of $200 for damage to his car. The suppliant, being a mechanic, attended to these repairs himself personally, and the amount claimed is more in the nature of a guess than an actual expenditure for labour and material.

With respect to the doctor's bill, the evidence is very unsatisfactory. He says he generally pays about $20 to $30 a year for his doctor's bill and that came in as part of the usual doctor's bill and he charges $100. The cost of removal of the motor has been satisfactorily established at $30.

At the opening of the trial, I drew the attention of the parties that the case was on its face prescribed, the accident having occurred on July 1, 1916, and the Petition of Right being filed on July 16, 1917, 1 year and 15 days after the accident. Having allowed the suppliant to establish by some evidence when the case was filed with the Secretary of State, under the provisions of sec. 4 of the Petition of Right Act, R.S.C. 1906, ch. 142, evidence was supplied whereby it appears that the petition was left with the Secretary of State on June 6, 1916. Following the numerous decisions in this Court on that point, it is found that such lodging of the Petition of Right, with the Secretary of State, under the section above mentioned, interrupted the prescription from that date.

Approaching the question on its legal aspect, it is quite apparent that it is an action against the Crown sounding essentially in tort or damages, and that, apart from breach of contract and under statutory authority, such an action would not lie against the Crown.

The suppliant, to succeed, must bring his case within the ambit of sec. 20 of the Exchequer Court Act as I have already said in the case of *Hopwood* v. *The King* (1917), 39 D.L.R. 95 at 97; 16 Can. Ex. 419 at 421. If he seeks to rest his case under sub-sec. b of sec. 20 . . . I must answer that contention by the decision in the Supreme Court of Canada in *Piggot* v. *The King* (1916), 32 D.L.R. 461, 53 Can. S.C.R. 626, where Fitzpatrick, C.J., says: "Pars. (a) and (b) of sec. 20 are dealing with questions of compensation not of damages. Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken under, or injuriously affected by the exercise of statutory powers."

CAN.
EX. C.
MAYOR
v.
THE KING.
Audette, J.

Therefore it obviously follows that the present case does not come under sub-secs. (a) and (b) of sec. 20.

Does the case come under sub-sec. (c) of sec. 20 repeatedly passed upon by this Court and the Supreme Court of Canada?

To bring the case within the provisions of sub-sec. (c) of sec. 20, the injury to property must be: 1st. On a public work; 2nd. There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; 3rd. The injury must be the result of such negligence.

It is contended that because the Crown did expend some money for the building, under contract, of the King Edward Highway at the place in question and under the supervision of a Government engineer, that it has become a public work of Canada, relying upon the decision in the case of *Coleman* v. *The King* (1918), 44 D.L.R. 675, 18 Can. Ex. 263. Without passing upon this point let us consider whether the second requirement has been complied with. I may say that there is not a tittle of evidence upon the record establishing that there was any officer or servant of the Crown whose duties or employment involved the care or maintenance of the road in question. From this fact, it will necessarily follow that there was not any negligence of any officer or servant of the Crown acting within the scope of his duties whose negligence could have caused the accident.

There is no evidence on the record to shew that the Crown was in any manner under any obligation to maintain the road in question in good repairs, and as was decided in the case of *McHugh* v. *The Queen* (1900), 6 Can. Ex. 374, in respect of a bridge built by and at the expense of the Dominion Government where there was no officer or servant of the Crown in charge of the same, that such duty could not be ascribed to the Minister himself who is not an officer or servant of the Crown within the meaning of sec. 20 of the Exchequer Court Act. Moreover the Court has no jurisdiction to sit on appeal from exercise of any statutory discretion given to the Minister. *Harris* v. *The King* (1904), 9 Can. Ex. 206; *Municipality of Pictou* v. *Geldert*, [1893] A.C. 524; *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400.

In the result it is quite clear that this action which is essentially one in tort or for damages, in the nature of *quasi delicto*, will not lie against the Crown at common law, and in the absence of any

statute making the Crown liable in such a case, the action will not be maintained.

The suppliant has failed to bring the facts of this action within the provisions of sec. 20 of the Exchequer Court Act. There is no evidence that the injury complained of in this case resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The *onus probandi* was upon the suppliant and he has failed to discharge such obligation. He has not proven his case.

Therefore the suppliant is not entitled to any portion of the relief sought by his Petition of Right herein.

Judgment accordingly.

THE SHIP "FORT MORGAN" v. JACOBSEN.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 22, 1919.

MASTER AND SERVANT (§ I E—25)—HIRING OF SHIPMASTER—INDEFINITE TERM—CHANGE OF VOYAGE—DISAGREEMENT—WRONGFUL DISMISSAL—NOTICE.

A shipmaster, who is not hired for a definite term is entitled to reasonable notice before being dismissed.

[*Creen* v. *Wright* (1876), 1 C.P.D. 591, referred to.]

Statement.

APPEAL from the judgment of the Local Judge of the Nova Scotia Admiralty District (1919), 49 D.L.R. 123, 19 Can. Ex. 165, in favour of the plaintiff. Affirmed.

T. S. Rogers, K.C., for appellant; *J. B. Kenny*, for respondent.

Davies, C.J.

DAVIES, C.J.:—I concur in the opinion of Anglin, J.

Idington, J.

IDINGTON, J.:—Having regard to the peculiar terms of the hiring, whereby the respondent was always to get a higher wage than the engineer, with which Anderson was conversant, I do not think he was treating respondent fairly in supplanting him by another captain without first telling him he had an engineer duly qualified and willing to go at $400 a month and offering something in excess of that wage.

And none the less is that so, when regard is had to the terms of the telegram to him (Anderson) from appellant's Halifax agents, on which its counsel laid so much stress in argument here, for that clearly indicates respondent was not in accord with the possibly excessive and imperative demands of the rest

CAN.

S. C.

THE SHIP "FORT MORGAN" v. JACOBSEN.

of the crew whereby the engineer would get $475 a month yet respondent was offering to take $450, but by no means clearly putting it as an ultimatum.

I am clearly of opinion that there was a dismissal and no refusal on the part of the respondent to go.

Idington, J.

In view of the express concession of the appellant's counsel that the Norwegian law was intended to govern, I see no alternative which entitles us to consider English law as the binding basis of the contract or anything therein relative to the consequences of a breach thereof.

The intention of the parties contracting is in that regard the rule of law however variable and difficult of application may be the general respective presumptions which any given set of circumstances may give rise to.

The appellant and respondent being agreed in that regard herein, we are relieved from any of the difficulties that sometimes exist in such cases. The only other question involved is the measure of damages and they must be measured by the terms of the contract made in light of and rendered definite by a reading of the relevant law.

I cannot help having a suspicion that the respondent may have had, and possibly even availed himself of, the opportunity of minimizing his damages by accepting another engagement, but as no such contention is in fact set up I cannot assume that a return to Norway, though for past 20 odd years resident in New York, apparently was not the alternative he chose to abide by when this litigation had ended, if not before.

Primâ facie at least the extreme limit of the statutory provision is what, as he claims, he is entitled to when as here no alternative basis is presented by the evidence.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think there is evidence to support the finding that the contract made in New York between Anderson, the representative of the owners, and the respondent as master, was subject to the condition that he should not be bound to serve in any voyage taking him across the Atlantic. The contract appears to have been indefinite as to the duration of hiring. The rule of English law, which in such circumstances would govern the

rights of the parties, is that the contract cannot be terminated without reasonable notice. *Creen* v. *Wright* (1876), 1 C.P.D. 591. Whether this rule of English law be applied to the present case or the rule of the Norwegian law as explained in the evidence, the judgment of the trial Judge seems to be a satisfactory disposition of it. As to the jurisdiction of the Court of Exchequer, a Court of Admiralty in such cases has jurisdiction to award damages; *The Great Eastern* (1867), L.R. 1 A. & E. 384, and any difficulty which might otherwise have arisen from the decision in *The Courtney* (1810), Edw. Adm. 239, seems to be met by sec. 10 of the Admiralty Courts Act, 24 Vict. 1861, ch. 10.

Anglin, J.

ANGLIN, J.:—The trial Judge, as I read his judgment, found that the plaintiff was employed by the owner of the defendant ship not by the month, as the latter contends, but for a voyage from New York to Halifax and thence to the West Indies. Since the evidence of the plaintiff, corroborated to some extent by that of Martin Marsden, supports this finding we should not disturb it merely because the defendant testifies to the contrary. Another not unreasonable inference from the evidence and all the circumstances might be that the plaintiff was engaged for an indefinite term as master of the "Fort Morgan" to take her wherever ordered subject to the limitation that she would not be sent overseas nor into the war zone.

The contract of employment was made in New York. The evidence also warrants a finding that it was one of its terms that the plaintiff's wages as master of the "Fort Morgan" should be higher than those of any other officer on the ship.

The vessel proceeded to Halifax under the plaintiff's charge and while it lay in that port the owner notified the master that the ship had been chartered to go to Newfoundland and thence to Italy instead of to the West Indies. While the master was willing to assent to this change of route and destination, he and the owner were unable to come to terms as to his wages for the new voyage. The owner recognized his right to a substantial increase owing to the fact that the vessel would proceed to the war zone, and offered him $400 a month. The captain's demand was for $450 but not less than should be paid to the chief

CAN.

S. C.

THE SHIP "FORT MORGAN" v. JACOBSEN.

Anglin, J.

engineer. The owner engaged new officers in New York agreeing to pay the new chief engineer $400. When the new master and his officers arrived at Halifax the plaintiff, who had never been offered more than $400 a month by the owner, left the ship. The trial Judge found that he was discharged without notice and "under the English law . . . would be entitled to compensation for such damages (*sic*)." The facts in evidence I think warrant this conclusion.

There was some discussion at bar as to the law by which the nature of the contract, the question of its breach and the relief to which the plaintiff might be entitled should be determined and as to the jurisdiction of an English Admiralty Court to enforce *in rem* rights based on foreign law in excess of those conferred by the general maritime law. Counsel were agreed that the Norwegian law applied and evidence of it was given by the Norwegian Consul at New York. No evidence of any other foreign law was adduced. The law of the State of New York, should it be applicable, must therefore be deemed to be the same as the law administered by English courts.

In the view I take of the case it is unnecessary to decide to what law the rights of the parties were subject. If they were governed by the Norwegian law the plaintiff's damages appear to have been assessed in accordance with its provisions as proved by the witness Ravn. If they should be determined by English law the amount allowed does not appear to have been excessive —at all events, not sufficiently so to justify interference. The total judgment was for $1,888.85. The plaintiff's wages when dismissed were $343.75 per month, and there was then due to him for wages earned and unpaid $727.60. His damages for wrongful dismissal were therefore assessed at $1,121.25, or $120 more than 3 months' wages. I am not prepared to hold that this amount was so excessive for loss of the voyage to the West Indies that the assessment of the local Admiralty Court should be set aside.

There is no evidence that the plaintiff actually obtained, or could by reasonable effort have secured, other employment which he would have been bound to accept in order to minimize his damages.

I would for these reasons dismiss this appeal with costs.

BRODEUR, J.:—This appeal does not, to my mind, present any serious difficulty. Brodeur J.

The engagement of the respondent as master of the "Fort Morgan" was for a trip from New York to Halifax and the West Indies. The "Fort Morgan" is a Norwegian ship and the respondent is also a Norwegian. The contract should be governed by Norwegian law because *primâ facie* the law of the flag governs, unless the parties have provided otherwise in the language of the contract. It was said in *The Johann Friederich* (1839), 1 Wm. Rob. 35 at 37, that "in cases of mariners' wages whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law." *The Leon XIII.* (1883), 8 P.D. 121; *The Livietta* (1883), 8 P.D. 209; *Lloyd* v. *Guibert* (1865), L.R. 1 Q.B. 15.

The law of Norway, as was proved, shewed that the plaintiff was entitled to damages for wrongful dismissal.

The plaintiff having been engaged for a particular voyage could not be forced to go elsewhere; and if on his refusal he was replaced by another master, that constituted on the part of the owners of the ship a breach of contract.

The amount of the damages awarded was not excessive.

The appeal should be dismissed with costs.

MIGNAULT, J.:—This is by no means a satisfactory case and the reasons for judgment of the trial Judge are extremely brief, 49 D.L.R. 123, 19 Can. Ex. 165. The evidence, as I read it, is contradictory not only as to the salary agreed to be paid to the respondent as master of the ship "Fort Morgan," but also as to the term and the voyage for which he was hired. The trial Judge finds that when the ship arrived at Halifax, the respondent's salary was $343.75 per month, and this finding I would not disturb as it evidently rests on the credibility of the respondent's evidence as opposed to the statement of Anderson, owner of the ship, that his salary was then only $250 per month. Mignault, J.

As to the voyage for which the respondent was hired, the finding is that he came to Halifax with a view to a West India charter, but that after remaining there the owner chartered the

CAN.

S. C.

THE SHIP "FORT MORGAN" v. JACOBSEN.

Mignault, J.

ship for the war zone, and offered the captain and crew an increase of wages provided they would agree to go to Italy, but that the respondent refused the wages so offered him and was discharged without notice. I do not find in the reasons for judgment any express statement as to the term for which the respondent was employed, but I take it that the finding was that the respondent, as he testified, was engaged for a voyage from New York to Halifax and thence to the West Indies. Very probably the appellant, in chartering the ship for the war zone, found such a charter much more profitable than the intended voyage to the West Indies.

On the basis of the findings of the trial Judge there can be no doubt that the respondent was wrongfully dismissed, and the only question is with regard to the amount of the damages to which he is entitled for wrongful dismissal. The judgment appealed from allows him 3 months' salary and the price of transport to Norway, granting him such compensation "by analogy to the Norwegian Maritime Code," and the amount for which judgment was entered, after a reference to the Registrar, was $1,888.85, being, I take it, $1,031.25 for 3 months' wages, $302 for return to Norway, and the difference, $555.60, for wages due the respondent at the date of his dismissal. Both parties have admitted that the issues in this case are governed by the law of Norway, and proof of this law was made by the Consul General of Norway at New York, Mr. Ravn, who referred to arts. 63, 64, 65 and 66 of the Norwegian Code, the effect of which is to give the master wrongfully dismissed in a port outside of Europe, when not engaged for any fixed term, 3 months' wages, plus his travelling expenses, including subsistence, to the place at which he was engaged in Norway, but otherwise to that port to which the ship belongs.

The respondent had been in the United States for over 20 years and was hired at New York, although he says he belongs to Stavanger in Norway. He was not asked whether he had any intention of returning there. If the Norwegian law governs the matter, as both parties admit, the respondent would appear to be entitled to claim the amounts which the trial Judge allowed, and no special complaint is made in the appellant's factum as to the sum granted for travelling expenses.

CAN.
S. C.
Mignault, J.

As I have said this is far from being a satisfactory case, but I cannot find sufficient ground to justify me in setting aside the judgment of the trial Court, and therefore I would dismiss the appeal with costs. *Appeal dismissed.*

KENNEDY v. INMAN.

ALTA.
S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, and Beck, JJ. February 5, 1920.

VENDOR AND PURCHASER (§ I E—26)—AGREEMENT FOR SALE OF LAND—NO RESERVATIONS—TITLE TO PRECIOUS METALS—DELUSION AS TO VALUE.

An agreement to convey lands without making any reservations does not oblige the vendor to give title to the precious metals.

A contention that there existed at the time of the contract such a general delusion as to actual values on account of a local boom in real estate, that the purchaser ought not to be held to his contract in a Court of Equity, cannot be considered as applying to a delusion which probably was not shared at all by the people of Canada.

[*Savile* v. *Savile* (1791), 24 E.R. 596, distinguished.]

Statement.

APPEAL from the order of Ives, J., pursuant to a decision given by him upon certain questions of law set down for argument under an order for directions.

F. Ford, K.C., and *G. V. Pelton*, for appellants; *H. H. Parlee*, K.C., and *D. W. MacKay*, for respondents.

Harvey, C.J.; Stuart, J.

HARVEY, C.J., concurs with Stuart, J.

STUART, J.:—The action is by a purchaser under an agreement for the purchase from the defendants of a half section of land in Tp. 53, range 24, west of the fourth meridian. He asks for determination of the agreement and judgment for recovery of the first instalment of purchase money on account of certain defects in title and also on account of a mutual mistake or general delusion as to value.

The agreement, which was in the form of an option, is dated March 12, 1914, and by it the vendor in substance agreed to sell to the plaintiff purchaser the south half of sect. 24 in Tp. 53 in range 24 west of the fourth meridian for the sum of $165,000. The sum of $20,000 was to be paid upon the acceptance of the option on June 30, 1914, and was in fact then paid but no further payments were made.

There were thus no reservations made by the vendor. But the plaintiff claims that the vendors' title is subject to the

ALTA.
S. C.
KENNEDY
v.
INMAN.
Stuart, J.

reservation by the Crown of the gold and silver mines under sec. 161 of the Dominion Lands Act R.S.C. 1906 ch. 55, repealed 7-8 Ed. VII., 1908, ch. 20, sec. 103, and also subject to regulations governing placer mining in Manitoba, Saskatchewan and Alberta under order in council of February 8, 1909, by which, so it is alleged, the Crown may give the right to persons other than the vendor to enter upon the lands for mining purposes and to locate, prospect and mine for such minerals, *i.e.*, gold and silver, and to fish and shoot for his own use, and also to cut timber necessary for his purpose.

The common law of the prerogative of the Crown is the same in Alberta as in England unless altered by express enactment in which the Crown is mentioned. It is the common law that by a general grant of land from the Crown without any express reservations gold and silver do not pass. The Case of Mines (1568), Plowd. 310. We have no statute altering this law. From 1883 (at least) up to 1908 the Dominion Lands Act contained a section which was sec. 161 of R.S.C. 1906 ch. 55, providing that

> No grant from the Crown of lands in freehold or for any less estate shall be deemed to have conveyed or to convey the gold or silver mines therein, unless the same are expressly conveyed in such grant.

Undoubtedly that was no more than a declaration of the common law. The section does not appear in the revision of the Act which was made in 7-8 Ed. VII., 1908, ch. 20, and the last section of that Act repeals ch. 55 of R.S.C. 1906. In my opinion it cannot be successfully contended that this repeal made any real change in the law. The repeal of a statute merely declaring the common law does not, it seems to me, repeal the common law, at any rate in a case where the common law involved is the prerogative of the Crown and by the repealing Act no mention is made of the Crown or its prerogative. I have heard and found nothing to shew that it is not still the law of this Province that a grant of lands from the Crown without any reservation whatever does not convey mines of gold and silver. In England the Crown can, subject to certain formalities, grant the gold and silver in fee. In Canada it can do the same, or at least could up to 1914. I see no reason whatever for suggesting any differ-

ence in the law. It ought to be remembered that it is only restrictive legislation, rather than authorising legislation, that really has much efficacy here, because the Crown can always do what it wills with its own without any special grant of parliamentary authority as long as it has not surrendered its rights.

I think, therefore, that in this country, as in England, an agreement to convey certain lands without making any reservation does not oblige the vendor to convey title to the precious metals.

With regard to the other restrictions such as the possibility of placer mining rights being granted and the right of fishing and shooting and cutting timber in connection therewith. I have in the first place always understood that placer mining was only for gold. Furthermore, if I am not mistaken in this, there is nothing on the record to shew that the property contains any river or stream upon which placer mining could be carried on, and in the absence of specific assertion on this point I think we ought to assume that the contrary is the fact and therefore that the reservation complained of is with respect to the piece of land in question meaningless and reserves nothing in fact.

The same can I think be said with regard to rights in respect of navigable rivers, which is a matter as to which an amendment was sought. Even assuming the amendment to be allowed, I think it would be useless. Counsel never made the slightest suggestion upon the argument that on the land in question there was any such thing as navigable water, or even a stream. Possibly gold and silver may be concealed in the bosom of the earth, but certainly the parties ought to be able to see, and seeing to inform the Court whether or not there is in fact any such thing as a stream or lake either for placer mining or for navigation upon the property in question, or whether it is simply pure continuous prairie to the end that the Court may know whether it is dealing with realities or merely with intangible fancies of the brain.

The other contention raised was that there existed at the time of the contract such a general delusion as to actual values on account of a local boom in real estate that the purchaser ought not to be held to his contract in a Court of Equity. *Savile* v.

ALTA.
S. C.
KENNEDY v. INMAN.

Savile (1791), 24 E.R. 596, and some similar cases were cited. I do not think it is necessary to say more with regard to these cases than to point out that there at any rate must be a great distinction between the general delusion of a whole nation and the local delusion which arose in this case. Even if *Savile* v. *Savile* would be held to be good law if similar facts ever again arose, which is denied by Fry, par. 448, I do not think it can be considered as applying to a delusion which probably the majority of the people of Canada did not share at all.

Stuart, J.

I would therefore dismiss the appeal with costs.

Beck, J.

BECK, J.:—I concur with Stuart, J.

Appeal dismissed.

ALTA.
S. C.

KENNEDY v. MELICK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 5, 1920.

Frank Ford, K.C., and *G. V. Pelton*, for appellants; *R. E. McLaughlin*, for respondents.

Harvey, C.J.

HARVEY, C.J.:—I concur with Stuart, J.

Stuart, J.

STUART, J.:—In substance the same points arise in this case as in the case of *Kennedy* v. *Inman et al.*, 51 D.L.R. 155, and what was said in the latter case is applicable here. But I think it proper to add that in my opinion, where a vendor agrees to convey particular lands "subject to the reservations contained in the grant from the Crown," and when that is the form of agreement which the purchaser has accepted the latter is not entitled to object at least in a case where the reservations are such as exist here. The appeal should be dismissed with costs.

Beck, J.

BECK, J., concurs with Stuart, J.

Appeal dismissed.

N. S.
S. C.

DAVISON v. PRIEST.

Nova Scotia Supreme Court, Harris, C.J., Longley, J., and Ritchie, E.J. January 13, 1920.

CONTRACTS (§ V C—390)—AGREEMENT FOR SALE OF STOCK—DEATH OF ONE PARTY—SUIT FOR RESCISSION BY EXECUTORS—FRAUD AND MISREPRESENTATION—KNOWLEDGE OF FACTS BY DECEASED.

The executors of the estate of one party to a contract cannot succeed in an action to rescind the contract on the ground of fraud and misrepresentation where the facts establish that the deceased was told and knew all about the matter before entering into the contract.

N. S.

S. C.

DAVISON v. PRIEST.

Statement.

APPEAL from the judgment of Drysdale, J., in favour of plaintiffs, executors of Francis Davison, deceased, in an action to rescind a contract made between said Francis Davison and the defendant Priest, whereby said Priest agreed to sell to Davison and Davison agreed to buy 900,000 shares of the common stock of the Canada Clay Company for the sum of $9,000. The ground upon which the contract was sought to be rescinded was fraud and misrepresentation on the part of the defendant Priest. Reversed.

J. McG. Stewart, for appellant; *S. Jenks*, K.C., for respondents.

Harris, C.J.

HARRIS, C.J.:—The plaintiffs are the executors of Frank Davison, deceased. The deceased and the defendant entered into the following agreement, dated November 1, 1913:

Witnesseth that the said John W. Priest hereby agrees to sell to the said Frank Davison 900,000 shares of the common stock of the Canada Consolidated Clay Co., and hereby undertakes and guarantees that he will pay and discharge all debts due by the said company to their creditors at the date of these presents for and in consideration of the sum of $9,000, to be paid to him by the said Frank Davison, as hereinafter provided, and hereby agrees to transfer and have transferred on the books of the company the said 900,000 shares of common stock to the said Frank Davison. The said Frank Davison hereby agrees to purchase the said 900,000 shares of the Canada Consolidated Clay Co., and to pay therefor by delivering to the said John W. Priest, herewith, two notes, one for $4,000 payable at 3 months with interest at 6%, and one note for $5,000, payable 6 months from date, with interest at 6%. And the said Frank Davison hereby agrees and undertakes to use his best endeavours to obtain from the said Company an option for the said John W. Priest for a reasonable period of time, for the sale of the River Denny China Clay property, belonging to the said company, for the sum of $10,000.

And the said John W. Priest hereby undertakes and agrees to deliver to the said Frank Davison proxies for 200,000 additional shares of common stock of the said company, authorising the holder of said proxies to vote the same for a period of 2 years from the date hereof, and delivery of the same forms part of the consideration of this agreement.

It is understood that this agreement is made on the faith of the statements as to the properties belonging to the company contained in a letter written by Mr. Grandin to the said Frank Davison, dated October 7, 1913.

It is further understood and agreed that the said John W. Priest will obtain from Mrs. Fraser a deed of the property belonging to her near the properties of the Clay Co., for the sum of $260, for the said Frank Davison.

N. S.

S. C.

DAVISON v. PRIEST.

Harris, C.J.

The letter from Grandin to Davison, dated October 7, 1913, referred to in the agreement reads as follows:

Pictou, Nova Scotia,
October 7th, 1913.

F. Davison, Esq.,
Bridgewater, N.S.

Dear Sir: You are no doubt aware that the Canada Consolidated Clay Co. Ltd. has for some time past been running into debt, and although the net amount it owes is less than $6,000, prompt action must be taken to pay off its debts to prevent the company going into liquidation.

The present state of affairs has been mainly brought about by the directors having been unfortunate in their selection of superintendents. Neither of these men proved themselves capable of producing a satisfactory percentage of vendible brick from the quantity of green brick they burnt. To be candid, the directors are also to blame for not having removed the last superintendent before the present deficit was reached. They can only plead in extenuation that they allowed themselves to be led further and further into debt by the repeated assurances of the superintendent that he was just on the eve of success as regards the burning. That there was nothing inherently wrong with the clay is conclusively proved by the fact that in every kiln burnt a considerable quantity of first-class vendible brick was produced; but it is also true that every kiln contained about equal quantity of badly burnt and unsaleable brick. The type of kiln used has been blamed for the poor output, but this type is the commonest kind in which bricks are successfully burnt in Canada. Obviously then, the fault is in the superintendent and not in the kilns and the clay.

The above facts having become generally known, the directors now find it practically impossible to sell sufficient stock to pay the losses and give them a fresh start. The stock in the treasury is therefore of little value just now; but it can be made of considerable use and value, as will be explained later.

Undoubtedly the best thing to do under the circumstances is, as E. M. McDonald, M.P., recommends, viz., to organise a new company with a stronger and more capable management to take over the entire proposition. And as it is generally known that the profits of a well managed brick plant are excessive, there should be no difficulty in finding the right men to promote the new company, provided, of course, there are sufficient inducements in the way of profit and control. Several parties have already expressed a willingness to organise along the lines sketched below, but usually, the smaller the number of those in control the more assured is success. The writer, therefore, knowing that single-handed you are in a position to carry out the proposition, begs to submit the same to you before appealing to a number of business men. The majority of the directors are in favor of the project, and there will be no difficulty in getting it ratified by the shareholders.

Briefly stated, the position of the C.C.C. Co. is as follows:

Nominal capitalization, $2,000,000 divided into 2,000,000 shares. Stock issued, 1,412,907 shares. Balance in treasury, 587,193 shares. Quick assets, $2,042.30. Net liabilities, $5,848.95. Plant: valued, Dec. 31/12, at $34,067.57. Freehold Clay Lands, Pictou, valued Dec. 31/12, at $494.44.	
99 year lease, clay land, Pictou, containing practically an inexhaustible quantity of unrivalled clay and shale, about	83 acres
Freehold clay lands at Pictou, about	2 "
Freehold clay lands at River Denys, Cape Breton, containing a valuable china clay deposit	95 "
Leases of excellent clay lands at Meadowville, N.S., estimated to contain about	341 "
3 year renewable lease of Yorston House, used as superintendent's residence, with stables, etc.	
25 year renewable lease of land on which plant is located, and through which railway passes, with water lot extending to main channel of Pictou harbour, about	4 "
	525 "

It is proposed to form a new company to be called, say, the Pictou Clay Co., to buy the Canada Con. Clay Co.

1. The Pictou Co. to have a capitalization of $200,000 divided into 200,000 shares. Value $1 each. The shareholders of the C.C.C. Co. to receive one share in the Pictou Co. for every ten they hold in the C.C.C. Co., or 1,412,907 C.C.C. stock to be exchanged for 141,290 Pictou shares.

2. The promoters of the Pictou Co. to receive 587,193 shares remaining in the C.C.C.C. treasury on payment of that company's debts, ($5,806.65 plus expenses likely to be incurred between now and taking over the C.C.C. Co., say in all $7,000) which are to be exchanged for 58,710 shares in the Pictou Co.

3. The whole of the stock of the Pictou Co. would thus be issued, 141,290 going to the C.C.C.C. stockholders, and 58,710 to promoters, making 200,000 shares; but provision would have to be made for the enlargement of the plant and providing a working capital, which could be done by issuing bonds, preferably to the promoters of the Pictou Clay Co.

4. About $5,000 to $10,000 should be sufficient for extensions and working capital for the first year.

The first thing the promoters of the Pictou Co. would have to do would be to get control of the C.C.C. Co. This could be secured as follows:

N. S.

S. C.

DAVISON v. PRIEST.

Harris, C.J.

5. The promoters would hold at start in exchange for paying the C.C.C.C. debts, say..587,000 C.C.C.C. shares.
M. V. Grandin would donate in trust to promoters .....113,000 " "

700,000 " "

The C.C.C.C. directors would guarantee proxies in favour of Pictou Co. promoters for a period of say 3 years on C.C.C.C. stock which the holders would exchange for Pictou Co. stock in which the voting power would be continued to be vested in the promoters .....300,000 " "

Control of Can. Con. Clay Co. .....1,000,000 " "

6. These 1,000,000 C.C.C.C. shares would be exchanged for 100,000 in the Pictou Co., and thus give control of that Co.

7. If the promoters take the Pictou Co's bonds they would also secure a still stronger grip on that Co.

The Pictou Clay Co. Promoters' Profits would be as follows:

1. A stock profit of 51,710 shares in the new Co. as instead of paying $7,000 for 7,000 shares valued at $7,000 they would only pay $7,000 for 58,710 shares, leaving a balance of 51,710 shares profit. 2. In the event of the new company producing only 2,500 thousand the first year—and this is the output of only a small plant—the profits should be about $10,000, or sufficient to pay 5% on a capital of $200,000. The old C.C.C.C. stockholders would receive 5% on the par value of their stock in the new Co., while the promoters would receive over 40% on their investment of $7,000. 3. Interest on their bonds. 4. Profit on cheap stock they may buy from C.C.C.C. shareholders before deal is closed.

From the above it will be seen that the parties who pay off the C.C.C.C. liabilities and organise a new Co. to buy the C.C.C.C. could not only secure complete control of the new Co., select their own directors and fully protect their own interests, but derive very handsome profits and a large revenue for the comparatively small sum of $7,000 plus what they pay for the bonds.

In conclusion, the writer would say that his motive for donating his stock to the promoters is that he may be able to sever his connection with the Canada Con. Clay Co. at an early date, and devote his time solely to his own business, and also that those whom he induced to invest in the C.C.C. Co. may be more generously treated than would otherwise be possible. He proposes to deed his stock in trust to the promoters, who are to use their best judgment in distributing it among any shareholders who may object to the reorganization, etc. Any balance left over after satisfying such parties to become the property of the promoters. If you think favourably of the above proposition will you kindly name place and time for a meeting with the C.C.C.C. directors. The best place to meet would no doubt be at the office of E. M. McDonald, M.P., Pictou, where all are sure to

receive the best advice as to the legal and financial phases of the proposition.

Kindly consider the above as strictly confidential.

An early reply will be much appreciated.

Yours very truly,

(Sgd.) M. V. GRANDIN.

Approved by
(Sgd.) J. W. Priest.
" J. Welsford Macdonald, Secretary.
" D. F. Morrison, Director.

Enclosed with this letter was the following statement:

Approximate statement of quick assets, sent with the above letter of October 7th, 1913.

Approximate statement of Canada Consolidated Clay Co.'s Quick Assets and Liabilities:

September 24, 1913.

Liabilities.

Accounts payable	$4,021.04
Agents' Commission	811.50
Bank demand note	475.00
Bank overdraft	1,564.88
Hilchey's a/c.	55.28
Morrison's a/c.	225.00
Robertson's a/c.	5.00
†Grandin's a/c.	
Taxes	153.75
Rent	337.50
Pay roll Sept. 30/13 estimated at	200.00
	$7,848.95

†Grandin will not put in any claim if company's affairs are satisfactorily adjusted at an early date.

Assets.

Accounts receivable, brick	$ 512.30
Logan's note	600.00
2 horses estimated at	300.00
Brick on hand, 180 M., estimated 90 M. good brick at $7.00 per M.	630.00
Assets	2,042.30
Liabilities net	5,806.65
	$7,848.95

A disputed account of $180.00 and some unpaid stock accounts may yet be added to these assets, but against these there will probably be some more expenses before the organisation of a new company can be effected.

(Sgd.) W. J. PRIEST,
Treasurer.

N. S.

S. C.

DAVISON v. PRIEST.

Harris, C.J.

Frank Davison gave the two notes referred to in the agreement and received a transfer of the shares. He died shortly after, and his executors paid the notes when they fell due, to the Royal Bank of Canada, who were alleged to be the holders thereof for value, and later brought an action to set aside the agreement, alleging certain specific statements to have been made by the defendant to Frank Davison which were claimed to be untrue to the knowledge of the defendant, and plaintiffs asked that the agreement should be set aside as fraudulent.

The parties went to trial on this issue, and the plaintiffs failed to make out the case set out in the pleadings; but in consequence of some evidence given on the trial, counsel for plaintiffs asked for and obtained leave to amend and thereupon delivered the following amended statement of claim:

Pursuant to leave given by Mr. Justice Drysdale, the statement of claim is amended by inserting the following paragraph at the end of paragraph 10:

10a. The said Frank Davison was induced to enter into said agreement with the said Priest by the false and fraudulent representations made by the defendants, other than defendant Dustan, to the said Davison, that the defendant company had certain assets, including manufactured brick, debts due, etc., which would be available for the purposes of the company in the event of the said Frank Davison entering into said agreement, and that the treasury stock of said company was the sole consideration to be given to the said Priest by the said company for assuming the said company's debts by the said Priest, whereas in fact the said quick assets had been disposed of by the said company before the making of said agreement and formed part of the consideration to be given, and in fact given, to the said Priest by said company for assuming and paying said company's debts.

The defendant, Priest, delivered a defence as follows:

1. This defendant denies that the said Frank Davison was induced to enter into said agreement by false or fraudulent representations made by the defendants or any of them as alleged in paragraph 10a of the amended statement of claim or otherwise or at all.

2. This defendant denies that the defendants or any of them made any of the representations alleged in paragraph 10a of the amended statement of claim.

The trial was adjourned from Pictou to Halifax to take further evidence, and the trial Judge gave judgment for the plaintiffs on the amended statement of claim; and the relevant parts of the order for judgment read as follows:

It is declared that the said Francis Davison was induced to enter into the agreement herein, dated the 1st day of November, 1913, and

made between the defendant John W. Priest and the said Francis Davison set out in the statement of claim by the false and fraudulent representations made by the defendant, John W. Priest, and the said agreement is hereby set aside and declared to be of no effect.

And it is further ordered that the plaintiffs do recover from the defendant, Priest, the sum of $9,000 paid by the said Francis Davison pursuant to the said agreement, with interest thereon from the 1st day of April, 1919, at 5% per annum, and that the counterclaim of the defendant Priest herein be and it is hereby dismissed with costs.

There is an appeal from this decision and order.

It will be noticed that the plaintiffs' case as set out in their amended statement of claim depends upon whether or not the deceased was induced to enter into the agreement by the false and fraudulent representations that the company had certain assets.

It follows that if Frank Davison knew that the assets in question were not the property of the company, but had been otherwise disposed of, that the action must fail because it could not under such circumstances be successfully contended that he was induced to enter into the agreement on the faith of these assets being the property of the company.

A reference to the statement of quick assets and liabilities of the company enclosed in Grandin's letter shews that the gross liabilities were $7,848.95; the quick assets were $2,042.30; and the net liabilities were $5,806.65, and in Grandin's letter there is the statement that "The promoters of the Pictou Co. to receive 587,193 shares remaining in the C.C.C.C. treasury on payment of that company's debts ($5,806.65 plus expenses likely to be incurred between now and taking over the C.C.C. Co., say in all $7,000) which are to be exchanged for 58,710 shares in the Pictou Co."

It will be seen that the net liabilities are referred to in this clause and in the statement, and the $5,806.65 is arrived at by deducting the quick assets in question from the gross liabilities.

The evidence shews that these quick assets were handed over to the defendant who paid all the debts, and the contention of the plaintiffs is that these quick assets are included in the "properties belonging to the company contained in" Grandin's letter to Davison, and that the agreement on the part of the

N. S.
S. C.
DAVISON
v.
PRIEST.
Harris, C.J.

defendant to pay all the debts of the company required him to pay the gross debts without the aid of these quick assets.

The contention of the defendant is that throughout the negotiations the debts were always discussed and referred to as the net debt and that both parties so understood the matter.

Reginald Davison, a son of Frank Davison, accompanied his father when the negotiations were carried on, and before the amendment to the plaintiff's claim was thought of his evidence was taken and on this point is thus reported: "Q. And you also understood that there were certain small assets to come in? A. Well, I understood that when we took it over there was to be a clean sheet, and there was not to be any assets, and the debts were all to be paid, wiped out and start a clean sheet."

After the amendment had been made and all parties realised the importance of the question, and after the defendant and Grandin had testified that Frank Davison had been told that the quick assets were to be applied as against the gross liabilities, Reginald Davison was recalled and asked: "Q. Did Mr. Priest say anything to your father in your presence as to Mr. Priest taking over the liquid assets of the company? A. No, not to my knowledge, I am sure he did not. Q. About his taking over the bricks that were manufactured at the time or any of the other assets? A. I am pretty sure that he did not; in fact I am sure he did not say anything about it to my knowledge."

The witness did not attempt to explain his previous evidence, which is inconsistent with his later statements, and even if these latter could be regarded as positive denials, I would, I think, have to take his earlier statement in preference.

Both Priest and Grandin swear positively that the matter of the quick assets was discussed with Frank Davison and he was told that Priest was to take these assets and discharge the liabilities, and E. M. McDonald, M.P., who drew the agreement as solicitor for both Frank Davison and the defendant states that at the interview when the defendant and Frank Davison were both present at his office, "there was some question about paying the debts of the company. Mr. Priest was to dispose of some brick or something of that kind. I have forgotten the details and he was to pay the debts up to November 1st. Then I pro-

ceeded to draw the agreement. They talked for a very long while, and every phase of the thing was discussed and I started to draw the agreement."

And Roy Davison in his evidence more than once speaks of the debts as being about $6,000. They could only be that amount if all the quick assets were applied in reduction of the gross liabilities, and that is what Grandin's letter referred to in the contract plainly shews.

From this evidence there is no escape from a finding that Frank Davison knew from the beginning that the $2,000 of quick assets were not to form part of the assets retained by the company, but were to be applied in reducing the liabilities to about $6,000, and that sum was what was to be paid by the defendant.

The phrase in the agreement is that it is made on the faith of the statements "as to the properties belonging to the company" contained in Grandin's letter, and in that letter there is a list of various clay lands to which the company had a title or which it held under lease, aggregating 525 acres.

The quick assets consisted largely or altogether of promissory notes, horses, stock of manufactured brick, coal and cement. The word "properties" is an apt phrase to use in referring to the lands but quite inappropriate in referring to these quick assets. I think it is obvious that it was not intended to include the quick assets, but if it was so intended it could not affect this case which must turn on the question as to whether or not the deceased, Frank Davison, was induced by misrepresentation to enter into the agreement. When he was told and knew all about the matter such a defence is absolutely hopeless.

The only answer suggested by counsel for the plaintiffs was that the agreement expressly stated that all the debts were to be paid by defendant and also in terms included all the properties mentioned in Grandin's letter. I have already given my reason for thinking that it did not include and was never intended to include the quick assets, but assuming that it did it could at most give rise to an action against defendant to restore these assets to the company. It would not justify a judgment setting aside the agreement.

N. S.

S. C.

DAVISON v. PRIEST.

Harris, C.J.

The appeal should be allowed with costs, and the action dismissed with costs.

There was a counterclaim for interest on the two promissory notes given by Frank Davison. The agreement says these notes were to bear interest at 6%, but the evidence shews they were drawn without interest and no interest was paid. The order for judgment dismissed this counterclaim with costs. Nothing was said about the matter on the appeal, and if counsel do not agree about the matter they will be heard as to the counterclaim when the rule is settled.

Longley, J.

LONGLEY, J.:—I shall not differ from the rest of my colleagues in this case, although I have the gravest possible doubt in reaching the conclusion they have. I am under the impression there was wilful misrepresentation on the part of Priest, and I have very great difficulty in reaching an opinion opposite to the conclusion that the trial Judge reached.

However, as I do not feel strongly on the point, I will not undertake to differ fully from the other Judges.

Ritchie, E.J.

RITCHIE, E.J.:—The respect which I have for the finding of the trial Judge has caused me to have doubt as to whether I am correct in the conclusion at which I have arrived in this case, but after a most careful examination of the evidence I am of opinion that a case of fraud has not been made. I therefore would allow the appeal with costs. *Appeal allowed.*

ALTA.

S. C.

BANK OF OTTAWA v. ESDALE.

Alberta Supreme Court, Hyndman, J. January 6, 1920.

JUDGMENT (§ I C—10)—FOREIGN COURT—DEFAULT JUDGMENT—APPLICATION TO OPEN UP—ATTORNMENT TO JURISDICTION.

The application of a defendant in applying to open up a judgment of a foreign Court operates as an attornment or submission to the jurisdiction of such Court, although nothing further is done than obtaining the right to file a defence, on terms too severe for the defendant to comply with, and no formal appearance is ever entered and the order allowing him to defend is subsequently vacated and the original default judgment restored.

Statement.

ACTION on a judgment obtained in an Ontario Court against defendant, a resident of Manitoba.

J. E. Wallbridge, K.C., for plaintiff; *S. A. Dickson*, for defendant.

Hyndman, J.

HYNDMAN, J.:—This is an action brought by the plaintiff on a judgment obtained against the defendant in the County

Court of the County of Carleton, in the Province of Ontario, on February 14, 1918, for the sum of $700.50 including costs and interest to June 25, 1918. The defendant at the time the action was entered against him in the Ontario Court was a *bonâ fide* resident of this Province. No appearance was filed in the foreign Court and judgment by default was duly entered against him. On April 23, 1918, upon the application of the defendant through his counsel an Order was made by the Judge of the said County Court, the material portions being the following terms:

> Upon the application of the defendant Matthew Esdale, in the presence of counsel for the plaintiff as well as for the defendant, Esdale, upon reading the affidavits filed and upon hearing counsel for the said plaintiff as well as for the said defendant, Esdale.
>
> I do order that upon the said defendant Esdale paying into Court the amount of the judgment therein with interest and costs within 21 days from the date hereof that the said judgment be vacated and set aside as against the said defendant Esdale, and that leave be granted to the said defendant Esdale to appear herein and file a defence to this action.
>
> And I do further order and direct that the trial of the said action shall be heard at the Sittings of this Court to be held in June, 1918.

Affidavits made by the defendant and used on the application to open up the judgment were also filed and it is clear beyond question that the defendant through his counsel or solicitor appeared in the said Court for the purpose of obtaining the Order opening up the judgment. The terms imposed in the Order, however, were at the time too onerous for the defendant to comply with, and he took no further steps in the matter, with the result that on May 20, 1918, another Order was taken out at the instance of the plaintiff's solicitors in the following terms:

> Upon the application of the plaintiff, no one appearing for the defendant Matthew Esdale, though duly notified of the application and upon hearing read the application of Alexander Christie Hill filed and upon hearing what was alleged by counsel for the plaintiff aforesaid.
>
> I do hereby order that the Order dated the 23rd day of April, 1918, made by me herein shall be and the same is hereby vacated and set aside.

It is contended on the part of the plaintiff that the act of the defendant in applying to open up said judgment operates as an attornment or submission to the jurisdiction of the foreign Court. On the other hand the defendant contends that as noth-

ALTA.

S. C.

BANK OF OTTAWA v. ESDALE.

Hyndman, J.

ing further was done than obtaining the right to file a defence and on terms too severe for the defendant to comply with and the former judgment having been restored that the matter stands as though no application had ever been made at all. It cannot be overlooked that the material filed on the application clearly shews that the defendant never at any time disputed the jurisdiction of the Ontario Court, but had the intention of defending on the merits only and it was due to possible misunderstandings that an appearance and defence in the regular way were not duly filed. The defendant complains that the terms of the Order were unfair and prohibitive.

Under the circumstances, as I see them, had a similar application come before me I would have allowed the defendant to appear on terms much less onerous than those imposed. However, the case may have presented a different complexion to the Judge of that Court, and it is not for me to criticize the Order made, and I think I am bound to presume that everything done was fair and just and not contrary to natural justice. See Piggott, on Foreign Judgments, 2nd ed., 167, 168 *et seq.*

The principal question, then, for decision is "Was this act on the part of the defendant an appearance or voluntary submission to the jurisdiction of the foreign Court?" It is true the defendant never entered what is known as a formal appearance or defence because of the onerous conditions above referred to, and not having done so the Order allowing him to defend was vacated and the original default judgment was restored, and as the judgment now stands it is as though no such application or Order had ever been made. It seems to me, however, the case does not depend on whether the defendant did or did not enter an appearance or defence within the limited meaning of those terms, but rather did he in any manner recognize the jurisdiction of the Court by some act or proceeding in the cause?

I have looked very carefully through many of the cases and fail to find any altogether on all fours with this one, but is seems to me it is the same in principle as *Guiard* v. *de Clermont and Donner*, [1914] 3 K.B. 145, the head note of which reads:

> The plaintiff, who resided and carried on business in Paris, commenced proceedings in the Tribunal of Commerce of the Seine against

the defendants, who were merchants carrying on business in London, for breach of contract. A notification of those proceedings was sent to the French Consul in London, who informed the defendants that certain legal documents had been received by him for them and requested them to take them up. The defendants, although they had reason to suspect to what the documents related, declined to take them. Thereafter judgment by default for damages and costs was entered against the defendants in the Tribunal of Commerce, and intimation thereof was given in the same way as in connection with the commencement of the proceedings, but the defendants took no notice thereof until the plaintiff obtained the issue of a saisie-arret or conditional order attaching any moneys belonging to them in the hands of the Credit Lyonnais Bank in Paris. The defendants had a sum of 4l. or 8l. due them in the bank at the time, and the bank intimated to them that the saisie-arret had been issued, whereupon the defendants filed an "opposition" in the Tribunal of Commerce asking that the default judgment should be reopened. The Tribunal of Commerce allowed the "opposition," heard the case on the merits, and gave judgment for the defendants with costs. The plaintiff appealed to the Court of Appeal in Paris, and that Court held that, the first judgment of the Tribunal of Commerce having been executed by the plaintiff, the defendants' "opposition" was too late and was therefore not receivable, and accordingly the plaintiff's appeal was allowed. The plaintiff now sued on the judgment of the Court of Appeal restoring the first judgment of the Tribunal of Commerce:—

Held, that the judgment was enforceable inasmuch as (1) the defendants had voluntarily appeared in the French proceedings, and (2) the judgment took its whole force and effect from the decision of the Court of Appeal and was not merely the original default judgment.

I also find in 4 Corpus Juris under the title of "Appearances" notes founded chiefly on American decisions, but which I think are entirely in accordance with our own principles of law, and I here quote some of them:

A general appearance may be express or it may arise by implication from the defendant seeking, taking or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting only the jurisdiction. The appearance must be by the party himself or by a duly authorized representative acting for him (page 1316, par. 3.)

In most jurisdictions a defendant is considered to have made a general appearance when he applies for or obtains leave to answer, after the overruling of a demurrer, the striking out of an answer, or even after judgment by default. But such an appearance does not relate back so as to validate void proceedings theretofore had. So an application for an extension of time to plead is a recognition of the jurisdiction of the Court over the person and constitutes a general appearance (page 1339, par. 31).

A general appearance is entered in a cause by the making of any motion which involves the merits (page 1340, par. 32).

ALTA.

S. C.

BANK OF OTTAWA v. ESDALE.

Hyndman, J.

A motion to vacate a judgment, based on the sole ground of want of jurisdiction of the person, does not constitute a general appearance. But it is otherwise, if the motion is based on other grounds, either alone or coupled with an objection to the jurisdiction. . . . An unqualified appearance by motion to vacate a judgment amounts to a general appearance, where it is required that, if an appearance is special, it shall be so stated. . . .A general appearance is entered by making a motion to set aside a default, except where the judgment is absolutely void for want of jurisdiction of defendant, and the motion is made upon that sole ground (pages 7341, 7342, par. 33).

Where a defendant, properly served, moves to vacate a default and at the same time asks permission to file an answer, he thereby makes a general appearance waiving the service of summons; but such appearance does not relate back so as to cure void proceedings already had (page 1370, par. 69).

(1) An application for an extension of time to answer is a recognition of the jurisdiction of the Court over the person, and requires a general appearance. To extend the time to answer is a favour which can only be granted to a defendant in an action. And to ask as a favour of the Court, an extension of the period of time to answer on the merits, is a submission to the jurisdiction of the Court. (2) It is well settled that an application for an extension of time ordinarily amounts to a voluntary general appearance and a submission to the jurisdiction of the Court, because the circumstances shew a waiver of the right to question such jurisdiction (page 1339, note 85a).

As pointed out, the above quotations are based on decisions in the various States of the Union, but I think are quite in accord with our own principles of law. The question is one largely of fact, and in this instance is: "Did the defendant in any way recognize the jurisdiction of the foreign law Court?" It would appear to me that the motion made on his behalf in the Ontario law Court upon material which does not refer at all to jurisdiction but merely to merits must be held to constitute a general appearance in that Court and its submission to its jurisdiction notwithstanding that due to the conditions imposed he took no further steps.

Mr. Dickson argued also that the plaintiff had failed to prove that the judgment, if actionable here, had not been paid or satisfied. The only pleas in the defence, however, are that no such judgment was recovered but if so it was one in a foreign Court wherein the defendant did not appear. In order to avail himself of the defence of payment or satisfaction I think it should have been alleged in the defence. The judgment once having

ALTA.

S. C.

BANK OF OTTAWA v. ESDALE.

Hyndman, J

been proved as it was here a *prima facie* case of debt is established which may of course be displaced by the defendant but only after a plea alleging payment or satisfaction is properly placed upon the record. *Grant* v. *Easton* (1883), 49 L.T. 645, 13 Q.B.D. 302; *Hodsoll* v. *Baxter* (1858), E.B. & E. 884, 120 E.R. 739.

It seems to me therefore that I have no alternative but to order that judgment be entered for the plaintiff for the amount of the claim together with interest at 5% per annum from June 25, 1918, and costs of the action.

Judgment accordingly.

REX v. TEY SHING.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 7, 1920.

ARREST (§ I B—9)—WITHOUT WARRANT—OPIUM AND DRUG ACT—JURISDICTION OF MAGISTRATE.

An objection to a magistrate's jurisdiction on the ground that the accused has been illegally arrested without warrant, is too late if not taken until after pleading in the regular way without protest.

[*Rex* v. *Pollard* (1917), 39 D.L.R. 111, followed.]

APPEAL from the judgment of Ives, J., dismissing a motion to quash a conviction under the Opium and Drug Act, 1-2 Geo. V., 1911 (Dom.), ch. 17. Affirmed. Statement.

J. K. Macdonald, for Crown; *J. M. Macdonald*, for appellant.

HARVEY, C.J.:—The accused was convicted of a breach of The Opium & Drug Act 1-2 Geo. V., 1911 (Dom.), ch. 17, in having opium in his possession without lawful excuse. Harvey, C.J.

He was arrested without a warrant. The record shews that there was a remand for a couple of days and it is stated by counsel that accused was released on bail. On the return he pleaded not guilty and after some evidence was given, in which it was disclosed that he had been arrested without warrant, his counsel took objection to the magistrate's jurisdiction upon the authority of *Rex* v. *Pollard* (1917), 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 Alta. L.R. 157. The case proceeded, however, and he was convicted. A motion to quash the conviction was made

ALTA.

S. C.

REX v. TEY SHING.

Harvey, C.J.

before Ives, J., who dismissed it. No written reasons were given, but counsel states that he expressed the view that the arrest was not illegal though without warrant. Without considering whether on the facts of the case an arrest without warrant was authorized we are of opinion that the view expressed by Walsh, J., in *Rex* v. *Kostich* (1919), 31 Can. Cr. Cas. 407, is a correct one, and that this objection, even if it would have been a valid one if taken in time, must be taken promptly, as was done in the *Pollard* case, and that it was too late after pleading in the regular way without protest.

The appeal is, therefore, dismissed with costs.

Stuart, J. Beck, J.

STUART, J., and Beck, J., concur with Harvey, C.J.

Appeal dismissed.

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. February 26, 1920.

STATUTES (§ I C—20)—WORKMEN'S COMPENSATION ACT, 6 GEO. V. 1916, CH. 125—MANITOBA—ITS CONSTITUTIONAL VALIDITY—STATUS OF BOARD—ADMINISTRATIVE BODY—NOT A COURT OF JUSTICE—JURISDICTION.

The Workmen's Compensation Board as created by the Workmen's Compensation Act, 6 Geo. V. 1916, ch. 125, and amendments, is an administrative body, and not a Court of justice. This body has certain jurisdiction given to it by the statute, and it is the duty of the Courts to lend their assistance when necessary as long as the Board acts within this jurisdiction. Should the Board exceed its jurisdiction or act without jurisdiction it may be restrained.

[*Re Toronto R. Co. and City of Toronto* (1918), 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381; *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.*, 48 D.L.R. 218, [1920] A.C. 184; *Murphy* v. *City of Toronto* (1918), 45 D.L.R. 228, 43 O.L.R. 29; *C.N.R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, 29 Man. L.R. 193, referred to.]

Statement.

APPEAL from Mathers, C.J.K.B. (1920), 50 D.L.R. 578. Although the appeal was from an order of the Referee in Chambers dismissing the action, the argument before Mathers, C.J.K.B., assumed the form of an attack upon the constitutional validity of the Workmen's Compensation Act, 6 Geo. V. 1916, (Man.) ch. 125 (see amendment 9 Geo. V. 1919, ch. 118), the discussion proceeding as if there had been a case stated under rr. 463-468 raising that question of law. It was claimed by the plaintiff that the Workmen's Compensation Board, as constituted by secs. 46-52 of the Act, and having the powers conferred upon it by secs. 57-59, 61, 70 and other sections, is in essence a Superior Court,

that therefore the appointment of the Board and its remuneration came, by secs. 96 and 100 of the B.N.A. Act, within the powers exclusively assigned to the Dominion and that an appointment by the Provincial Government was consequently without jurisdiction.

J. B. Hugg, K.C., for the Attorney-General of Manitoba.

T. J. Murray and *A. A. Fraser*, for the Attorney-General of Manitoba and appellants.

W. M. Crichton and *R. W. McClure*, for respondent.

PERDUE, C.J.M.:—A somewhat similar question was raised in *Re Public Utilities Act* (1916), 30 D.L.R. 159, 26 Man. L.R. 584, in which my brother Haggart and myself were of opinion that that Act was *ultra vires* of the Legislature of the Province as infringing the exclusive powers of the Dominion under 96 and 100 of the B.N.A. Act. The other Judges, Howell, C.J.M., and Richards, J.A., held that the constitutional question was not before the Court, because section 70 of the Act only permitted an appeal upon a question involving the jurisdiction of the Commission, and that such appeal must be confined to the question whether the Commission had, in making the order appealed from, acted within the powers given to it by the Act.

Perdue, C.J.M.

Some two years later the same constitutional question was considered by the Appellate Division of the Supreme Court of Ontario in *Re Toronto R. Co. and City of Toronto* (1918), 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381. I am much impressed with the point raised in that case by Meredith, C.J.O., and stated by him as follows, at page 551:—

> The presumption undoubtedly is that *de facto* members of the Board were validly appointed, and it might be a sufficient answer to the contention to say that there is nothing to shew that they were not appointed by the Governor-General. There is, however, an insuperable difficulty in the way of the appellant's success on this branch of the case. That it is not open to attack in a collateral proceeding, the status of a *de facto* Judge, having at least a colourable title to the office, and that his acts are valid, is clear, I think, on principle and on authority, and it is also clear that the proper proceeding to question his right to the office is by *quo warranto* information.

The Chief Justice cites many English, Canadian and American authorities which bear out his view as above expressed. He cites, at page 554, the rule deduced from the cases in the United States, stated in 23 Cyc. 621, as follows:—

> The right of a *de facto* Judge to hold his office is not open to question, nor are his acts subject to attack in a collateral proceeding; these being matters which can only be inquired into in a proceeding to which he is a party.

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Perdue, C.J.M.

All the other Judges of the Appellate Division agreed with the view taken by the Chief Justice.

From this decision an appeal was taken to the Judicial Committee of the Privy Council, who delivered their judgment on 20th January, 1920, 51 D.L.R. 69. A copy of this judgment has been furnished to us. The Judicial Committee allowed the appeal on a ground which was quite distinct from the constitutional question. This latter question was argued, but, as their Lordships state, it was unnecessary for them to consider it, in view of their decision upon the other point.

The intention of the Workmen's Compensation Act is to provide means for securing speedy compensation to workmen who receive injury by accident arising out of and in the course of their employment. In the cases covered by the Act the employer is liable to pay the compensation. In order to assure to the workmen or their dependents payment of such compensation as may be awarded, every employer is required by the Act to file with the Board a policy of insurance in form satisfactory to the Board, providing for payment to the Board of the compensation which may become payable by the employer; unless the Board, with the approval of the Lieutenant-Governor in Council, permits an employer to carry his own insurance (sec. 71). One purpose of the Act is to afford prompt financial assistance to an injured workman. Another purpose is to enable him to recover reasonable compensation without the expense of litigation and the delay incident thereto.

Section 3 of the Act declares that:—

> Where in any employment to which this Part applies, personal injury by accident arising out of and in the course of the employment is . . . caused to a workman, his employer shall be liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, except, etc.

The exceptions are (a) where the injury does not disable the workman for more than 6 days, and (b) where the injury is attributable to the serious and wilful misconduct of the workman, unless death or serious disablement results. In some cases not only "the employer" but also the principal who has engaged "the employer" to perform the work is liable to compensate the workman for injury sustained in the execution of the work (sec. 9). The administration of the Act is committed to "The Workmen's Compensation Board"

which is declared to be a body corporate consisting of a Commissioner and two directors, all of whom shall be appointed by the Lieutenant-Governor in Council (8 Geo. V. 1918, ch. 105, sec. 6). No special qualification of any kind is required of the members. It is not necessary under the Act that any member of the Board should be a lawyer or should possess any legal training. To the Board so constituted the Legislature has entrusted exclusive jurisdiction to examine into, hear and determine all matters and questions arising under Part I. of the Act (which, with a few exceptions, applies to employment in general). The action or decision of the Board on any matter or thing in respect of which any power or authority is conferred upon the Board shall be final and conclusive and shall not be open to question or review in any Court and no proceedings of the Board shall be restrained by injunction, prohibition or other process in any Court or be removable by *certiorari* or otherwise into any Court, sec. 57. The Legislature in fact makes the Board the exclusive judges of law and fact in all questions arising under Part I. of the Act. By sec. 13, the right of compensation provided by Part I. of the Act shall be in lieu of all rights of action by the workman or his dependents by reason of any accident to the workman and no action in any Court of law in respect of it shall thereafter lie. By sub-sec. 2 of sec. 13, any party to such action if brought may apply to the Board for adjudication and determination of the question of the plaintiff's rights to compensation under Part I. and as to whether the action is one the right to bring which is taken away by that Part, "and such adjudication and determination shall be final and conclusive." It is under this section that the order or certificate of the Board was made declaring that the plaintiff had a right to compensation under Part I. of the Act by reason of his accident and that the matter was one in which the right to bring an action was taken away by the Act. The motion to dismiss this action was founded upon the certificate of the Board that the plaintiff has a right to compensation under Part I. of the Act and that the matter in question was one in which the right to bring an action for, or by reason of, such accident was taken away by the Act.

Similar statutes have been in force for several years in other Provinces of Canada and the jurisdiction of a Provincial Legislature to enact such statutes has not been successfully attacked.

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Perdue, C.J.M.

The powers of the Board under the Workmen's Compensation Act of Ontario were considered by the Appellate Division in *Murphy* v. *City of Toronto* (1918), 45 D.L.R. 228, 43 O.L.R. 29.

In that case the Workmen's Compensation Board notified the defendant corporation, which was indebted to the plaintiff, a contractor, for work done, to pay the amount of an assessment by the Board to the Board out of the moneys due by the defendant to the plaintiff. The defendant paid the assessment to the Board. The action was brought by the plaintiff to recover the amount from the defendant. It was held by Clute, J. (1917), 45 D.L.R. 229, 41 O.L.R. 156, that the Court had jurisdiction to inquire into the proceedings of the Board to ascertain whether the defendant had brought itself within the protection of the Act. It was also held that after a decision has been rendered and a valid assessment made by the Board, it is final and not subject to review in the Courts. The trial Judge in that case allowed an inquiry to be made and evidence to be taken to shew that a valid assessment had been made. The result of the investigation was that it was found by the Judge that the assessment by the Board was valid. The decision of the trial Judge was unanimously affirmed by the Appellate Division, 45 D.L.R. 228, 43 O.L.R. 29. The constitutional validity of the Act was not specially argued but was assumed both by the trial Judge and the Appellate Court. The Manitoba Workmen's Compensation Act is similar in effect to the corresponding Ontario statute, 4 Geo. V. 1914, ch. 25.

C.P.R. Co. v. *Workmen's Compensation Board*, (*The "Sophia"* case) (1919), 47 D.L.R. 487, dealt with the corresponding Act, 6 Geo. V. 1916, ch. 77, in British Columbia. The Court of Appeal held that the Act was *ultra vires* of the Legislature of British Columbia in so far as it purports to warrant the payment of compensation to seamen, or their dependents, for accidents, or death by accidents, on ships in foreign waters. This decision was reversed by the Judicial Committee of the Privy Council: *Workmen's Compensation Board* v. *Can. Pac. R. Co.*, 48 D.L.R. 218, [1920] A.C. 184. In giving the judgment of the Privy Council, Lord Haldane said, at page 221:—

> It is not in dispute that the persons employed by the respondent company with reference to whose dependents the present question is raised, come within the conditions under which the enactment purported to be applicable to them. Nor can it be successfully contended that the Province had not a general

power to impose direct taxation in this form on the respondents if for provincial purposes.

It was held, following *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, that the Province could impose direct taxes on companies carrying on business within the Province, even where the companies were incorporated under Dominion statute. Lord Haldane dealt with other contentions of the respondents that the Act was *ultra vires* and over-ruled them. The question as to the power of the Province to appoint the Board was not raised, but, apart from that single question, I must regard the decision as an authority for the validity of the Act in general.

The right of compensation under the Act was regarded by Lord Haldane as the result of a statutory condition of the contract of employment made with a workman resident in the Province, for his personal benefit and for that of members of his family dependent upon him: 48 D.L.R. 218-220. I would refer also to *Citizens Ins. Co. of Canada* v. *Parsons* (1881), 7 App. Cas. 96, at pages 109-110.

Taking the Workmen's Compensation Act at large, I think the power to enact such legislation was conferred on the Legislature of the Province by sec. 92 of the B.N.A. Act. In *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at 132, it was said that the B.N.A. Act conferred on a Provincial Legislature,

> authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme.

The same view is expressed in *Dobie* v. *Temporalities Board* (1881),7 App. Cas. 136 at 146, and *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437 at 441-443.

There may be certain clauses in the Workmen's Compensation Act the validity of which may be open to question, but it is not necessary to discuss or refer to them on this appeal. The Board as created by secs. 46-52 is an administrative body and not a Court of justice. It is not, in my opinion, a superior Court. Some provisions of the Act are of a drastic, almost of a revolutionary, character. But the Courts have nothing to do with the policy of the legislation. The function of interpreting the statute lies with the Court of King's Bench as the High Court of this Province, subject, of course, to appeal from that Court: 27 Hals. 126-127 and

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Perdue, C.J.M.

cases there cited. If the Board exceeds its jurisdiction or acts without jurisdiction it may be restrained: *C.N.R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, 29 Man. L.R. 193. But as long as the Board acts within its jurisdiction it is the duty of the Courts to lend their assistance when necessary so as to carry out the purpose and intention of the Act.

With great respect, I would allow the appeal and restore the order dismissing the action.

Cameron, J.A.

CAMERON, J.A.:—This is an action for damages brought by the plaintiff, a carpenter, against the defendants, contractors, for personal injuries sustained while in the defendants' employment. It is alleged by the plaintiff in his statement of claim, issued November 27, 1918, that his injuries were due to the defendants' negligence, and, alternatively, to the negligence of the defendants' foreman to whose orders he was bound to conform.

It is alleged in the defence, after making certain denials of the plaintiff's allegations, that the accident happened on May 29, 1918, and that on May 29, 1918, the plaintiff filed his claim with the Workmen's Compensation Board in the form of an affidavit and that his claim was duly allowed and payments made in respect thereof; also that on November 26, 1918, an application was made by the defendants to the Board for adjudication and determination of the right of the plaintiff to compensation under the Act and that the Board on December 5, 1918, declared that the plaintiff's right to compensation was within the Act and the right of action in respect thereof was taken away.

An application was made to the Referee to dismiss the action and, on March 21, 1919, he made an order dismissing the action, holding that the order made by the Board December 5, 1918, was final. On appeal from this order, Galt, J., gave the plaintiff leave to amend by raising the question of the validity of the Act. Thereupon the plaintiff, May 30, 1919, replied to the amended defence by making further allegations, amongst them one that the Act in question was *ultra vires* of the Legislature, more particularly with respect to certain specified sections.

Subsequently this appeal was heard before Mathers, C.J.K.B., 50 D.L.R. 578, when the question of the validity of the Workmen's Compensation Act, ch. 125, 6 Geo. V. 1916 (Man.), or rather of

certain sections of that Act, was argued. As a result of the informal procedure thus adopted, an order was made or judgment pronounced by Mathers, C.J.K.B., in which it was adjudged and declared that secs. 46 to 51 inclusive of the said Act are *ultra vires* of the Legislature of the Province of Manitoba, especially so when considered in relation to the other provisions of the Act and the powers conferred upon the Workmen's Compensation Board by the provisions of the Act.

From this order or judgment the defendants appeal and, on the argument before us, it was agreed by counsel for all parties, including counsel representing the Attorney-General, that the question of the validity of the Act should be argued and determined as if regularly brought before the Court under sec. 466 of the King's Bench Act, R.S.M. 1913, ch. 46.

The Workmen's Compensation Act, 6 Geo. V. 1916, ch. 125, repealed the Employers Liability Act, R.S.M. 1913, ch. 61, and the Workmen's Compensation Act, R.S.M. 1913, ch. 209, provided a new method of determining and paying compensation to workmen for injuries sustained in their employment. It is limited to workmen in certain specified industries to which additions may be made by the Board constituted by the Act. Part II. of the Act deals with employers' liability, but is a different subject and does not affect the question before us. The Act enlarges the right to compensation for personal injuries from accident arising out of and in the course of employment to all cases excepting those where the workman is not disabled for a period of at least 6 consecutive days and excepting where the accident is attributable solely to the serious and wilful misconduct of the workman "unless the injury results in death or serious disablement." No action lies for the recovery of compensation but all claims for such compensation are to be heard and determined by a Board which is created by the Act.

By sec. 13 it is provided that the right to compensation provided by the Board shall be in lieu of all actions and rights of actions against the employers of workmen of the designated classes and by sub-sec. 2 that any party to an action may apply to the Board for adjudication and determination of the plaintiff's right to compensation and as to whether the action is one the right to bring which is taken away by the Act and such adjudication and determination

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Cameron, J.A.

shall be final and conclusive. This subsection was amended in 1919, 9 Geo. V, ch. 118, but the amendment is immaterial here.

The Board consists of a Commissioner and two directors to be appointed by the Lieutenant-Governor in Council, and shall be a body corporate. It is given the like powers as the Court of King's Bench or a Judge thereof, for compelling the attendance of witnesses, examining them under oath and compelling the production of documents.

It is provided that an accident fund shall be created to be furnished by contribution to be made by insurance companies and by employers carrying their own insurance, which may, if found necessary, be supplemented out of the Consolidated Revenue Fund. Employers are to file statements shewing wages earned by employees and a policy of insurance satisfactory to the Board is to be filed with such statements. The Board may examine the books of employers and may inspect their premises to see if satisfactory precautions against accidents have been taken. But to ascertain the scope of the Act reference must be made to the whole Act.

By sec. 57 the jurisdiction of the Board is made exclusive as to matters arising under the Act and its decisions are made final and conclusive and shall not be open to question or review in any Court and its proceedings shall not be restrained by injunction, prohibition or other process or proceeding in any Court or removable by *certiorari* or otherwise into any Court. The Board is given the power to rescind, alter or amend its decisions or orders. Provision is made for the creation of an accident fund out of contributions by insurance companies and underwriters, and by employers carrying their own insurance.

Sec. 57 is amended by 9 Geo. V. 1919, ch. 118, sec. 23, whereby sub-sec. 2 of said sec. 57 is repealed and a new subsection, retroactive in its operation, is substituted. Without limiting the generality of the provisions of sub-sec. 1 it declares the exclusive jurisdiction of the Board shall extend to determining the existence and degree of disability, the permanence of the disability, the effect of the injury on earning capacity, average earnings, relationship of workman to his family, dependency, whether any industry within scope of Act, and "whether or not any workman in any industry is within the scope of this Part (Part I. of the Act) and entitled to compensation thereunder."

The authority of the Provincial Legislature to make laws respecting the matters involved in the legislation in question is to be found amongst the classes of subjects assigned to its exclusive jurisdiction by sec. 92 of the B.N.A. Act and more particularly by sub-sec. 13 of sec. 92, concerning "Property and Civil rights." Incidentally there arises also the consideration of sub-sec. 14 "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."

There is no provision in sec. 91 of the B.N.A. Act (which defines the exclusive legislative authority of the Parliament of Canada), that is affected by this Act. No question whatever arises that it encroaches upon the powers of Parliament in the slightest. There is no provision in sec. 91 or elsewhere in the Act that the Provincial Legislature shall not make laws respecting the creation and appointment of Boards or Commissions or Officers who may exercise judicial powers.

Section 96 of the B.N.A. Act provides "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." This power of appointment has nothing to do with the Dominion Parliament and concerns only the powers of the Governor-General. No question, therefore, arises with respect to conflict of powers between Parliament and the Provincial Legislature as respectively assigned to them by secs. 91 and 92 of the B.N.A. Act. The Act before us is within the authority of the local Legislature under sec. 92. The sole question is whether its validity is affected by the power of appointment reserved to the Governor-General by sec. 96 of the Imperial Act, with which secs. 99 and 100 are to be read.

The authority of the Provincial Legislature and that of the Dominion Parliament may at times overlap. "Subjects which in one aspect and for one purpose fall within sec. 92 (B.N.A. Act) may in another aspect and for another purpose fall within sec. 91." *Hodge* v. *The Queen*, 9 App. Cas. 117 at 130. See *Attorney-General of Manitoba* v. *Manitoba License Holders Ass'n*, [1902] A.C. 73 at page 78. In such a case we are to determine "the true nature and character of the legislation in the particular instance under

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Cameron, J.A.

discussion"—its grounds and design, and the primary matter dealt with—its scope and object—"in order to ascertain the class of subject to which it really belongs," and any merely incidental effect it may have over other matters does not alter the character of the law. *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at 839-840. Similar considerations may reasonably be invoked in determining the validity of legislation when it is assailed as being apparently repugnant to provisions of the B.N.A. Act other than sec. 91.

What then is the scope and object of this legislation? It is contended that the object of the Act in question is to provide a scheme of accident insurance for the benefit of workmen within this Province, and that the Board which is created by the Act is not a Court but merely an administrative body designed to carry out effectively its terms.

In *C.P.R. Co.* v. *Workmen's Compensation Board*, 48 D.L.R. 218, [1920] A.C. 184, [1919] 3 W.W.R. 167, it was held by the Privy Council, on appeal from the Court of Appeal for British Columbia, 47 D.L.R. 487, that the provisions of the Workmen's Compensation Act, 1916, 6 Geo. V. (B.C.), ch. 77, were not *ultra vires* of the Provincial Legislature for the alleged reason that they warranted payment of compensation to dependents of workmen, coming within the enactment, who may be killed in an accident elsewhere than in the Province. The British Columbia Act is similar to that of this Province and its validity was impeached on the ground above set forth, but there is no suggestion made throughout that the Act was in conflict with sec. 96 of the B.N.A. Act. Yet Macdonald, C.J.A., says: "The Board is both Judge and sheriff. It pronounces judgment and carries it into execution. It is a new Court in substitution, to the extent of jurisdiction of the ordinary Courts with powers in part judicial and in part ministerial. Its creation is authorized by the powers conferred on the Legislature under said class 13 (of sec. 92 of the B.N.A. Act)." But McPhillips, J., who delivered a dissenting judgment, which was upheld in the Privy Council, took the view "that the Workmen's Compensation Act is in its nature a scheme of insurance or pension scheme, providing compensation to workmen, in case of injury and to their dependents in case of death caused by accident quite independent of negligence and the obligation is imposed at large upon the

employers covered by the Act in favour of the workmen and dependents of workmen defined in the Act," page 494. Lord Haldane, in giving the judgment of the Privy Council, 48 D.L.R. 218 at 221, [1920] A.C. 184, deals with the provisions of the Act and holds that,

> the right conferred arises under sec. 8 (dealing with accidents outside the Province) and is a result of a statutory condition of the contract of employment made with a workman resident in the Province, for his personal benefit and for that of members of his family dependent on him. . . . This right arises not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province.

These views are of the greatest weight in determining the precise scope of this legislation. Our Act unquestionably creates a scheme of accident insurance and it further imposes a statutory condition on the contract of employment in the cases it specifies.

In *Murphy* v. *City of Toronto*, 45 D.L.R. 228, it was decided that a decision of the Board under the Ontario Workmen's Compensation Act, 4 Geo. V. 1914, ch. 25 (also similar to ours), was final and not subject to review by the Courts. The Appellate Division rested its decision, 45 D.L.R. 228, 43 O.L.R. 29, on sec. 60 of the Ontario Act (our sec. 57), giving the Board exclusive jurisdiction in the matter in question and held, agreeing with the trial Judge, that there was no right of action. In this case as in the British Columbia cases, no question was raised as to the validity of the legislation, though its provisions were thoroughly examined and discussed.

What is the meaning of the term "Superior Court" as used in sec. 96? It is pointed out in 9 Hals., page 9, that:—

> Many bodies are not Courts, although they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality; such as assessment committees, boards of guardians, the benchers of the Inns of Court. . . . or the General Medical Council.

And at page 11:—

> The Superior Courts are the House of Lords, the Judicial Committee of the Privy Council, the Supreme Court of Judicature, the Court of Criminal Appeal and the Courts of Chancery of the Counties Palatine of Lancaster and Durham and are all Courts of Records.

With the changes necessitated by the statutes enacted since 1867, those were Superior Courts as they existed and were present in the mind of the Imperial Parliament when it passed the B.N.A.

MAN.
C. A.
TREMBLAY
v.
KOWHANKO.
Cameron, J.A.

Act. The general conception as to what is a Superior Court with its attendant powers, dignity and prerogatives has not been changed since that time.

In 15 Corpus Juris, page 715, there is the following: "A Court is a body in the Government to which the public administration of justice is delegated." Similar definitions are given in a footnote. (2) "A tribunal charged, as a substantive duty, with the exercise of judicial power. (3) A tribunal organized for the purpose of administering justice, and presided over by a Judge or Judges." The term "has been held not to include a Master Commissioner, a Master in Chancery, a commission appointed by the Court, a public service commission . . . a board of equalization of taxes . . . the view being that the word "Court" implies a permanent organization for the administration of justice." *Ib.* at page 717. These definitions or expositions of the term are in accordance with our traditional views of Courts of justice and their meaning is accentuated when the word "superior" is prefixed.

The opinions stated on this question by Sir John Thompson in various reports made by him as Minister of Justice have been frequently cited. His report on the Quebec District Magistrates Act, 1888, is set out at length in Lefroy on Legislative Powers, pages 141-174, and the terms of the disallowed Act at pages 142-3. That Act was an attempt on the part of the Quebec Legislature to substitute a Provincial Court with provincially appointed Judges for a Superior Court with Dominion appointed Judges. Sir John Thompson comments on the decision of the Privy Council in *Regina* v. *Coote* (1873), L.R. 4 P.C. 599, holding that that dealt only with the question of conferring power to examine witnesses, etc., although a wider construction was placed upon it in *Regina* v. *Horner* (1876), 2 Cart. Cas. 317. But in a later report Sir John Thompson repudiated the idea that the local Legislatures have no power to create Courts of no matter how small jurisdiction, where Judges shall be appointed by the local executives. He maintains the view that the words of the B.N.A. Act referring to "Judges of the Superior, District and County Courts," include all classes of Judges like those designated and not those which at the passage of the Act happened to bear those names. Lefroy, Canada's Federal System, page 562.

Sir John Thompson made a restatement of his position in a subsequent report (May, 1892), quoted in Lefroy, Canada's

Federal System, page 566, which dealt with the provisions of a Quebec Act empowering the Lieutenant-Governor in Council, upon the report of the Railway Committee of the Executive Council, to cancel railway charters in certain cases. He held that the legislation might be objectionable as conferring on the Railway Committee powers generally reposed in legal tribunals, but adds that "it seems clear that a Legislature may invest other bodies than the Courts with such powers and functions without exceeding its jurisdiction." Mr. Lefroy remarks that the Minister is here speaking of the power of the Provincial Legislature to create a special tribunal for the determination of a special matter and not of the power to confer general jurisdiction.

It must be remembered that Sir John Thompson and other Ministers of Justice who have discussed this subject were dealing with the provincial Acts from the point of view of their disallowance and that the power of disallowance may be exercised upon grounds of policy and not necessarily upon the ground of *ultra vires*, which is properly a question for the Courts. In reality if a provincial Act is *ultra vires* there is no need to disallow it. But whatever his point of view, and his opinion though extra-judicial is entitled to weight, he evidently considered it was within the power of a local Legislature to create bodies other than Courts with the powers and functions usually reposed in legal tribunals for special purposes.

In *Re Toronto Ry. Co.* v. *City of Toronto*, 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381, an order made by the Ontario Railway and Municipal Board required the Toronto Railway Company to place a certain number of cars in operation and a further order was made requiring the company to pay a sum of money as penalty for non-compliance with the first order. On appeal Meredith, C.J.O., dealt with the objection that the order of the Board had no validity; that the Board is a "Superior Court" within the meaning of sec. 96 of the B.N.A. Act and that its members had no jurisdiction. He held that the presumption is that *de facto* members of the Board were validly appointed, and that it might be a sufficient answer to say there was nothing to shew that they were not appointed by the Governor-General. He says: 46 D.L.R. at 551:—

> That it is not open to attack, in a collateral proceeding, the status of a *de facto* Judge, having at least a colourable title to the office . . . is

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Cameron, J.A.

clear, I think, on principle and on authority, and it is also clear that the proper proceeding to question his right to the office is by *quo warranto* information.

At page 555 he expresses the opinion that the Board is an administrative body, having, as incidental to the performance of its administrative functions and the exercise of its administrative powers, jurisdiction to construe contracts and further that if the Board be a Court it is not a Superior Court within the meaning of sec. 96 of the B.N.A. Act, and he points to provisions in the Ontario Act warranting this view, not a few of which are to be found in the Act before us. See pages 559, 560. He concludes his judgment thus, page 561:—

> According to the rule which has been admittedly laid down, that in considering a question as to the constitutional validity of a provincial enactment, it is the duty of the Court "to make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of the B.N.A. Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it" (*per* Strong, J., in *Severn* v. *The Queen* (1878), 2 Can. S.C.R. 70, 103), we ought, in my opinion, to hold that in the Ontario Railway and Municipal Board Act, 1906, the Legislature must be taken to have constituted a tribunal, the members of which should be appointed under its authority as provided by sec. 4 (2), rather than that the Legislature created a Superior Court and usurped an authority which it did not possess, but which was vested in the Governor-General.

Maclaren, Magee and Hodgins, JJ.A., agreed with Meredith, C.J.O., and Ferguson, J.A., says, page 561:—

> As I read the B.N.A. Act, the designation *Superior* as applied to a Court means a Court, other than County and District Courts, in which is vested the right and power to control, regulate, restrain or review the acts and proceedings of some other Court.

For this and the reasons assigned by Meredith, C.J.O., he agreed with the other members of the Court in dismissing the appeal.

On appeal to the Privy Council, 51 D.L.R. 69, the judgment of the Appellate Division was reversed on the ground that the wording of the Ontario Act that the penalties therein prescribed must be imposed by the Railway Board "for the purpose of enforcing compliance" with its orders must be taken to refer to process for procuring specific performance and, further, that, the Act prescribing the penalties having been passed after a breach of the first order had occurred, it could not be supposed the Legislature passed it without intending some further allowance of time to

remedy the breach as that would bear too great a resemblance to *ex post facto* legislation. Their Lordships' conclusion, therefore, was that the order appealed from was not authorized by the Act. A still further ground is stated to the effect that in the proceedings before the Board no claim for penalties was made, nor was the question referred to until judgment was delivered. As to the other point, that the Board must be regarded as a "Superior Court," Viscount Cave, who delivered the judgment of the Judicial Committee, says at page 75, "This question was fully considered by the Supreme Court (of Judicature for Ontario) and was decided by that Court against the appellants" but he points out that in consequence of the view of their Lordships on other points it became unnecessary for them to consider it and it was not argued before them and they express no opinion on it.

Counsel called attention to certain characteristics of a Court which this Board does not possess. These are, of course, not individually or, perhaps, collectively, conclusive, but they throw light on the subject as indicating the intention of the Legislature and the object of the legislation. The Board is not declared to be a Court. It has no seal as is usual in the case of Courts. Its orders are not enforceable until registered in the King's Bench. They are not given by the Act the power of enforcement such as ordinarily exists to compel obedience to a Court order. There is given no power to commit for contempt. The provisions of the Act, taken as a whole, do not contemplate a litigation between parties but rather an adjustment of claims by the Board against a fund. There also exist under the Act what may be called positive attributes which are inconsistent with the idea of the Board being a Court. It is a body corporate and is given the right to bring an action and to take proceedings before magistrates. It is given the power to inspect premises and direct alterations to be made thereon and other powers at variance with those usually exercised by Courts. These and other characteristics apparent on perusal of the Act are in opposition to the contention that this Board is a Court and point to the conclusion that it is merely an administrative body created with the powers deemed necessary to carry out effectively the insurance scheme which is the object of the Act. The observations of Meredith, C.J.O., on this matter to which I have referred are most instructive.

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Cameron, J.A.

I cannot accede to the contention that the Board, merely because it is given, to a limited extent, certain powers usually exercised by judicial tribunals, which limited powers are necessary for and incidental to the due administration of the insurance scheme contemplated by the Act, is therefore a Superior Court. Similar powers have been freely bestowed upon provincial officers and authorities. It has been held that Provincial Legislatures have jurisdiction to pass laws for the appointment of justices of the peace, whose powers are largely judicial. In the same category we have the officers under the Real Property Act, R.S.M. 1913, ch. 34, coroners, arbitrators, assessors, Courts of Revision and commissioners to make inquiries respecting public matters. All these provincial authorities are clothed with powers that are more or less judicial.

An objection taken to the validity of the Act in the judgment appealed from and on the argument is based on sec. 3 which provides for determination by the Board whether an accident arose out of and in the course of employment. It is pointed out that these questions under the English statute are reserved for the Courts, as was the case before this Act. It is argued that if the jurisdiction of the Courts can be thus limited, such limitation cannot be indefinitely extended. But can there be any doubt about that? The constitution, maintenance and organization of the Courts is exclusively within the powers of the local Legislature. The right to enact implies the right to repeal. The powers of the Court of King's Bench are derived from the King's Bench Act and the Legislature that passed it can surely limit, modify or repeal it.

That the powers of this Board could be exercised by the Legislature itself cannot be doubted. The executive power of the Legislature is co-extensive with its legislative power. There is nothing to prevent the Legislature delegating its executive power to creating a Board to do what it itself could do within the ambit of its jurisdiction.

I am strongly inclined to the view, and I am strengthened in it by Meredith, C.J.O.'s judgment in the Ontario case referred to, that this legislation, assuming that it does create a Court as contended, is still *intra vires* of the Provincial Legislature. It is the only Legislature that can constitute a Provincial Court. Neither the Dominion Parliament nor the Governor-General has

the power. It is only the appointment of the Judge that can be questioned and that is a matter outside the legislation altogether and does not affect the validity of the legislation. If the Act creates a Court and is therefore invalid would the appointment of a Judge by the Governor-General have the effect of validating that which was theretofore invalid and void? I cannot see it. But in the view I take it is not necessary to discuss this aspect of the question raised.

In my opinion the sections of this Act here called in question are valid as a due exercise of the power of the Legislature to create a special body or tribunal for the adjustment and determination of matters necessarily and incidentally arising in the administration of the system of insurance which the Legislature intended to create. With that view of the Board's powers and functions it seems to me impossible to bring it within the meaning of the term "Superior Court" as that term is used in sec. 96.

I have not attempted to deal with all the numerous cases or citations more or less relevant brought to the attention of the Court. But this Act has been in force in this Province since 1916 and similar Acts in other Provinces for a longer period and now for the first time we have the question of their validity under sec. 96 brought before the Courts. Every presumption is to be made in favour of the validity of the legislation and in my judgment there was no argument presented to the Court that was cogent enough to rebut or shake that presumption.

Fullerton, J.A.

FULLERTON, J.A.:—This appeal raises the question of the validity of secs. 46 to 51 of the Workmen's Compensation Act, 6 Geo. V. 1916 (Man.), ch. 125, as amended by ch. 105, 8 Geo. V. 1918, and ch. 118, 9 Geo. V. 1919.

These sections deal with the appointment by the Lieutenant-Governor in Council of a Commission for the administration of Part I. of the Act.

Mathers, C.J.K.B., from whose judgment, 50 D.L.R. 578, this appeal is taken, held that the sections in question were *ultra vires* of the Provincial Legislature as being in conflict with the powers reserved to the Dominion by sec. 96 of the B.N.A. Act which provides for the appointment by the Dominion of Superior, District and County Court Judges.

While the Board is not in terms declared by the Act to be a "Superior Court" the contention is that it is by the Act constituted

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Fullerton, J.A.

in essence, if not in name, a "Superior Court." In other words, that if the powers and jurisdiction conferred on the Board constitute it a Court the fact that it is not in terms called a Court is immaterial.

The several sections of the Act conferring jurisdiction are set out at length in the judgment appealed from.

Speaking generally, the purpose of the Act is to create an "accident fund" for the payment of compensation to injured workmen or their dependents. The fund is created by an assessment levied upon the employers based upon an estimate of the probable amount of the pay rolls.

Speaking of the British Columbia Workmen's Compensation Act, which is very similar in its terms to our own, McPhillips, J.A., in the case of *C.P.R.* v. *Workmen's Compensation Board*, 47 D.L.R. 487 at 494, said:—

> The Workmen's Compensation Board is in its nature a scheme of insurance or pension scheme, providing compensation to workmen in case of injury and to their dependents in case of death caused by accident, quite independent of negligence, and the obligation is imposed at large upon the employers covered by the Act in favour of the workmen and dependents of workmen defined in the Act.

The Act is divided into two parts. Part I., with which we are alone concerned, deals with the subject of compensation; Part II. treats of the rights of workmen who are not entitled to avail themselves of the provisions of Part I.

The tribunal provided for by the Act to carry the provisions of Part I. into effect is the Workmen's Compensation Board.

Section 46, sub-sec. 1, as amended by 8 Geo. V. 1918, ch. 105, of the Act is as follows:—

> There is hereby constituted a Commission for the administration of this Part, to be called, "The Workmen's Compensation Board," which shall be a body corporate and shall consist of a Commissioner and two directors, all of whom shall be appointed by the Lieutenant-Governor in Council.

In order to effectually carry out the provisions of Part I. the Board is necessarily endowed with certain judicial powers and it is the possession of these powers which is said to constitute the Board a "Superior Court."

Mathers, C.J.K.B., in his written opinion, after referring to the fact that sec. 3 of the Act is in terms the same as sec. 5 of the Imperial Act, 6 Edw. VII. 1906, ch. 58, and to the fact that an immense amount of litigation had arisen in England in connection with the interpretation and application of that section, goes on to say at page 589:—

Prior to the enactment of this Act, such questions could only be determined by the judgment of this Court or the County Court after a trial. The Act transfers this jurisdiction to the Board. If the jurisdiction of the Court over this limited but very important field of litigation may thus be taken from the Courts and vested in an official or officials appointed and paid by the Province, I can see no reason why the same thing may not be done with respect to any other subject matter, and so ultimately the whole jurisdiction now exercised by the Court.

With deference, it appears to me that the error into which the Chief Justice has fallen is in assuming that any jurisdiction formerly exercised by the Court of King's Bench or by the County Court has been transferred to the Board.

It is true that the Act takes from the Courts jurisdiction in actions brought by workmen who are entitled to compensation under the Act but the jurisdiction thus taken away is not transferred to the Board.

Prior to the passing of the Act a workman who had been injured by negligence could bring action at common law against his employer or under the Employers Liability Act, R.S.M. 1913, ch. 61, whichever the facts warranted.

Where the workman had suffered injury by accident, arising out of and in the course of the employment, he had an alternative remedy by application for compensation under the provisions of the Workmen's Compensation Act, R.S.M. 1913, ch. 209, providing his employment was one to which the Act applied. All questions arising in proceedings under the last mentioned Act if not settled by agreement were to be settled by the arbitration of a committee representative of the employer and his workmen if any such committee existed, otherwise by an arbitrator agreed on by the parties or in the absence of agreement by the County Court. The Judge of the County Court in disposing of any matter under the Act did not exercise the functions of a County Court Judge but acted as an arbitrator.

An appeal is given to the Court of Appeal but, so far as I can discover, the Court of King's Bench was given no jurisdiction whatever. How then can it be said that any jurisdiction formerly possessed by either the Court of King's Bench or the County Court has been transferred to the Board?

Part II. of the Act repeals both the Employers Liability Act and the original Workmen's Compensation Act, and enacts provisions which to some extent take the place of the Employers Liability Act.

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Fullerton, J.A.

The Board is not given power to try any action either at common law or under Part II. of the Act. Its sole duty is to administer the fund for the creation of which the Act makes provision.

Any injured workman who is not entitled to compensation under Part I. of the Act may take action in the Courts as he could prior to the passing of the Act.

It is true that the Act confers on the Board certain judicial functions, but that fact alone is by no means decisive of the question. Many bodies exercise judicial functions but are not Courts, as for example, arbitrators, committees of clubs, etc.

At the argument counsel for the respondent strongly relied on sec. 52 of the Act as shewing that the Board was in reality a Court. That section provides that the Board shall have the like powers as the Court of King's Bench or a Judge thereof for compelling the attendance of witnesses, etc.

In *Kelly* v. *Mathers* (1915), 23 D.L.R. 225, 25 Man. L.R. 580, the validity of "An Act respecting Commissioners to make Inquiries concerning Public Matters" was called in question.

Section 2 of that Act provided that "The Commissioner or Commissioners shall then have the same power to enforce the attendance of such party or witnesses, and to compel them to give evidence, as is vested in any Court of law in civil cases." It was held that the Act was *intra vires* of the Provincial Legislature.

In *The Queen* v. *Coote*, L.R. 4 P.C. 599, the Privy Council decided that it was within the competency of the Legislature of Quebec to appoint 5 commissioners empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses, and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

See also in *Re Public Inquiries Act, Re Clement* (1919), 48 D.L.R. 237.

In *Re Toronto Railway Co. and City of Toronto*, 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381, an order was made by the Ontario Railway and Municipal Board requiring the Toronto Railway Company to place in operation upon its system not later than a certain date 100 additional cars.

Subsequently a further order was made which, after reciting that the former order had not been complied with, required the

company to pay to the City Corporation a sum of money as a penalty.

The Ontario Railway and Municipal Board was appointed by the Lieutenant-Governor in Council under the authority of sec. 5 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186. Very large powers both judicial and ministerial are conferred on this Board in connection with the operation and maintenance of railways, street railways, telegraphs, telephone systems and public utilities.

Section 5, sub-sec. 4 of the last mentioned Act gives the Board "all the powers of a Court of Record and (the Board) shall have an official seal and shall be judicially noticed."

Section 21, sub-sec. 4:—

> The Board shall, as respects the amendment of proceedings, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary and proper for the due exercise of its jurisdiction, or otherwise for carrying this Act or any other general or special Act into effect, *have all such powers, rights and privileges as are vested in the Supreme Court.*

The point was taken in this case that the Board was a "Superior Court" within the meaning of sec. 96 of the B.N.A. Act, and its members, not having been appointed by the Governor-General, had no jurisdiction to exercise the powers conferred upon the Board by the Act by which it was created.

The Court, consisting of Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A., held that the Board was not a "Court" within the meaning of sec. 96 of the B.N.A. Act.

It seems to me that much stronger grounds existed in this case for holding "The Ontario Railway and Municipal Board" to be a Court than in the present case for holding "The Workmen's Compensation Board" to be a Court.

If the Board were intended to be a Superior Court one would expect that it would be given the power to enforce its own orders and not be obliged to resort to the Court of King's Bench under sec. 60.

Again, if it were a Superior Court, sec. 52, which gives it the like powers as the Court of King's Bench for compelling the attendance of witnesses, etc., would be unnecessary.

The Board is not in terms declared by the Act to be a Court, and the provisions of the Act constituting it a body corporate

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Fullerton, J.A.

Dennistoun, J.A.

(sec. 46) and giving it a right of action against a defaulting employer (sec. 69E) are entirely inconsistent with the idea that the Board is a Court.

My view is that the Board is not a Court.

For the above reasons I would set aside the order and allow the appeal with costs.

DENNISTOUN, J.A.:—The evolution of the law relating to contracts of employment has been progressive during a number of years in this Province. First, an adaptation of Lord Campbell's Act was passed, next an Employers Liability Act which enlarged the causes of action open to a workman and removed some of the common law defences which stood in his way. In 1912, the Workmen's Compensation Act was passed which followed closely the English Act of 6 Edw. VII. 1906, ch. 58, and gave the workman a right to compensation by reason of his employment and injury, quite apart from the doctrine of tort, which had been the pivot upon which previous legislation turned. In 1916 the Act, 6 Geo. V., ch. 125, under consideration was passed. It abolishes the action in tort on the part of workmen in special employments and substitutes a claim upon an insurance fund in lieu thereof. The scheme of the Act is to provide a fund always available for the relief of injured workmen of the classes specified without any delays or technicalities. Compensation is paid to the workman not by his employer, but by the Board, which makes assessment upon employers in advance of any claims for compensation arising. Upon failure of employers to maintain the fund, compensation is payable out of the Consolidated Revenue Fund of the Province.

The Legislature has declared that the contract of employment in certain classes of work has attached to it statutory conditions and creates new rights and remedies in substitution for old.

It has been argued that the Act in question abrogates certain powers of the Courts and transfers those powers to a new Court. In my opinion such is not the case. The jurisdiction of the Court of King's Bench and the County Courts to entertain actions in tort in respect to the claims of certain classes of workmen against their employers is abrogated, but is not transferred to any other tribunal, and there can be no doubt that the Legislature has full power to abolish any right of action in respect to property and civil rights within the Province. Certain causes of action, as for

example those against trade unions, have been, from time to time, abolished in England, and in like manner certain causes of action, as for example those in question, against employers, have from time to time, been abolished in Manitoba. The statute in question, sec. 13 (1) as amended 9 Geo. V. 1919, ch. 118, sec. 8, says: "No action in any Court of law in respect thereto shall thereafter lie." The power of the Legislature to so enact is as full as the power of the Imperial Parliament: *Hodge* v. *The Queen*, 9 App. Cas. 117.

The Workmen's Compensation Act of British Columbia was before the Judicial Committee of the Privy Council very recently, 48 D.L.R. 218, [1920] A.C. 184, and was held to be *intra vires* in so far as the general scheme was concerned. It is similar in general outline to the Manitoba Act. The validity of the appointment of the Commissioners was not raised before their Lordships and is not referred to by them. Viscount Haldane says, at page 222, speaking of the Act as a whole and declaring it to be *intra vires:* "It is in substance a scheme for securing a civil right within the Province."

It is not conceivable that a tribunal could be created by the Province for the purposes named, without conferring upon that tribunal some judicial functions. Every scheme of insurance calls for the exercise of judicial or quasi-judicial powers by certain officials. An insurance company is called upon daily to determine the rights of claimants under the policies which it issues.

The identification of the claimant as one of the assured, the proof of his right to compensation as one of a class, and the assessment of his compensation based upon a wage scale, and the extent of his injuries, are ordinary administrative acts which must necessarily be performed; and the adjudication made in respect thereto can be made as well by an inferior as by a superior Court, and equally as well by a tribunal which is not a Court at all.

The right of a Province to create inferior Courts and to appoint those who exercise judicial functions therein has been generally recognized: *Re Small Debts Recovery Act* (1917), 37 D.L.R. 170, 12 Alta. L.R. 32; *Reg.* v. *Bush* (1888), 15 O.R. 398; *Rex* v. *Sweeney* (1912), 1 D.L.R. 476, 19 Can. Cr. Cas. 222, 45 N.S.R. 494; *Wilson* v. *McGuire* (1883), 2 O.R. 118.

The judgment appealed from, 50 D.L.R. 578, referring to the decision of the Judicial Committee of the Privy Council in *Work-*

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Dennistoun, J.A.

men's Compensation Board v. *C.P.R.*, 48 D.L.R. 218, [1920] A.C. 184, sometimes known as the "*Sophia*" case, adopts the view that the enactment of legislation for the establishment of a Commission, or Board, with the powers above outlined, is within the competence of the Legislature of the Province. Further, that it is competent for the Province to provide, as this Act has done, for the creation of a fund by an assessment against employers, for payment of compensation according to a specified scale, to an injured workman, or his dependents in the event of death, and to take away from him or them the right to proceed for compensation in any other way. Such legislation has to do with civil rights within the Province and does not encroach upon the powers of the Dominion nor any of the subjects reserved to it under sec. 91 of the B.N.A. Act.

The Legislature has set up a special tribunal by which these provisions are to be made effective, and the judgment appealed from, finding certain judicial functions conferred upon that tribunal—and for that reason alone—assumes that a Superior Court has been created which can only be controlled and made operative by the appointment of a Judge by the Governor-General under the provisions of secs. 96 to 101 of the B.N.A. Act. Special tribunals have been created by the Province for special purposes in a number of instances. All of them exercise judicial functions.

Under the Small Debts Recovery Act of Manitoba, 6 Geo. V. 1916, ch. 101, Police Magistrates are appointed by Provincial Order-in-Council to exercise jurisdiction in all claims and demands for debt whether payable in money or otherwise where the amount or balance claimed does not exceed $50. Judgments of the magistrate may be filed in the office of the Clerk of the County Court for the judicial division in which the action is brought, and thereupon shall be entered as a judgment of that Court, and execution, garnishing proceedings, and certificate for registration against lands, may be issued thereon and enforced according to the ordinary procedure of that Court or of the Court of King's Bench where applicable. *Re Small Debts Recovery Act*, 37 D.L.R. 170, 12 Alta. L.R. 32.

Under the provisions of the Real Property Act, R.S.M. 1913, ch. 171, judicial functions of an extensive character are exercised by District Registrars and particularly under the foreclosure sections of the Act.

Assessors and Courts of Revision under the Municipal Act, R.S.M. 1913, ch. 133, deal with large and small holdings of land and impose tax burdens often of magnitude upon them.

Public Utilities Commissions have been created in several Provinces and necessarily exercise judicial powers in determining questions concerning property and civil rights within the Province concerned: *Toronto Railway Co.* v. *City of Toronto*, 46 D.L.R. 547, 24 Can. Ry. Cas. 278, 44 O.L.R. 381.

Commissioners to make inquiries concerning public matters with large powers as to the taking of evidence and enforcing the attendance of witnesses may be appointed under R.S.M. 1913, ch. 34; *Kelly* v. *Mathers*, 23 D.L.R. 225, 25 Man. L.R. 580.

The contract of fire insurance is subject to statutory conditions under R.S.M. 1913, ch. 103, one of which provides that the value of the property insured, the value of the property saved or of the amount of the loss, shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to arbitration, and that the award shall be conclusive as to the amount of the loss, and the amount to be paid by the company. Jurisdiction is thereby conferred on a statutory tribunal to measure and determine the compensation payable under a statutory contract of fire insurance. In the case under consideration a statutory contract of employment insurance is similarly dealt with.

All of these tribunals are exercising useful powers of a judicial character, which have been conferred upon officials appointed under the authority of the Provincial Legislature. Generally speaking they are not powers which can with advantage be administered by a Superior Court, for they combine administrative with judicial functions. An insurance scheme such as the one under consideration could not in my opinion be successfully administered by a Superior Court of the type which is contemplated by sec. 96 of the B.N.A. Act.

But even if the powers conferred upon this Board should be found to include some of the powers of a Superior Court Judge, the Act itself or the appointment of the Board would not for that reason alone be *ultra vires* of the Legislature. It would in my opinion take much more to give to the Board the status and jurisdiction of a Superior Court. Certain clauses of the Act in question may call for judicial interpretation as occasion arises.

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Dennistoun, J.A.

Section 52 (as amended by 9 Geo. V. 1919, ch. 118, sec. 22) provides that:—

> The Board shall have the like powers as the Court of King's Bench in Manitoba or a Judge thereof for compelling the attendance of witnesses, and of examining them under oath, and compelling them to answer questions and compelling the production of books, papers, documents and things.

Such a clause (and there are others in the Act) may be scrutinized as to its effect and the jurisdiction which the Legislature intended to confer upon officials of the Province when occasion arises, but it does not arise in connection with the present appeal, and if it did would not, in my opinion, invalidate the scheme of the Act or the appointment of the Board for the purposes which are clearly within the jurisdiction of the Legislature. *Kelly* v. *Mathers*, *supra*.

It has been urged in argument that certain clauses of the Act impose the findings of the Board upon the Court of King's Bench without permitting any inquiry on the part of the Court as to the jurisdiction of the Board to make such findings. That in effect the Board is made a Court superior to the Court of King's Bench, and secs. 13, 57, 58, 60 and 61 are referred to.

To my mind these sections mean that a party whose rights have been declared by the Board, cannot be subjected to process in any Court to vary or alter the adjudication and determination made by the Board in respect to matters which are within the scope and purview of the Act. Why should there be any review by a Court? The rights and remedies provided by the Act never were administered by the Court of King's Bench. They are new creations of the Act itself, and the Legislature, being determined to put an end to litigation in respect to workmen's compensation has decreed that the Board alone shall be responsible for its findings and must itself and of its own motion correct its errors, if any occur. These sections do not mean that the Court of King's Bench is immediately bound to stay or dismiss an action because the Board certifies that it has determined or adjudicated in respect to an accident in which the same parties are concerned. If the pleadings and proceedings in the Court of King's Bench or the County Court shew jurisdiction upon their face the Court will be justified in proceeding with the action until satisfied that the cause of action sued on is one of the causes of action which has been abolished by the Act. When satisfied on the point the Court

should stay the action in obedience to the statute and not because it is bound to act blindly upon a certificate of the Board which may be founded in complete error as to the cause of action which is before the Court. When it has been satisfactorily established that the Board has determined and adjudicated under the Act the identical cause of action which is before the Court, such determination and adjudication will be final and conclusive: *Murphy* v. *Toronto*, 45 D.L.R. 228 at 246, 43 O.L.R. 29; *C.N.R.* v. *Wilson* (1919), 49 D.L.R. 440; *Jones* v. *C.P.R.* (1919), 49 D.L.R. 335.

The judicial acts which the Board is to perform under sec. 57 of the Act, as amended by the statute of 1919, are only such as are necessary to establish the right of the claimant or his dependants to rank against the insurance fund and to measure his compensation according to scale. They in no way conflict with the jurisdiction previously possessed by the Courts in respect to common law rights and statutes which have been repealed, and even if they did would, in my opinion, fall far short of conferring Superior Court jurisdiction upon the Board.

This Board which has been held by the judgment appealed from to be a "Superior Court" within the meaning of sec. 96 of the B.N.A. Act has a number of characteristics which are, in my judgment, incompatible with that finding. It is declared to be a body corporate by sec. 46. It has no authority to render enforceable judgments, but must seek the aid of the Court of King's Bench when necessary to carry its orders into effect. Secs. 27, 60, 77 (4). In order to enforce penalties for violation of its orders it must apply as complainant to a Justice of the Peace asking for a summary conviction under sec. 30 as amended by the Act of 1919, 9 Geo. V. ch. 118. In order to recover assessments the Board is given a right of action against the defaulting employer in respect of the amount unpaid together with costs of such action by sec. 69E. It thereby becomes a plaintiff in legal proceedings. There is no Court to which it is superior or over whose proceedings it can exercise any control.

Section 96 of the B.N.A. Act when it refers to Superior and County Courts means Courts similar to those which were so designated in 1867. *Re Small Debts Recovery Act*, 37 D.L.R. 170, 12 Alta. L.R. 32. They were Courts for which the statute provided

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Dennistoun, J.A.

Judges learned in the law and of standing at the bar of the Province to which they were commissioned.

Under the Act in question, which establishes a tribunal from which solicitors and counsel are banished by sec. 11, it is not requisite that the members of the Board should possess any legal qualification whatsoever. The manifest purpose of the Legislature was to take away from the Courts, the lawyers, and the litigiously inclined, the rights and privileges formerly enjoyed by them in respect to certain classes of action in tort, and to substitute a lay tribunal administering an elaborate scheme of state insurance. The creation of a new type of Superior Court or County Court was never contemplated by the Legislature and I cannot agree that it has unwittingly done so.

Had the opposite conclusion been arrived at, there would still remain the fact that this Board has been in operation for some years and has transacted a large volume of business, has levied and disbursed large sums of money, and now holds large sums of money for the satisfaction of compensation claims which may arise in the future. The Commissioners if improperly appointed Judges of a Superior Court are nevertheless *de facto* Judges and as such subject to removal only by *quo warranto* proceedings in which they can take part in defence of the jurisdiction which they have exercised. As pointed out by Meredith, C.J.O., in *Re Toronto R. Co. and City of Toronto*, 46 D.L.R. at 551, the status of a *de facto* Judge is not open to attack in a collateral proceeding where he holds at least a colourable title, and his acts as such are valid until properly questioned. In that case the Appellate Division of the Ontario Supreme Court unanimously came to the conclusion that the Ontario Railway & Municipal Board, although it has for some purposes, judicial functions to perform, is not a Court, but an administrative body having as incidental to the performance of its administrative functions and the exercise of its administrative powers, jurisdiction to construe contracts. The Judicial Committee of the Privy Council while allowing an appeal on other grounds, 51 D.L.R. 69, did not question the judgment on the point quoted.

With great respect, I am of opinion that the Workmen's Compensation Board of Manitoba is neither a "Superior Court," nor an "Inferior Court." It has no controlling authority over any other Court which is a distinguishing characteristic of a

MAN.

C. A.

TREMBLAY v. KOWHANKO.

Dennistoun, J.A.

Superior Court, nor is it subordinate to any other Court which is a distinguishing characteristic of an Inferior Court, 15 Corpus Juris 721. It has none of the characteristics of the Superior Courts of common law which were the Queen's Bench, the Common Pleas, and the Exchequer, at Westminster, *Garrard* v. *Tuck* (1849), 8 C.B. 231. Neither has it, in my opinion, the characteristics of the Superior Courts as they existed in Canada in 1867 when sec. 96 of the B.N.A. Act came into force.

It is an administrative tribunal with certain ancillary judicial functions, for the adjustment of civil rights within the Province, in respect to workmen's compensation for injuries, within fixed limits. No portion of the jurisdiction previously exercised by the Courts in respect to employers' liability has been assigned to it, and the field in which it operates is a new creation within the competence of the Legislature, which has authority to appoint and pay the Commissioners who constitute the Board.

It was admitted by counsel on the argument before this Court that the facts relied on in this case as establishing the cause of action were the same as those before the Board in respect to which a certificate was given and that the Board had adjudicated upon the matter. In view of this admission I think, with great respect, that the appeal should be allowed and the dismissal of the action affirmed.

HAGGART, J.A., concurs. *Appeal allowed.*

LAVIN v. GEFFEN.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 25, 1930.

PARTNERSHIP (§ II—8)—SALE OF INTEREST BY ONE PARTNER TO THE OTHER —PARTNERSHIP ASSETS—ORAL AGREEMENT—STATUTE OF FRAUDS —SALES OF GOODS ORDINANCE.

The interest of a partner in the assets of the partnership is a *chose in action*, and the purchaser of the same by an oral agreement cannot successfully plead the Statute of Frauds, even though there appeared to be a leasehold interest in lands among the partnership assets. Nor can the purchaser plead the section of the Sales of Goods Ordinance corresponding to sec. 17 of the Statute of Frauds. For this ordinance does not apply to a *chose in action*.

[*Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch. D. 218, 38 L.T. 229; *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261, 55 L.J. Ch. 585; (1886), 11 App. Cas. 426, 56 L.J. Ch. 53, 55 L.T. 362, referred to.]

Statement.

APPEAL from the judgment at the trial in an action claiming, under an oral partnership agreement, a leasehold interest in real estate owned by the partnership. The trial Judge in a former

ALTA.

S. C.

LAVIN v. GEFFEN.

action held that this was within the Statute of Frauds and dismissed the action on appeal. This decision was reversed and a new trial ordered (49 D.L.R. 23, 15 Alta. L.R. 59), from which the present appeal is taken.

A. Macleod Sinclair, K.C., and *B. Ginsberg*, for appellant.

J. B. Barron, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The decision of this Court upon the previous appeal (1919), 49 D.L.R. 23, 15 Alta. L.R. 59, in this case was simply to the effect that where one partner had by oral agreement sold his share in the partnership to the other—and only other—partner the fact that among the partnership assets there appeared to be a leasehold interest in lands did not entitle the purchaser to plead successfully the Statute of Frauds in an action against him to enforce the agreement. The point there came up on appeal from a judgment given on the first trial dismissing the action simply upon the admission of counsel that such a leasehold interest was among those assets. The Court ventured to dissent from the view rather tentatively, or perhaps one should say rather unnecessarily, expressed by the Court of Appeal in England in the case of *Gray* v. *Smith* (1889), 43 Ch. D. 208, 62 L.T. 335, which the trial Judge had followed. The Court then ordered a new trial and by the terms of our decision it was left open to the defendant to adduce any evidence which might place a different aspect upon the matter.

The Judge at the second trial apparently found nothing in the evidence which he thought should induce him to take any different view. We now have both the partnership agreement and the lease in question before us as well as the testimony of the parties. The trial Judge has found the existence of the alleged agreement proven as a fact and I do not understand that any serious attempt is now made to induce the Court to interfere with that finding; and indeed any such attempt would obviously be futile in the circumstances.

So far as the question of an interest in land is concerned, I can see nothing in the case to justify any distinction being made which would make our former decision inapplicable.

There is, however, the additional circumstance to be considered that the partnership assets included certain goods and chattels

as well as the leasehold interest. But here also I think the defendant cannot successfully plead the section of the Sales of Goods Ordinance which corresponds to sec. 17 of the Statute of Frauds. It seems to be well settled that the interest of a partner in the assets of the partnership is a mere *chose in action* and to *choses in action* it is clear that that ordinance does not apply, sec. 2(i).

In the case of *Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch. D. 218, 38 L.T. 229, it was decided by Bacon, C.J. (Chief Judge in Bankruptcy) that such an interest was a mere *chose in action*. And I take it that this view was approved by Fry, L.J., in *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261, 55 L.J. Ch. 585, and by Lord Ashbourne in the House of Lords in the appeal in that case (1886), 11 App. Cas. 426, 56 L.J. Ch. 43 at 53, 55 L.T. 362, although the exact property involved in the latter case was a share in a joint stock company. In the former case Bacon, C.J., decided that the interest of a partner was within neither the Bankruptcy Act, 46-47 Vict. 1883, ch. 52, nor the Bills of Sale Act, 41-42 Vict. 1878, ch. 31.

Lindley in his work on Partnership, 8th ed., 795, also adopts this case as authority for the statement that a partner's interest is a *chose in action*.

Finally, I cannot discern any distinction which can be drawn on account of the suggestion that there was at the moment of the agreement, or shortly prior thereto, a dissolution of the partnership agreed upon. As between the partners the nature of the interest agreed to be sold still obviously remained the same.

I, therefore, think the appeal should be dismissed with costs.

Appeal dismissed.

NORSTRANT v. DAVIDSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. March 3, 1920.

CONTRACTS (§ I C—15)—OPTION—WRITTEN AGREEMENT UNDER SEAL—CONSIDERATION NOT PAID—SPECIFIC PERFORMANCE—LIABILITY OF PARTIES.

An option in the form of a written agreement under seal for the sale and purchase of land is not binding upon the parties when the consideration mentioned as having been paid, and the receipt of which is acknowledged, has not, in fact, been paid.

ALTA.

S. C.

NORSTRANT v. DAVIDSON.

Harvey, C.J.

APPEAL by defendant from the trial judgment in an action for specific performance of an option agreement and for damages. Reversed.

F. C. Mayer, for appellant; *E. A. Dunbar*, for respondent.

HARVEY, C.J. (dissenting):—The defendant was purchasing 5 sections of land from a company in which the plaintiff was interested. The plaintiff wished to take a half interest with him but owing to the fact of his fiduciary position he desired to get the approval of the beneficiaries before doing so. He stated, however, that he felt no doubt that they would approve. Before the defendant signed the agreement for purchase he entered into an agreement with the plaintiff by which he agreed upon payment by the plaintiff, before May 1, following, of $5,000 with interest from the date of the purchase ($5,000 being half of the cash payment to be made by defendant), to sell and assign to him an undivided half share in the land. After the plaintiff had obtained the approval of his beneficiaries he tendered the amount specified before May 1, but the defendant returned it and he now refuses to carry out the agreement. This is an action for specific performance of the agreement and for rectification of the agreement, a wrong figure having been used in the description of the land clearly without the intention of either party. On the trial before Simmons, J., judgment was given in favour of the plaintiff.

I can see no reason whatever why the rectification asked for should not be made as there is no shadow of doubt as to what land the parties both had in mind. The agreement:

> Witnesseth that in consideration of the sum of one hundred dollars . . . now paid . . . receipt whereof is hereby acknowledged the vendor covenants and agrees . . . to sell and assign to the purchaser on or before the 1st May, 1918, one undivided half share or interest in, etc., for the price or sum of five thousand dollars on which shall be credited the said sum of one hundred dollars.

The agreement is signed and sealed by both parties.

It is contended by the defendant that this is an option and its terms must be strictly complied with.

In my opinion no notice of acceptance is required and upon tender on or before May, 1, 1918, of the requisite amount, the defendant was by its terms bound to assign the half interest.

The $100 specified as the consideration was, however, not paid

and it is claimed now on behalf of the defendant that he was not bound, in other words, that there never was any option. It is quite apparent that the rule that the terms of an option must be strictly complied with has no necessary application to the consideration of whether there was a good option created. Leaving aside the question of whether the presence of a seal may not bind the defendant even though a sum of money is specified as the real consideration and considering the agreement as one not under seal, in my opinion, the question whether the defendant is to be considered bound without the actual payment of the money is entirely one of intention of the parties, which may be gathered from the document and the surrounding circumstances including the conduct of the parties.

In *Cushing* v. *Knight* (1912), 6 D.L.R. 820, 46 Can. S.C.R. 555, an agreement of sale was signed which acknowledged receipt of the cash payment of $10,000. This, however, was not paid prior to the signing of the agreement and after signature payment was refused until the vendor made some satisfactory arrangement about encumbrance. The vendor then notified the purchaser that if he did not pay it within 4 days he would consider the agreement cancelled. In delivering a dissenting judgment in that case (1912), 1 D.L.R. 331, 4 Alta. L.R. 123, I expressed the view that in the absence of that payment there was no binding agreement. Practically the same view was expressed in the Supreme Court of Canada by Duff, J., with whom Brodeur, J., concurred, he being of the opinion that the agreement as a whole manifested that intention. Idington, J., considered that the refusal to pay could be treated as a repudiation by the purchaser entitling the vendor to cancel, which he did after notice. Anglin, J., with whom Davies, J., concurred, while expressing somewhat the same view as Duff, J., seems to rest his conclusion on the cancellation after notice.

Now it is quite apparent that that case is very different from the present one in its facts. Why the $100 was not paid is not very clear but it being such a comparatively small amount and both parties apparently considering it practically certain that the plaintiff would take advantage of the agreement, they seem to have paid no particular attention to it. Certainly there is no evidence that the plaintiff would not have paid it if it had

ALTA.

S. C.

NORSTRANT v. DAVIDSON.

Harvey, C.J.

been requested. By not paying it then he had to pay interest on it along with the rest of the $5,000 when paying it. The defendant had already arranged for an advance of the whole $10,000 required to be paid and his letter refusing the plaintiff's cheque when it was sent gives as his reason that as he had arranged for the money and was paying interest on it, he did not even then wish payment of plaintiff's half at that time. If that letter was an honest expression of the defendant's reason for refusing the cheque, it did not indicate any intention at that time of questioning the plaintiff's right to acquire a half interest under the agreement. If the agreement was binding but could be cancelled upon the plaintiff's refusal to pay the $100 it was not so cancelled and no case arises as in *Cushing* v. *Knight*, *supra*, for holding it cancelled, and, in my opinion, there is nothing to indicate as there was in that case that it was the intention that the payment of that sum should be a condition precedent to the defendant being bound. That he contracted under seal certainly seems to me to be a circumstance indicating a contrary intention apart from any other legal effect it might have.

I would dismiss the appeal with costs.

Stuart, J.

STUART, J.:—The agreement between the plaintiff and defendant, dated December 8, 1917, witnessed, that in consideration of the sum of $100 "*now*" paid by the purchaser (plaintiff) to the vendor (defendant) "receipt whereof is hereby acknowledged" the vendor covenanted and agreed with the purchaser to sell and assign to the purchaser on or before May 1, 1918, one undivided half interest in the lands in question for the price or sum of $5,000, on which should be credited the said sum of $100, with interest at 6% per annum from December 4, 1917. After referring to certain other chattel property the agreement proceeded thus:—"In the event of the purchaser availing himself of the vendor's agreement herein contained it is agreed, etc." Then followed a number of stipulations, on the part of both parties, which were obviously only intended to bind the purchaser "in the event of his availing himself of this agreement."

The document was signed by both parties and was under seal. The $100 was not in fact paid and it appears clear from the evidence that it was never mentioned at all.

It appears that the defendant at the moment of signing the document referred to had not yet acquired any interest in the

lands. The equitable owners of the land were a firm of Beiseker and Davidson. The latter member of the firm was dead and the plaintiff was one of the executors of his estate. There had been discussion between the plaintiff and the defendant about a proposed purchase of the land, which consisted of 5 sections, by the defendant from the firm named. A sum of $10,000 was understood as being required as a down payment to the firm and defendant had arranged for a credit with his bank for that amount. Immediately after signing the document above referred to, defendant went into an adjoining room in the same office (of Beiseker and Davidson, I think) and there signed an agreement to purchase the lands and paid the $10,000. The defendant says that he expected Davidson would have been a party to this agreement but I do not quite see how he could have so expected. Davidson's evidence is to the effect that he fully intended to go in with the defendant on the purchase but felt (which was quite natural and proper) that he should first secure the approval of his co-trustees or co-executors before doing so. He said that he told Norstrant that he was going down to Minneapolis, where they lived, "in the spring" and would, no doubt, then obtain their approval. Nothing further whatever was said between the parties after their separation on December 8, until Davidson's return in March. On the 14th of that month he wrote a letter to Norstrant in which he stated that he had returned "a week ago" from the States, and that his fellow executors were quite agreeable to his entering into the contract and asked to be informed where Norstrant would like a cheque for $5,000 sent to him. To this Norstrant made no reply until March 23, when he wrote and said, "I have plenty of cash on hand. I made arrangements at Drumheller to get $10,000" and then referred to a possible meeting in a few days.

On March 19, Davidson sent an unmarked cheque to Norstrant for $5,066.16 to cover "my half of the cash payment made to" the vendors with "interest from January 10th, to March 20th." Norstrant returned this cheque on April 9, saying "Enclosed find your cheque for $5,066.16 which I am returning. I don't need the money now as I have to pay interest on the money which I borrowed when the deal was made anyway and this money would only be idle here." Then Davidson having received the two replies

ALTA.
S. C.
NORSTRANT v. DAVIDSON.
Stuart, J.

did nothing for a month and on April 23 he sent a marked cheque for $5,100.71 and said "I now beg formally to notify you that I accept the offer contained in that agreement." On April 25, Norstrant returned the cheque saying:" Enclosed find your cheque which you left me yesterday. I will be in at your meeting the first of the month." Some further remonstrances were made by Davidson by letter but Norstrant never acquiesced or agreed to take the money or directly admit obligation to sell.

It further appears that in January or February Norstrant had begun to resell the lands at advances of nearly 50%. Four of the sections had been so resold prior to the letter of March 14. Whether Davidson had then been informed or had heard of these resales is not very clear from the evidence but he admitted that he had heard of them, at least, prior to sending the marked cheque on April 23. Owing to the relations between the various parties concerned in the matter it seems to me to be extremely probable that Davidson would learn about the resales pretty soon after his return but, of course, it cannot on the evidence be found as a fact that he had heard of them before March 14, the date of his first letter, even if then.

The action for specific performance and for damages was begun on March 29, 1919. The trial Judge held that Norstrant was bound by the agreement of December 8, 1917, that Davidson had accepted the option, which the agreement undoubtedly was, within the required time and as most of the lands were sold he gave a judgment for damages with a reference in respect to these and for specific performance with regard to the unsold portion.

The initial question to be decided seems to me to be whether or not Norstrant ever became bound at all under the agreement of December 8. At first blush it would perhaps seem strange to question this when the contract is under seal and a consideration is mentioned. But in my opinion the question is a very grave one indeed. I should first like to observe that there would appear to me to be no doubt whatever that if the sum mentioned as being paid for the option were $500 or $1,000 and that sum had never in fact been paid at all there would be far less inclination to treat the non-payment lightly. But for my part I am still unable, notwithstanding the great depreciation in the value of money, to look upon even $100 as a merely nominal sum of money.

When obliged to pay it, it has never appeared to me in that light, and I think the inclination so to regard it is rather to be found among people who are accustomed to think in thousands and tens of thousands.

Moreover, it is to be remembered that Davidson was getting Norstrant bound and was not becoming bound himself. Even a very small sum expressed as the consideration for that benefit should not, in any case, as it appears to me, be treated lightly or casually. It is true that it appears that no mention at all was made of the payment of the $100. But it seems to me to be quite fallacious to suggest that Norstrant never asked for it and that if he had done so it would have been paid. It was no more his business to ask for it than it was Davidson's to offer it. And it was Davidson who was getting, or was to get, the benefit of the unilateral contract, so-called. Davidson, indeed, says that he did not know that it was to be paid in the contract and that in reading it over he read over those first two lines evidently very hastily because he never had any recollection, at which point he was interrupted. Taking that to be the fact it would appear to be doubtful whether Davidson ever, in fact, agreed to pay the $100, that is whether there ever was a *consensus ad idem* at all. But of course Davidson cannot dispute and does not dispute that he did agree that he was obtaining the option in consideration of the payment down then and there of the sum of $100. At law the receipt in the document would stand in the defendant's way but in equity he can deny the receipt.

As I view the matter, the payment of the $100 then and there was essential to the creation of any right in the plaintiff. It is universally admitted that in an option contract time is considered essential even though not so expressed. That is to say, with respect to the time fixed for acceptance of the option the party holding the option must accept in the required manner and strictly within the time fixed for so doing. If that is so, surely when the moment of execution of the option contract is fixed as the time for paying the consideration for the benefit under it, that time so fixed is also essential, at any rate until waived.

This is a matter of the interpretation of a written agreement under seal. There is nothing uncertain or ambiguous in the terms of the written instrument. I see no reason existing here for

ALTA.

S. C.

NORSTRANT v. DAVIDSON.

Stuart, J.

going beyond the document itself to ascertain the intention of the parties. From the words they used the intention is plain and unmistakable that the sum was to be paid down. Both the peculiar nature of the contract and the actual words expressing a receipt of the money shew this beyond question. No doubt by the execution of the contract the defendant was bound to accept the money if paid forthwith as was obviously intended although possibly a refusal to accept it would be tantamount to an instantaneous withdrawal of his execution of the document.

It was argued that Norstrant could at any time within a week or two weeks or a month or even yet sue for his $100. But it seems to me that this conceals a fallacy. Davidson did not by the contract merely *covenant* to pay the $100. That is not what the document says. It says that Norstrant in consideration of the *payment* of the $100 agreed to sell and convey. If that instantaneous payment was essential to the creation and retention of the rights of Davidson, as I think it was, then Norstrant would be met with the difficulty from which I cannot get clear that there was no concluded contract at all. It is said that Davidson had his option and could be sued for the consideration which he agreed to give for it. But that begs the question; because in the view I take Davidson never got his option at all simply because he did not pay for it when he was supposed to get it as it was the intention that he should.

Of course if you may treat the option as one would treat a pound of butter, for example, then the case might be different. If a grocer intends to sell a pound of butter for cash and the purchaser goes out of the store with the butter in his hand without paying he can no doubt be made to pay. But an option to purchase is a contract of a special nature. It is not mere deliverable goods. It is essential that its terms be strictly complied with and if these are not complied with then the contract does not exist.

In *Richardson* v. *Hardwick* (1882), 106 U.S. 252, the Supreme Court of the United States said, at 255: "In suits upon unilateral contracts it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound." This view is thus expressed in Street, Foundations of Legal Liability, vol. 2, p. 53: "From what has been said it appears

that in unilateral engagements the contractual relation does not begin until one party performs the act which constitutes the consideration for the promise of the other." In this view the circumstances of the affixing of a seal becomes, in my opinion, quite unimportant and indeed irrelevant. The presence of a seal can make no difference in the interpretation of the meaning of the words used in the document or in the intention of the parties which is to be ascertained from those words.

The fact that the document is under seal no doubt gives one pause. It is said very often that a seal "imports consideration." But whatever those words may exactly mean it is, I think, not a very accurate expression. At common law a contract under seal is binding, not because it implies or imports consideration but because the contract is a "formal" one, that is, it is made in a "form" which the common law considers binding just as the Roman law gave binding effect to the formal *stipulatio*. In Street, vol. 2, p. 19, it is said:

> The general principle was settled at an early day that a specialty is good without consideration or any other similar element. In modern times the notion that something must always be given for a promise in order to make it binding has become so deeply imbedded in legal consciousness that our Judges have sought to bring the specialty contract within the doctrine by declaring that the seal raises a presumption of consideration. This fancy has been indulged for more than three hundred years. But it is as erroneous as it is superfluous.

Where the document is under seal indeed, but itself expresses a consideration as intended, the presence of the seal does not, I think, preclude the doctrine of failure of consideration. Whatever might have been the result of an attempt in a Court of Equity to enforce the agreement if there had been no reference to a consideration at all, whether the mere option contract, as distinguished from the subsequent bilateral contract of purchase and sale, would have then been enforced even though voluntary—as to which a good deal might have been said—it seems to me that with the expression of an intended consideration in the document before us we need not consider that other problem at all. As was said in a Pennsylvania case, *Meek* v. *Frantz* (1895), 171 Pa. 632, at 638:

> There is a well settled distinction between cases in which a valuable consideration was intended to pass and therefore furnished the motive for entering into the contract and cases in which such consideration was not contemplated by the parties. In the former, failure of consideration is a

ALTA.

S. C.

NORSTRANT v. DAVIDSON.

Stuart, J.

defence although the contract is under seal while in the latter equity will not relieve against an instrument under seal merely on the ground of want of consideration.

In 9 Corpus Juris, p. 21, para. 31, it is said:

> At common law a failure of the consideration of a bond does not have the effect of affording relief to the obligor. But in equity, or under statutes, in case of a failure of consideration, as where it proves to be a mere nullity, or where although good at the time of entering into the agreement, it wholly fails before either party has received any benefit or sustained any loss or detriment thereunder, the agreement will not be binding, unless the failure of consideration is due to an unavoidable casualty which the parties are presumed to have contemplated at the inception of the contract.

I am therefore of opinion that, administering equity as we must in this Court, the presence of a seal cannot upon the facts of this case make the contract binding.

It is not, perhaps, I repeat, open to us to gather from extrinsic evidence that the parties never intended that the $100 should be paid. The plaintiff rests upon a very plain and unambiguous written agreement which expresses clearly that their intention was that it should be paid.

The question then arises whether anything which afterwards occurred operated to bring the contract into existence. There is nothing but the letters of the defendant. I have already excluded their operation as evidence of intention. Then how else can they operate? No doubt they were not frank. No doubt the defendant failed to say that he did not consider himself bound. No doubt the letters rather imply that he thought perhaps he was or might be. But what is there in all this to create an obligation or even to revive one? For myself I do not think such letters should be treated as formal pleadings and the writer of them made subject to a demurrer. Perhaps he did think he was bound. But his thinking so cannot surely make him so. Then as to waiver. I do not think ambiguous or disingenuous words which fail squarely to repudiate liability ought to be treated as a waiver where the other party has not been prejudiced by them or mislead. The only waiver that there could be would be the waiver of the right to be paid the $100 at the time of the agreement. But there must have been for this fresh agreement a new consideration or a seal or an arrangement must have been in fact carried out in some way. Hals., vol. 7 p. 423. vol. 13, p. 165.

It can only be urged in substance that by the letters the defendant waived his right to be paid the $100 on December 8, and

impliedly agreed to accept it as included in the $5,000 when the time came viz.: May 1, for the payment of the larger sum. But I think there was no consideration for this in any case and there was no action by the plaintiff on the strength of it and no prejudice to him by its not being implemented, assuming that to have been intended.

I do not think the defendant can be made liable merely because we may think he was playing for an opportunity to get out of a supposed contract under which he perhaps thought he was bound but by which, as I think, he was not bound at all.

In this view it becomes unnecessary to deal with the other grounds taken by the appellant. I think the appeal should be allowed with costs and the action dismissed with costs.

BECK, J.:—The plaintiff's action is grounded upon an instrument which is dated December 8, 1917. It is expressed to be a "Memorandum of Agreement" and to be made between Norstrant "hereinafter called the vendor" and Davidson "hereinafter called the purchaser." It continues:

> Witnesseth that in consideration of the sum of One hundred dollars of lawful money of Canada now paid by the purchaser to the vendor the receipt whereof is hereby acknowledged, the vendor covenants and agrees to and with the purchaser to sell and assign to the purchaser on or before the 1st May, 1918, one undivided one-half share or interest in "five designated sections of land" subject to the covenants and conditions contained in the agreement of sale thereof from the Calgary Colonization Company Limited to the vendor, for the price or sum of Five thousand dollars on which shall be credited the said sum of One hundred dollars, with interest at 6 per cent. per annum from December 4th, 1917, and an undivided one-half share or interest in all necessary equipment purchased by the vendor for the operation of the said farm prior to the said 1st May, 1918, for a price or sum equivalent to one-half of the actual cash paid for or on account of same by the vendor, subject to the payment of any unpaid purchase money remaining against the same, together with a sum equivalent to one-half the cash paid by the vendor prior to the said 1st May, 1918, in the cultivation of the said lands, together also with one-half of the actual cash cost of any necessary buildings which may be erected by the vendor on the said lands prior to the said date.

The instrument continued:

> "In the event of the purchaser availing himself of the vendor's agreement herein contained it is agreed that, until the purchase price payable to the Calgary Colonization Company is paid in full"

the vendor should carry on the farming operations and have the living expenses of himself and family allowed from the proceeds of the crop before equal division between them, and a salary of $150 a month from the 1st May, 1918; that the expenses of all equipment and improvements should be borne equally; etc., etc.

ALTA.

S. C.

NORSTRANT v. DAVIDSON.

Beck, J.

The instrument was signed by both Norstrant and Davidson under seal.

The $100 mentioned in the instrument was not paid. The plaintiff tendered the defendant $5,000 and interest some time in April, 1918. It was refused and what we have to determine is whether the plaintiff's tender (about the form or amount of which there is no question) was an effective acceptance of the option contained in the instrument.

A statement of the circumstances surrounding the making of the instrument is perhaps desirable.

The 5 sections of land mentioned in the instrument were part of a larger quantity of farm land owned originally by the Calgary Colonization Co. The defendant had been "running" the farms for the company. The plaintiff was treasurer of the company. The defendant signed an agreement bearing date December 8, 1917 (the same date as that of the option) whereby he agreed to purchase these 5 sections from the company. Prior to that date these 5 sections had been "distributed to Beiseker and Davidson," apparently by way of a distribution *in specie* of the assets of the Colonization Co.; "The Calgary Colonization Company" the plaintiff says "was two-thirds Beiseker & Davidson."

"Beiseker & Davidson" was apparently a limited joint stock company—Beiseker & Davidson Company, Limited. It was not the plaintiff who was indicated in the name of the company, but a brother. The plaintiff, however, was a shareholder in the company and was its sole representative in Alberta. Furthermore his brother had died and he was the personal representative of his brother's estate, and "was operating the company for the estate and for Mr. Beiseker" (who, it appears, lived in Minneapolis).

The plaintiff was "the agent for the sale of these lands," paid by way of salary not commission, and it was upon his instructions that the contract for the sale of them was prepared. The nominal vendor was the Calgary Colonization Company, Limited; the real vendor was the Beiseker & Davidson Company, Limited.

The plaintiff gives the following account of what led up to Norstrant signing the agreement for purchase and the option:

Mr. Clarke, K.C. (counsel at hearing for plaintiff):—

Q. Will you give a history of the matter so as to explain why the agreement was put in a unilateral form as it is.

A. Well, Mr. Norstrant had been considering for some time the purchase of these lands and I had charge of the sale of the lands, and I had discussed the purchase of the lands with him, at the time when my associates were here a few months prior to this. They had set the price on these lands of around $25 an acre. After discussing the subject with Mr. Norstrant he informed me that as the total amount was some 87 or 88 thousand dollars, he thought the deal was too large for him, and, at his home near Beiseker, when this matter was discussed, he said to me "Don't you want to take a half interest with me in them" and I informed him at the time that I thought the purchase was a good purchase for him and would be; and would interest me but that owing to the fact that I was operating the company for the estate and for Mr. Beiseker, I would not agree to close any transaction of that nature without first having an opportunity of consulting with them and getting their approval. I told him, however, that I thought . . . that I felt quite sure there would be no trouble, that they would be quite willing for me to take this interest, because they had already established the price which Mr. Norstrant was paying, and that they would have no objection to my going in and I informed him I wanted to take it up with them personally and I would be going down to Minneapolis in the early spring and that, therefore, we could arrange some agreement that would give me until May, that was along the line of the understanding.

The foregoing statement is not disputed. Davidson agrees with Norstrant that the agreement for purchase and the option were signed on the same day in the company's office in Calgary. What I gather from Norstrant's evidence, is that having come to Calgary for the purpose of seeing the company for which he was working, about other business as well as getting agreements for the sale of the 5 quarter sections, he went to the company's office where Davidson was. The understanding between him and Davidson, for Davidson taking an interest in the lands, was discussed at some length in the morning, but nothing concluded. In the afternoon Norstrant, after consulting with his wife who was rather opposed to his taking anybody in with him, returned and a further discussion took place with the result that Norstrant agreed that Davidson should have an option to come in on the basis of a half interest. The formal agreement was drawn up by Mr. Dunbar, a solicitor, on the instructions of Davidson, Norstrant, and indeed Davidson, paying little attention to the form of the instrument. It was then and there signed by both parties. Then Norstrant went into another room where the agreements for sale already prepared were presented to him. He says he expected to find the agreement made out in favour

ALTA.

S. C.

NORSTRANT v. DAVIDSON.

Beck, J.

of both Davidson and himself. This may be correct because he admits there was the previous oral understanding that Davidson should have a half interest, and the agreement had been prepared in advance on Davidson's instructions; but I cannot accept his statement that when he found that the agreements were in his own favour alone and that the entire responsibility was upon him and that he was expected to pay as he did the whole of the down payment of $10,000 he did not think he was bound to Davidson—though I am satisfied he did not fully understand the effect of the option agreement, and it appears that he was not then given a copy of it and that he didn't receive a copy until long afterwards. I get the impression, too, that Norstrant never felt positively that he was bound to Davidson but at most feared that he might be. However, in the view I take of the case, nothing turns upon the credibility of the defendant. Both the plaintiff and the defendant agree that not a word was said about the payment or non-payment of the $100, expressed to be the consideration for the option.

Mr. McCaul, K.C. (counsel at hearing for defendant), contended that the payment of the $100 was a condition precedent to the instrument of option taking effect.

Mr. Clarke, in answer, contended (1) that the consideration money not having been paid it became a debt for which Norstrant might sue or of which perhaps he might demand payment of at any time and in default of payment withdraw the option, and (2) that inasmuch as the instrument was under seal it was effective on that account without payment of the consideration money.

I deal with the last point first.

In my opinion, where a valuable consideration, *i.e.*, a consideration sufficient in law to support a contract in writing merely or oral, appears upon the face of an instrument under seal, the seal gives it no greater binding effect except incidentally in view of the Statute of Limitations and (but not so now on this jurisdiction) in view of the administration of the estate of a contractor. The not uncommon expression—a seal imports a consideration—though a convenient one is inaccurate. Sealing is of great antiquity as a method of authenticating or closing up documents, but nowhere but in England did the fact that a document was sealed change its character. In England in the course of time

a document under seal came to be looked upon analogously to the formal contracts of the Roman Civil law; *i.e.*, contracts made by means of certain forms or ceremonies and therefore requiring no consideration to support them as with the growth of the idea of consideration it was determined was required in the case of other contracts.

Whether an agreement became binding between parties because of its formal method of execution or because it was founded upon an actual consideration, no difference in the principles and rules of interpretation followed because of the different character of the contract.

If, in truth, the agreement was intended to be founded upon consideration, that was the primary foundation of the contract and the sealing was mere surplusage except for the ulterior incidents I have indicated. Sealing would make effective an agreement without consideration; but if it was obviously intended that the contract should depend on consideration that, and not the sealing, was the matter for inquiry.

(Much useful historical information on the subject of seals will be found in Street's Foundations of Legal Liability, vol. 2; Colquhoun's Roman Civil Law, vol. 2, sec. 1633; Pothier's Obligations, English translation with Appendix, by Evans, vol. 2, pp. 20, 164; Hals., vol. 10, pp. 357 *et seq.*, under title "Deeds and other Instruments;" and Maitland's "The Dark Ages," pp. 10 *et seq.*; where it will be learned that authentication by seal or signature by the Sign of the Cross was common by persons well capable of writing as well as reading.)

In the present case, inasmuch as the instrument of option expresses a consideration the fact that the document is sealed has, in my opinion, no bearing on the question we have to decide. The problem would be precisely the same if there were no seal, and the question now to be decided is whether the expressed consideration expressly stated to have been paid contemporaneously with the execution of the instrument not having been paid at all, results in the instrument having never become effective. Options being unilateral are dealt with in equity with as much strictness as at law.

In my opinion the payment of the expressed consideration of $100 was a condition precedent to the instrument taking effect.

ALTA.
S. C.
NORSTRANT v. DAVIDSON.
Beck, J.

Perhaps this condition precedent like any other might have been waived, but it is agreed by both parties that not a word was said at the time of the execution of the instrument, or at any time afterwards, as to its payment or non-payment. The amount cannot be treated as merely nominal and unreal as perhaps a consideration of $1 might be treated; it was in fact treated as of consequence because the agreement expressly provides for its allowance against the first payment by the purchaser.

There is, as far as I can see, nothing in or to be inferred from the correspondence which took place months afterwards between the parties with respect to the payment of the $5,000 which can be looked upon as a waiver of the condition precedent. "Waiver," I think, is well distinguished from "estoppel" by making intent an essential of the former and prejudice (irrespective of intent) of the latter. I can see nothing on which to ground either.

For the reasons I have indicated I think the plaintiff was not entitled to succeed, and I would therefore allow the appeal with costs and dismiss the action with costs.

I should like to add that if ultimately the plaintiff should succeed it seems clear that the reference to damages in the formal judgment ought to be eliminated. The plaintiff's right, if he is entitled to succeed, is, in my opinion, not to damages but to an account.

Ives, J.

IVES, J., concurs with Stuart, and Beck, JJ.

Appeal allowed.

ONT.
S. C.

Re UNION NATURAL GAS Co. OF CANADA AND TOWNSHIP OF DOVER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, J.A., Middleton, J., and Ferguson, J.A. January 19, 1920.

TAXES (§ VI—220)—ASSESSMENT—COMPANY OPERATING OIL AND GAS WELLS—ANNUAL INCOME—INTERPRETATION OF ASSESSMENT ACT, R.S.O. 1914, CH. 195, SEC. 40.

The value of land for assessment purposes, on which mining or mineral works are carried out, is determined by and is the amount of the income derived from it. It is not the income from the general business carried on, but the income from the mine or mineral work that is to be assessed.

Statement.

AN appeal by the company from an order of the Ontario Railway and Municipal Board dismissing the company's appeal from the decision of the Junior Judge of the County Court of the County of Kent affirming (with a variation) the decision of the Court of Revision of the Township of Dover, confirming the assessment of

the company for 1919 by the Corporation of the Township of Dover in respect of income.

The reasons for the order of the Board were stated by the Chairman in writing, as follows:—

This is an appeal by the Union Natural Gas Company of Canada against the judgment of the learned Junior Judge of the County Court of the County of Kent, which, with a variation, affirmed the decision of the Court of Revision of the Township of Dover, upholding the assessment of the appellant company for the year 1919 in respect of income. It appears that the appellant company in the year 1916 acquired eases of some 9,000 acres of land in the township of Dover, in the county of Kent, and thereafter expended large sums of money in drilling wells in search of oil and natural gas. The company's efforts came to little until 1917, in which year the value of the oil and gas produced was $11,041.41, and in 1918, when oil and gas to the value of $93,838.35 were produced. In its efforts to produce this, the appellant company drilled in the township of Dover some 12 wells, of which only 2—designated well No. 1 and well No. 7—produced oil and gas, and they produced practically all the oil and gas secured by the appellant company in this township, and they were of the value above set out. The income of the appellant company in respect of these wells for 1919 not being a fixed amount capable of being estimated for the current year, recourse is had, under sec. 11, sub-sec. 2 of the Assessment Act, R.S.O. 1914, ch. 195, to the amount of the income of the appellant company for the year 1918, as the basis of assessment for the year 1919. Proceeding under this provision, the assessor assessed well No. 1 at $35,000 and well No. 7 at $35,000. This was confirmed by the Court of Revision, and on an appeal to the County Court Judge the assessment was reduced to $62,376.81. This amount was reached in this way, starting from the value of the admitted production of the two wells in 1918 as $93,838.35

Less paid to Myers, lessor to appellant company of lands in which the wells were situate	$19,581.44	
Less cost of operating wells	11,880.00	31,461.44
		$62,376.91

ONT.

S. C.

RE UNION NATURAL GAS CO. OF CANADA AND TOWNSHIP OF DOVER.

With this assessment the respondent corporation does not quarrel, but the appellant company contends that other deductions should be made as follows: these deductions being disbursements by the appellant company in and about the enterprise during the years 1916, 1917, and 1918:—

Leasing (gas and oil lands)	$ 3,548.00
Drilling (wells some of which only were productive)	44,233.74
Deficit carried forward from the years 1916 and 1917	68,339.14
	$116,120.88
Assessable income as found above by County Court Judge	62,376.91
Deficit as on the 31st December, 1918	$ 53,743.97

The conclusion of the appellant company is that there is no income in respect of which it is assessable for 1919—the result of its operations shewing an accumulated deficit of $53,743.97.

The contention of the appellant company is, in substance, that before it is assessable for income in a given year, there should be deducted from the gross receipts of that year not merely what was paid by it to the lessor in the way of rental, and what was expended in operating the wells in that year, but also the total cost of the company's operations in the municipality for drilling wells—whether producing or not—and also for procuring leases. Furthermore, it is contended that, if this process results in a deficit in a given year, that deficit should be carried forward into the following year as a charge against the revenue of that year, and so continued from year to year until there is a surplus of revenue over these deductions; and that surplus, and only that surplus, is the measure of the assessability of the appellant company for income.

The Board is of the opinion that this mode of procedure is not warranted by the Assessment Act. A Scottish case—*Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315—was cited by Mr. Pyke, and, while not entirely on all fours with the case in appeal, it is concerned with the interpretation of the provisions of an Income Tax Act very similar to those to be applied here. The *Coltness* case decides that, under the British Income Tax Acts, a tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled,

ONT.

S. C.

RE UNION NATURAL GAS CO. OF CANADA AND TOWNSHIP OF DOVER.

in computing the profits for assessment of income tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working. Under the British Act the tax is to be computed on a sum not less than the "full amount of the balance of the profits or gains of the trade, manufacture, adventure, or concern" in question. The phraseology here bears a marked similarity to that of the definition of "income" in our Assessment Act, sec. 2 (*e*), namely, "annual profit or gain . . . as being profits . . . from any trade, manufacture or business." The principle of the above decision seems to be that, under the Act as framed, in determining the amount of taxable income of a mine, it is not permissible to deduct from the gross revenue in a given year any sum in respect of capital sunk or its equivalent. This principle seems to the Board to be applicable to the case in appeal, and is the principle applied by the learned County Court Judge in disposing of the appeal to him.

This appeal will therefore be dismissed, and the judgment in appeal will be affirmed.

J. G. Kerr, for appellant.

J. M. Pike, K.C., for respondent.

MEREDITH, C.J.O.:—This is an appeal by the Union Natural Gas Company of Canada from an order of the Ontario Railway and Municipal Board, dated the 14th October, 1919, confirming the company's assessment in the township of Dover. Meredith, C.J.O.

The facts are fully set out in the opinion of the Board, and the question for decision is as to the mode of assessing which should be adopted.

The assessment was for the taxable income, including Government bonus, from two oil and gas wells numbered 1 and 7, and the amount of the assessment was the same as to both wells, and was $35,000.

On appeal to the Judge of the County Court, the assessment was reduced to $62,376.81, and the assessment as so reduced was confirmed by the Board.

The method adopted by the Judge of the County Court was to find the gross income derived from the operation of the two wells and to deduct from it what was paid by way of royalty to Myers, the owner of the land, under the terms of his lease to the appellant,

ONT.

S. C.

RE UNION NATURAL GAS CO. OF CANADA AND TOWNSHIP OF DOVER.

Meredith,C.J.O.

and the cost of operating the wells. The appellant contended that there should also be deducted from the gross income what was spent in drilling the wells and other wells on property leased from Myers, and the expenditure of the company in the year 1917, which exceeded the revenue of that year by $67,839.14. I agree with the contention of the appellant that so much of the product of the wells as was represented by the value of the oil or gas *in situ* is not, for the purpose of the assessment, income, and that the value of it should be deducted from the revenue derived from the wells. In the absence of other evidence of its value, it must be taken that it is represented by the royalty paid to the owner of the land, and that, as I have said, has been deducted from the gross revenue.

Section 40 (6) of the Assessment Act, R.S.O. 1914, ch. 195, provides that:—

"The income from a mine or mineral work shall be assessed by and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate. Provided that the assessment on income from each oil or gas well operated at any time during the year shall be at least $20."

Section 40 is found among the sections headed "Valuation of Lands," and its object was to substitute that method for the ordinary method of assessing lands, which is to assess it at its actual value: sec. 40 (1).

Sub-section 5 provides for the assessment of mineral land and that it shall not "be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes."

Then comes sub-sec. 6, which provides, as I read it, for the assessment of mines and mineral works.

As I understand the provisions of sub-secs. 5 and 6, sub-sec. 5 applies to mineral land upon which there is no mine or mineral work being operated, and sub-sec. 6 to mines or mineral works that are being operated.

In my opinion, each gas or oil well—being a mine or mineral work—is to be treated as a separate entity, and the income from it is to be separately assessed.

The meaning of "income," as defined by sec. 2 (*e*) as applied to "a trade or commercial or financial or other business or calling," is the profit derived from it, and includes the profit or gain from any source.

ONT.

S. C.

RE UNION NATURAL GAS CO. OF CANADA AND TOWNSHIP OF DOVER.

Meredith, C.J.O.

The assessment in respect of a mine or mineral work is a very different thing from the assessment of a merchant, a manufacturer, or mine-operator in respect of the business carried on by him. If, as counsel for the appellant contended, the appellant was to be assessed in respect of its business generally, language very different from that which is used in sub-sec. 6 would have been used. What the Legislature was there dealing with was land, and it was providing that in the case of a mine or mineral work, the land should not be assessed at its actual value or at less than the value of other land in the neighbourhood used exclusively for agricultural purposes, but that its value for assessment purposes was to be determined by and be the amount of the income derived from it. It is to be noticed, also, that it is not the income from the business carried on by the appellant, but the income from the mine or mineral work, that is to be assessed.

As was pointed out upon the argument, if it were otherwise it would be difficult, if not impossible, where the wells are situate in different municipalities, to give effect to the provisions of sub-sec. 6. The only way in which they can be carried out is by treating each mine or mineral work as a separate entity and making the income from it the basis of the assessment. That that is the correct view of the meaning of the sub-section is supported by the proviso "that the assessment on income from each oil or gas well . . . shall be at least $20." What the Legislature has in effect done is to return in the case of mines or mineral works to the mode of assessment which was in force in years gone by when lands were assessed not at the actual, but upon their annual, value, though with a very different result in the incidence of taxation owing to the provision being limited to a particular class of property.

If I had come to a different conclusion, I should have agreed with the view of the Judge of the County Court and the Board that the losses in the appellant's operations in a former year or years and the cost of drilling other wells ought not to be deducted from the gross income from wells 1 and 7, which, as I understand, were the only producing wells in 1918. The losses in previous years were clearly losses of capital, and, though it would be quite proper, in determining what, if any, was available for dividends, to restore the lost capital out of income—they were none the less capital expenditures.

ONT.

S. C.

RE UNION NATURAL GAS CO. OF CANADA AND TOWNSHIP OF DOVER.

Meredith, C.J.O.

Middleton, J.

Ferguson, J.A.

Magee, J.A.

It is clear also, I think, that the cost of drilling wells, whether they proved to be producing wells or dry wells, is a capital expenditure. It is, as I view it, just as much a capital expenditure as the money which is spent in building upon or otherwise improving land, the object of the expenditure in both cases being to produce revenue from the property.

I would affirm the order of the Board and dismiss the appeal with costs.

MIDDLETON, J., and FERGUSON, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A. (dissenting):—The assessment from which the company appeals is not in respect of any real estate or business assessment, but an assessment for the year 1919 of $62,376.81 as "taxable income (including Government bounty) from" two particular oil wells on two different lots in the township of Dover, during 1918. The original amounts entered by the assessor were two sums of $35,000 as "taxable income" from each of the two wells, but the total $70,000 was reduced by the County Court Judge to the lower sum already mentioned. The company says that this sum much exceeds its income from its operations in the township, for in its endeavour to obtain oil or gas from the ground it incurred outlay in sinking other wells to get at the subterranean supply, but these efforts proved unprofitable—and it says that the loss so incurred, as well as other items of outlay, should be deducted. In this it is asking only what the Legislature has considered to be right and proper in dealing with mining companies, in the Mining Tax Act, R.S.O. 1914, ch. 26, which, in secs. 3, 4, and 5 imposes a tax of 3 per cent. upon the "annual profits of every mine." Section 5 directs the annual profits to be ascertained by taking the gross receipts or actual value of the output and deducting therefrom the working expenses, allowance for depreciations of plant, and *inter alia*, sub. sec. i "the cost of actual work done in sinking new shafts, making new openings, workings, or excavations of any kind, or of stripping or trenching, in or upon the lands upon which the mine is situated, or upon any other lands belonging to the same owner, lessee . . . or operator, in Ontario, such work having for its object the opening up or testing for ore or mineral." Section 14 directs that, if a person liable to pay tax under sec. 5 is also liable to and pays the municipality "an income tax upon income derived from such

mine," he shall be entitled to deduct the municipal tax from the Provincial tax—up to one-third, or in Cobalt one-half.

By sub-sec. 9 of sec. 40 of the Assessment Act it is provided that no income tax shall be payable to a municipality upon a mine or mineral work liable to taxation under sec. 5 of the Mining Tax Act, in excess of one-third (or in Cobalt one-half) of the tax payable in respect of annual profits from such mine or mineral work under that section; and in 1917 these three sections of the two Acts were amended by 7 Geo.V. 1917, ch. 7. Section 5 of that Act substitutes a new sub-sec. 9 of sec. 40 of the Assessment Act, so as to provide that "no income tax shall be payable to any municipality upon a mine or mineral work liable to taxation under sec. 5 of the Mining Tax Act, in excess of one and one-half per cent. of the annual profits of the mine or mineral work upon which the tax payable under the said section 5 is based." And sec. 6 of the 1917 Act amends sec. 14 of the Mining Tax Act so that the amount the mine operator is entitled to deduct for municipal income tax shall in no case exceed in amount "one and one-half per cent. of the annual profits upon which the tax payable under section 5 is based."

I find it impossible to believe that the "annual profits" referred to in these two sections side by side in the same Act are not intended to mean the same thing, although one amends the Assessment Act and the other the Mining Tax Act. Although the appellant company is not a producer of "solid mineral substance" so as to be liable under the Mining Tax Act to the 3 per cent. tax, it is only liable to municipal income tax under the sections of the Assessment Act which apply to companies actually liable to the Government tax, and can only be liable to income tax in the same way and to the same extent. If it was right to deduct the unprofitable workings in the one case, and was so intended, then equally it would be right and so intended in the other. I am unable to find anything in the Assessment Act to lead me to conclude that it was not so intended in either case—or that the "income" assessable by the municipality differs from the "annual profits" to a percentage of which its taxation is limited.

Sec. 2 (*e*) of the Assessment Act defines "income" as meaning the "annual profit or gain or gratuity" whether ascertained as wages, salary, etc., or unascertained as being "profits"

ONT.

S. C.

RE UNION NATURAL GAS CO. OF CANADA AND TOWNSHIP OF DOVER.

Magee, J.A.

from a trade or business, and also profit or gain from any other source. Section 3 makes the municipal taxes leviable upon the whole assessment for real property, income, and business or other assessments (such as those of telegraph and telephone companies) under the Act; and sec. 5 provides that all real property and all income derived by any person resident in Ontario shall be liable to taxation, subject to specified exemptions, which include (in clause 16) the income of a farmer derived from his farm: (in clause 18) dividends from stock in a company the "income" of which is liable to assessment; and (in clause 21) rent or income derived from real estate. By sec. 10, irrespective of any assessment of land, persons occupying or using land for the purpose of a business are to be liable to a business assessment, computed in the case of a business not specially mentioned at 25 per cent. of the value of the land so occupied or used; and by sub-sec. 8 those liable to business assessment shall not be assessed for the income of the business; and by sub-sec. 10 the business assessment tax is not to be a charge upon the lands. The business assessment took the place of the former assessment of personal property. There are thus the three subjects of assessment—realty, business assessment, and income—the two latter wholly personal.

By sec. 2 (*h*) "land" includes minerals, gas, oil, etc., in and under land. By sec. 11 every person (which includes body corporate) not liable to business assessment is to be assessed in respect of income, or, if liable to business assessment, then in respect of income not derived from the business; and (sub-sec. 2) the amount, if not fixed or capable of estimation, is not to be taken as less than the amount of the income during the previous calendar year. Then comes the question as to which municipality is to get the benefit of the income assessment. Section 12 (2) declares that, subject to sub-sec. 6 of sec. 40, the income of an incorporated company, if assessable, shall be assessed against the company at its head office. But sub-sec. 6 of sec. 40 provides that the income from a mine or mineral work shall be assessed by the municipality in which it is situate, and that the assessment on income from each oil or gas well operated during the year shall be at least $20. The next sub-section, 7, makes every person occupying mineral land for the purposes of any business other than mining liable to business assessment. Now, although this sec. 40, with several

others which follow it, is under the heading "valuation of Lands," there is no indication in sub-secs. 6 or 7 or sub-sec. 9, as amended in 1917, to which I have previously referred, that these income and business assessments lose their character of a strictly personal tax not made in respect of the land and not chargeable against it, although one or even both be arrived at in relation to it. The indication is, I think, all the other way. By sub-sec. 4 of sec. 40, the building, plant, and machinery on mineral land, used mainly for obtaining minerals or storing the same, and the minerals in or under the land, are not assessable (except as in sub-sec. 8) against a grantor reserving them). To make up perhaps for this exemption, the income tax is given to the municipality irrespective of where the company's head office may be. None the less it is part of the company's income which is taxed, and a minimum is fixed, based on each well operated, but also none the less a personal tax and income, just as business tax is purely personal, though calculated on the value of the land, and in some cases fixed in amount as in sec. 10, sub-sec. 4.

Section 5 (17) exempts fixed machinery used for farming or manufacturing purposes—just as is the plant, etc., for winning minerals. If in lieu of it the farmer's income were assessed, and he owned these lots 2 and 3, and had a bumper harvest on lot 2 with a lean one on lot 3, which caused a loss, I apprehend that the Legislature could never have intended that he should be charged with the whole profit on one without deducting the deficit on the other. If not, why should this company, whose income in Dover is being assessed, have a different principle applied to it? And again why should it be different from a mining company bringing up "solid mineral substance," whose annual profits, the Legislature expressly declared, should be calculated by deducting the losses in the unsuccessful ventures?

It is clear that a steamship company which constructs a vessel with a view to earning freight cannot say it has had a loss during the year of construction, merely because it has paid out more money than it received. The outlay is a capital investment for future earnings. And so with a mining company or oil company: it is not entitled to deduct its outlay on production shafts or wells and say there was no income. But if the steamship company find that, while some of its fleet have earned handsome profits, one

ONT.

S. C.

RE UNION NATURAL GAS CO. OF CANADA AND TOWNSHIP OF DOVER.

Magee, J.A.

vessel has proved unseaworthy or unsuitable, and has had to be scrapped, so that at the end of the year there was a loss on the year's transactions, it cannot be said that the company that year had any income, especially in the sense of our Assessment Act, that is, the "annual profit or gain" from the "business." It is not the gain from the shaft or well, but from the business.

In the case of *Coltness Iron Co.* v. *Black*, 6 App. Cas. 315, where the company sought to have deducted from the gross earnings of its mine in a particular year a large sum (p. 324) "to represent that year's depreciation of all the pits in the mines, wherever sunk," Lord Penzance pointed out that the word "profit" was used in the statute in a sense which precluded the company's interpretation that the intention of the Act was to tax "property," and the owner was intended to pay tax upon it as long as it lasted, and the thing which was to be taxed was the mine, and the words "profits received therefrom" meant, he thought, the entire profit derived from the mine, deducting the cost of working it, but not deducting the cost of making it; and, as he puts it at p. 327, "the words 'annual value' or 'profit received' from that 'property,' are introduced into the statute, not as the subject of taxation, but only as the measure of the taxation to which the 'property' shall be subjected." Lord Blackburn also dwelt upon the object and history of the statute. That case was strongly relied on for the municipality, but it seems to me that there is much difference between the statutory enactments here and those there dealt with.

I think this appellant company should be allowed to deduct from its receipts in 1918 the losses incurred in its business in that year, including the outlay upon dry holes, but not including the cost of new wells which are producing gradually and repaying the outlay upon them. The parties could probably agree upon the figures on that basis, or, if not, the matter might be remitted to the learned County Court Judge. I would favour giving the appellant company the costs of appeal.

Appeal dismissed.

EMPIRE FINANCIERS Ltd. v. NANCE.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Ives, JJ. March 1, 1920.

DISCOVERY AND INSPECTION (§ IV—31)—BILL OF EXCHANGE IN FAVOR OF CORPORATION—ENDORSED TWICE—APPLICATION FOR—EXAMINATION OF OFFICER—ENDORSEMENT OR ASSIGNMENT—RULES 234 AND 236 (ALTA.)

The holder of a bill of exchange whether by endorsement or delivery is not an assignee within the meaning of r. 236, and even if the transference of a note by endorsement were considered an assignment, only the immediate endorser to the plaintiff would be the assignor within the rule. Under r. 234 if the plaintiff were the assignee of the corporation assignor an order might be made to examine an officer of the corporation, but not a former or any other employee.

Statement.

APPEAL from an order of Simmons, J., refusing leave to examine for discovery an officer and past employee. Affirmed.

M. M. Porter, for plaintiff; *J. K. Paul*, for defendant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The action is on a promissory note made by the defendant in favour of the Great North Insurance Co., endorsed by it to one W. C. Young and endorsed by him to the plaintiffs. The note in question was one of several referred to in an agreement between the said Insurance Company and Young, which the Insurance Company agreed to assign to Young upon the payment of a specified sum at a later date.

Rule 236 provides that "where an action is brought by an assignee of a *chose in action* the Court or a Judge may order the assignor to be examined for discovery." Rule 234 authorizes the examination for discovery of a party or any person, who is, or has been employed by a party and appears to have some knowledge of the matters in question. The defendant contends that under the combined effect of these rules and r. 3 with the explanation furnished by r. 250, he is entitled to examine for discovery an officer and a past employee of the Insurance Company and the Master gave leave for such examination in the order for directions. On appeal to Simmons, J., this direction was struck out and the matter came before us by way of appeal from his order. Mr. Porter, for the plaintiffs, quite properly points out that before we come to consider r. 234 or r. 250, it must be shewn that the plaintiff is an assignee and the Insurance Company an assignor within the meaning of r. 236.

He contends that the holder of a bill of exchange, whether by endorsement or by delivery, is not an assignee within the meaning

ALTA.

S. C.

EMPIRE FINANCIERS LTD. v. NANCE.

Harvey, C.J.

of the rule and that even if the transference of a note by endorsement were to be considered an assignment in this sense it could be only the immediate endorser to the plaintiff who would be the assignor within the rule.

In my opinion both arguments are sound. Taking the second first: The rule says "*the* assignor," not *an* assignor. That evidently contemplates one person only and that person, the one who assigns to the assignor who is the plaintiff.

As to the other contention it is quite clear that the law regarding the transference of property in bills of exchange by endorsement or delivery is a part of the law merchant and is quite distinct and apart from the law relating to transference of property in other *choses in action* by assignment. As to the latter it is by statutory authority that the assignee acquires the right to sue in his own name (see Judicature Ordinance (Alta.), sec. 10, clause 14), while as to the former, long before there was any law which permitted an assignee of an ordinary *chose in action* to sue in his own name the holder of a note by endorsement or delivery could sue upon it.

The word "assignee" is not an apt word to describe the endorsee of a note, much less the holder by delivery of a note payable to bearer.

Then there is the further fact to which reference was not made upon the argument but which I think is of some importance, viz: that the law regarding bills of exchange as such, is wholly federal, while that respecting ordinary *choses in action*, including their assignment, is provincial thus making the separation and distinction, in Canada at least, that much clearer.

It seems to me, therefore, quite clear that the rule does not contemplate and include endorsers and holders of bills of exchange.

Though it becomes unnecessary to decide whether if the plaintiff were the assignee of a corporation assignor there could be an examination of the corporation's officer and former employee yet as the point was argued and it may be useful for future cases I think it proper to say that in my opinion a Judge may order the examination of an officer but not of a former or any other employee.

The decisions on the corresponding Ontario rule are, in my opinion, not in point because of the difference between our main rule (234) and their corresponding one.

Rule 250 is not one for the authorization of the examination

of an officer of a corporation but one (in part) for the authorization of the use in evidence of such examination the authority for which is by the rule assumed to exist. Rule 234 is where that authority is to be found.

That rule authorizes the examination of a party or an employee. It says nothing about the case where the party is a corporation, while the Ontario rule does. It is possible that an officer might be examined as "one who is employed" but in my opinion the right to examine the officer arises from the fact that that is the only way a party can be examined when that party is a corporation. This is in accordance with the decision of this Division in *Magrath* v. *Collins* (1917), 37 D.L.R. 611, 12 Alta. L.R. 240, in which it was held that where an employee subject to examination was a corporation it could be examined by the examination of one of its officers.

It has been pointed out frequently that when the officer speaks he is not speaking for himself but for the corporation, in other words, it is the corporation which is being examined.

It follows as of course that when an assignor within r. 236 is a corporation, it can be examined by the examination of its officer. If it were not so the rule would be only partially effective.

The right to examine an employee and particularly a past employee is quite another matter.

It is only by virtue of r. 234 that such a right exists. The employee is not examined because he represents his employer, corporation or otherwise, but because he has some knowledge and his employer has some responsibility for him. His evidence is not the evidence of, and cannot be used against, the employer.

This is a very considerable extension of the rights to obtain information but I can see no principle of analogy under which it can be said that because an employee of a party may be examined, therefore, the examination of an employee of some other person must be deemed to have been intended to be authorised. We are not concerned with the question of whether it would be proper to extend r. 236 to make it, but whether it is in reality by implication as comprehensive as r. 234.

In my opinion it would be making a very substantial amendment to adopt the view contended for.

In the result I would dismiss the appeal with costs.

Appeal dismissed.

N. S.

S. C.

CAHILL & Co. v. STRAND THEATRE Co. Ltd.

Nova Scotia Supreme Court, Harris, C.J., Longley, J., Ritchie, E.J., and Mellish, J. February 14, 1920.

INJUNCTION (§ I E—53)—GATHERING OF CROWD ON STREET—OBSTRUCTION OF TRAFFIC—BUSINESS INJURED—INJUNCTION.

Any person gathering or keeping a crowd of people on the street, whether formed in a queue or not, so as to unreasonably obstruct traffic, is liable to anyone specially injured thereby, and an injunction will be granted.

[*Lyons & Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631, referred to.]

Statement.

APPEAL from the judgment of Drysdale, J., dismissing with costs plaintiffs' action for an order restraining the defendants, their managers, servants and agents from permitting persons attending or proposing to attend the Strand Theatre from obstructing access to plaintiffs' premises. Reversed.

A. W. Jones, for appellant; *F. H. Bell*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—I agree with Mellish, J.

Longley, J.

LONGLEY, J. (dissenting):—I am sorry to be compelled to dissent from my brothers in this case.

The whole matter appears before us and the evidence of various parties was taken. It seems that the Strand Theatre is an institution which is largely patronised in the City of Halifax, and that only on certain occasions a queue of persons accumulates in order to take their turn for purchasing tickets. The whole thing is done under the control of the police of Halifax, and policemen are sent by the city especially to have charge of the matter; and it appears that on two or three or several occasions the queue extended up Sackville St. to the shop or store of Messrs. Cahill & Co. One can put it strongly or weakly if the evidence is to be dealt with. The judgment of Mellish, J., is made particularly strong and all the strong points are brought out in the case.

In my judgment the interfering by means of an injunction by the Court to stop any people from conducting a lawful series of plays is a very delicate and dangerous position. I have to subscribe to the doctrine that if it became a matter constantly worrying the adjoining proprietors and interfering largely with their business some course would have to be taken by the Court; but in my judgment the matter has reached no such stage, and there is lacking a single English case which justifies this Court in taking that course at the present time. In one English case the doctrine is talked about of closing other people's shops, and that

there should be interference made with it, but none in that case was made, and in no instance can it be found that in similar cases the Court has intervened with the tremendously severe penalty of injunction.

I hold that all parties in this matter are to be held to a reasonable exercise of their functions. The Strand people have put the whole question of their entrance in the hands of the police and the police are managing it as well as they possibly can and have sworn testimony to the fact that a decided improvement has been made within the course of time, and therefore I think it would be a solemn and grave responsibility for this Court to undertake to exercise any power of injunction.

Longley, J.

I am in favour of maintaining the judgment of Drysdale, J.

RITCHIE, E.J.:—I concur in the judgment of my brother Mellish but I do so with very great doubt because it is contrary to the finding of fact made by the trial Judge. In this respect the case is distinguished from *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631. In that case the trial Judge found that there was an unreasonable obstruction. It is, I think, clear that since the action was brought the grievance complained of has been minimized, and I am far from being sure that there is any necessity for an injunction at the present time, however it may have been when the action was brought.

Ritchie, E.J.

MELLISH, J.:—This is an action for an injunction to prevent the defendant company from obstructing the access to the plaintiffs' place of business by the patrons of defendant company's theatre.

Mellish, J.

The hearing, as I understood the facts, on the motion for an interim injunction, was treated as a trial of the action. Drysdale, J., after the hearing, dismissed the action with costs.

The following statement as to the facts by the trial Judge, and of the law applicable thereto has not, I think, been complained of; nor could it be open to objection:

> The plaintiffs own and conduct a grocery store at the corner of Argyle and Sackville Sts. in the City of Halifax. This shop has a frontage on Sackville St. of 32 feet 6 inches, the main door for entrance and exit being at the corner of Argyle and Sackville. The defendant company owns and manages the theatre next door east of the grocery, fronting on Sackville St., with a frontage of 17 ft. 5 inches on Sackville St. the entrance to which theatre being from Sackville with exits in the rear, one of which leads to Argyle St. and one to Barrington St. The complaint of the plaintiffs is that defend-

N. S.

S. C.

CAHILL & CO. v. STRAND THEATRE CO. LTD.

Mellish, J.

ant company so use and conduct this business and property as to collect crowds on Sackville St. and interfere with the entrance of plaintiffs' grocery. The defendant company is engaged in a lawful business. I agree with the proposition of plaintiffs' counsel that in the use of the property they, the defendant company, must so conduct their business as not to unreasonably obstruct the entrance to plaintiffs' grocery and this involves an examination of the methods of defendant in regulating the crowds that naturally flock to a theatre. The complaint here is as to the crowd that collects at the entrance to the Strand from Sackville St., there being no complaint as to the exits. In front of the Strand, Sackville St., has a sidewalk 12 ft. 2 inches wide with a sidewalk on the north side. The complaint is that patrons of the Strand form a queue in front of the Strand that extends in front of plaintiffs' entrance and prevents easy access to his shop by customers.

The trial Judge further states:—

In the early days of the Strand there was no attempt to regulate the admission of the entrance crowd from Sackville St. and such a crowd would frequently form as to block Sackville St., but on complaint of plaintiffs the police in charge of traffic, with the aid of defendant company, undertook the regulation of traffic entering the Strand and whatever complaint the plaintiffs may then have had I feel no longer exists.

I think that the evidence clearly establishes the fact that before the queues were formed the plaintiffs had a ground of complaint, viz., that the sidewalk was blocked in front of the defendant's theatre so as to compel the plaintiffs' customers to go round the crowd so as to be able to enter his store. His ground of complaint however in the present action is that since the queues were formed (originally there was only one, which was not formed in front of plaintiffs' premises), some 7 months before the trial, one of which was formed in front of his premises, the access thereto has been interfered with.

Whether the ground of complaint as first made before the queues were formed exists, is not, of course, the real matter for determination in this action.

The Judge, however, further finds "that plaintiffs' shop has not been obstructed or customers desiring to enter interfered with." With this finding I very much regret that I am unable to agree. The action was begun August 14, 1919. The trial was begun on September 26, and concluded on October 2, 1919. These dates are, I think, material in considering the evidence.

John E. Cahill and William Dalton, members of the plaintiff firm, gave evidence which, if believed, is in my opinion sufficient to support the plaintiffs' claim. In the opinion of the trial Judge the statements of the plaintiff Cahill are exaggerated, perhaps

unintentionally. The chief ground of plaintiffs' complaint seems to be that on Saturday evenings in particular the access to their premises, which is by a doorway on the corner of Argyle and Sackville Sts., is unreasonably obstructed by patrons of the theatre blocking up the sidewalk in front of this doorway by crowding, and also by the formation of a queue which extends from the entrance of the defendant's theatre on Sackville Street and up said street and round past the said doorway for some distance on Argyle St. The crowding, sometimes, as I understand the evidence, renders the plaintiffs' premises wholly inaccessible for considerable periods of time, while the queue formed as above prevents certain of plaintiffs' customers from entering plaintiffs' premises, unless they break through the queue, which is apparently not an easy matter, or make a detour round the end of it, which extends on Argyle Street.

As to the condition created by this queue, the plaintiff Dalton's evidence is as follows:

Q. How long did that go on? A. About 7 or 8 months ago they changed the line waiting for tickets up Sackville past our building and around the corner on Argyle if the crowd was large enough. Q. Describe on Saturday and Friday nights what the general condition is? A. On Saturday night it always comes around Argyle St.; there are times when the crossing would be kept open, but as a general rule it was blocked. Q. What is the crossing? A. The crossing on Argyle St. going South and the Sackville St. crossing. Q. Anyone coming from the north, could they cross over and down Argyle? A. They would have to go around; go off the sidewalk into the road and around. Q. Coming from the north on Argyle, they would have to go into the road into Sackville and around the road on Argyle and on to the sidewalk? A. Yes. Q. To get into your store they would come back north? A. Yes, around the end of the queue. Q. How often does that occur? A. It is frequent; on Saturday night, before the action, it was a common thing and it has occurred since the action. A. I understand the second show takes in about a quarter past 9; how long before that generally would this crowd be there? A. Saturday they start about 8 o'clock; about an hour. Q. What is the condition of your business during that hour? A. It is practically at a standstill. Q. And you have watched people coming to your store go around the end of the queue? A. Yes. Q. Do you remember the night Mr. Devlin was loading the truck; what do you say about that? A. I remember that night; the crowd was right around; it came up Sackville and around Argyle St. so as to block the crossing going from our corner to the opposite corner on Sackville, and the team came up and of course he always leaves his team next to the entrance to the door on Argyle St., and the crowd was past the car; the back of the car where he opens it to take the empties off and load up, and Mr. Cahill asked the policeman standing there at the corner

N. S.

S. C.

CAHILL & CO. v. STRAND THEATRE CO. LTD.

Mellish, J.

that night to move the crowds so that he could load his team and he said there were 2 or 3 barrels next our window on Argyle St., and he said we were blocking the street. Q. Your team was around the corner on Argyle and he didn't move the crowd away and it extended to where? Mark the place on the plan E.1? (Witness marks place on plan E.1. "a.") Q. Do you remember Mrs. Shano being in your store? A. Yes. Q. Remember her saying anything? Did she complain to you? A. Yes. Q. Have other customers said anything about it? A. Yes, frequently.

Samuel W. Freeman testifies that on September 6 the whole Sackville St. sidewalk in front of plaintiffs' store was completely blocked about 8 p.m. for 15 minutes before the police opened a passage way and formed a queue which when formed extended round on to Argyle Street.

Mrs. Shano states that on the Saturday evening before the trial began the queue existed so as to compel her to make the detour above referred to, to enable her to get into the plaintiffs' store.

William S. Craig had a similar experience on August 8 or 9, before the action was brought.

William Venner states that on Saturday, September 13, the sidewalk in front of the defendant's theatre was blocked up as early as 25 minutes to 7 o'clock and he was compelled to take the middle of the street to reach the plaintiffs' premises.

Charles W. Ackhurst, an alderman and police commissioner, visited the premises on the evening of Saturday, August 16, and his evidence I think clearly shews that the police protection was inadequate to ensure reasonably easy access to the plaintiffs' premises.

The trial Judge has believed the evidence of the police and I take it we must accept their testimony. Policeman Meehan states "Sometimes there has not been much space. I noticed since August (this action was begun August 14), there has been no room to complain of the sidewalk at all; there had been a great change."

This officer, however, was on duty only "every other Saturday night on and off the last 2 years."

Policeman O'Halloran was there only since July and on 3 occasions. Policemen Spruin, Simmonds, Maloney and Elford were on duty in the locality for short periods since the action began. Policeman Horne was on duty apparently only every

other evening. Policeman Gillis was only there from February to July.

Golden, a superannuated policeman in the employ of the defendant company, was not, I think, in a position to give detailed evidence that would be of much assistance. There is evidence that the crowd is composed of people who are apparently not very easily managed. They spread over the whole sidewalk when the policeman's back is turned, and on one occasion seem to have carried a policeman into the theatre. For a few evenings the crowd or queue formed was, on the instructions of the mayor, kept off the sidewalk altogether. In consequence, however, of the "indignation" expressed by the defendant's employees or patrons this practice after 3 days was discontinued by the Chief of Police. The police are apparently paid by the defendant for such services as they render in dealing with the crowd. This is no doubt a proper charge against the defendant, but in my opinion the service is insufficient. It may be that sufficient police are not employed.

The law applicable to such cases is, as I understand it, that any person who gathers and keeps a crowd of people on the street, whether formed into a queue or not, in such a way as to unreasonably obstruct traffic, is liable in an action to anyone specially injured thereby. The plaintiffs in this action ask merely for an injunction.

I think without giving any more weight to the evidence of the plaintiff Cahill than the trial Judge has given, it is quite clear that the access to the plaintiffs' premises before and since the action began has been unreasonably interfered with by the patrons of the defendant's theatre.

Giving full credit to the evidence adduced on behalf of the defendant, I do not think the plaintiffs' case has been met.

I think it is clear from the evidence taken as a whole and after due allowance for exaggeration that the means taken to protect the plaintiffs' business from undue interference are inadequate and that the injunction prayed for should be granted. It is with great diffidence that I fail to agree with the trial Judge but I cannot come to the same conclusion that he has come to on what I think he must have regarded as the dependable evidence in the case.

It was suggested by defendant's counsel on the argument that

N. S.

S. C.

CAHILL & CO. v. STRAND THEATRE CO. LTD.

Mellish, J.

conditions were as good as they can reasonably be made provided the defendant company is to continue to do business.

I do not agree with this contention. Whether the drastic steps taken by the mayor were necessary or proper does not, I think, call for determination.

The appeal should be allowed and the injunction granted, with costs. *Appeal allowed.*

ALTA.

S. C.

SHACKLETON v. PREVO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 27, 1920.

CONTRACTS (§ VC—390)—EXCHANGE OF AUTOMOBILES—MISREPRESENTATION —RESCISSION.

The representation by the vendor of the distance an automobile has run is a material representation which, if false and relied on by the purchaser, is sufficient ground for the rescission of the contract.

Statement.

APPEAL from the judgment of Ives, J., entered upon the verdict of a jury in favour of the defendant upon a counterclaim for rescission of an agreement of exchange of automobiles upon the ground of misrepresentation.

A. L. Smith, K.C., for plaintiff; *W. E. Payne*, K.C., for defendant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The defendant had purchased from the plaintiff a new car, Model No. 9 Gray Dort, for which he had paid in full. A few days after the purchase he desired to exchange it for a Gray Dort Special, and it was agreed that the additional amount payable should be $150. The exchange was made by the plaintiff's agent, and a note was given for the $150, payable in 10 days. Within a few days the defendant objected to the special on the ground that it was not a new, unused car. The plaintiff refused to rescind and subsequently brought suit upon the note, and the defendant counterclaimed for rescission.

It is contended on behalf of the plaintiff that the ground of misrepresentation alleged is that the car was a new, unused one, and that the defendant himself admitted in the witness box that, when he accepted the car, he knew it was not new, and that the verdict therefore should have been in favour of the plaintiff. The jury did not find the misrepresentation to be that it was a new, unused car, but that it had not been used as much as it had in fact been used.

It was shewn in evidence that the special car had been previously sold to a banker who had kept it for several weeks and driven it for 600 or 800 miles and then had exchanged it. The agent admits that he was unaware of this and says that he said he had driven the car about 250 miles and did not know to what extent it had been driven before that. There is also evidence that the speedometer had registered the driving of the former owner but that, when the car was delivered to the defendant, it had been altered to shew a very small mileage run. The defendant himself swore that the plaintiff's agent represented that it had only run about 200 miles.

There is, therefore, evidence to support the finding in respect to misrepresentation as to the extent of use the car had had and I cannot see how it can be said that it was not material. There is indeed evidence from which the jury might have concluded that it had run much more than the distance of approximately 1,000 miles which distance seems to be quite clearly established.

The only question then is whether that was a representation which the plaintiff was called on to meet. The counterclaim alleges that the defendant relied on the "representations that the car was a new car and had not been run more than 200 miles" and that the exchange was made and the note given on "the false and fraudulent representation that the car had not been run over 200 miles and was, with that exception, a brand new car."

After consideration I have come to the conclusion that this is not simply an allegation of a representation of a new car, with explanation or qualification of the term, but that it is an allegation of a representation of the distance the car had run, is in itself a material representation and that, therefore, a verdict resting on a finding of that representation which the jury found was not true, cannot be questioned.

There is, I think, also evidence from which the jury could infer that the defendant relied on the representation.

The question is not whether the conclusion is one which we think we would have reached but merely whether it is one which 6 intelligent men might honestly have reached on the evidence.

As I have said there is, I think, evidence to support it and I do not see that it can be said that there is such weight of evidence against it as would justify it being considered perverse.

I would dismiss the appeal with costs. *Appeal dismissed.*

ONT.

C. C.

CANADIAN PACIFIC R. Co. v. RYAN.

County Court of York, Denton, J. January 23, 1920.

CARRIERS (§ III A—375)—GOODS—DESCRIPTION—DIFFERENT—BILL OF LADING—SHIPPER—LIABILITY—TOLLS—HIGHER.

Where a consignee in a bill of lading describes a shipment as beverages and by labels on the bottles represents it to be patent medicines, he is liable for the higher freight tolls on patent medicines.

[*Pere Marquette R. Co.* v. *Mueller Mfg. Co.* (1919), 48 D.L.R. 468, 45 O.L.R. 312, distinguished.]

Statement. ACTION to recover the difference in freight tolls on a shipment between that paid under the toll for beverages and the higher toll on patent medicines.

J. Q. Maunsell, for plaintiff; *James Haverson*, K.C., for defendant.

Denton, Co.J. DENTON, Co.J.:—The point, or one of the points, to be decided, in this case, is whether the contents of the bottles shipped in cases were medicines or beverages. They were shipped as beverages. If, in fact, they were medicines and not beverages, the plaintiffs are entitled to recover under section eight of the conditions on the back of the bill of lading, which provides:

"If upon inspection it is ascertained that goods are not those described in this bill of lading, the freight charges must be paid upon the goods actually shipped, with any additional penalties lawfully payable thereon."

The preparation is called "Invalid Port," and the formula is sugar, water, tartaric acid, salicylic acid, and colouring matter. It contains about 1% alcohol. As a layman in such matters I would call it either a beverage or medicine, or both. To the railway company, the defendant represented it as a beverage. To the consuming public he represented it as a medicine, for the bottles are labelled, "Proprietary Patent Medicine Act, Serial No. 1643," "Health and Vigor." And on the wrappers which cover the cartons in which the bottles, containing the preparation, are sometimes shipped—though not the particular bottles in question—are the words: "Dose, one glass before meals." Another label on all the bottles is: "This preparation complies with the Dominion Proprietary Medicine Act, also Ontario Temperance Act. It may be legally sold by druggists or dealers in patent medicines, anywhere in the Dominion of Canada without a doctor's prescription." The question to be decided, then, is what is the rate applicable upon a shipment of goods which are described

ONT.

C. C.

CANADIAN PACIFIC R. CO. v. RYAN.

Denton, Co. J.

in the bill of lading (not correctly perhaps, in point of fact) as a beverage, but which to the public, for his own advantage, he chooses to call a medicine.

Were it not for the decision in *Pere Marquette Ry. Co.* v. *Mueller*, (1919), 48 D.L.R. 468, 45 O.L.R. 312, I should have thought the defendant estopped in a case of this kind from saying that the goods are other than what the labels represent them to the public to be. The *Pere Marquette R. Co.* v. *Mueller* case decides that the rate on the goods carried must be fixed by their actual and proper description and classification rather than by their description, and at p. 477, Ferguson, J.A., says:—

> I do not consider it necessary to deal with the hypothetical case stated by the learned trial Judge for this is not a case of intentional misdescription, where the defendant is seeking to set up and take the benefit of his own fraud or a case calling upon us to consider whether or not a defendant can set up his own fraud as an answer to a claim. It may be that the plaintiffs have a cause of action against the defendants for deceit or negligence but that claim is not before us in this action. The claim here is for lawful tariff charges on the goods carried, as fixed by the contract of the parties, read in the light of the provisions of the Railway Act.

If I give effect to the defendant's contention that the goods shipped were beverages, the result will be that the railway company has carried from Toronto to Winnipeg the goods in question for $132.82 less than they would have been entitled to charge if they had been shipped as goods of the kind and description which he wished them to be known and sold as in Manitoba and the West. It is all very well for the defendant to say that this Invalid Port was sold chiefly to hotels in the West and not to drug stores. The label on the bottles shews that he wanted to sell them to drug stores as a medicine. I do not see how the defendant can complain of his preparation being called a medicine when he himself labels it and calls it as such.

A case somewhat similar to this is *Andrews Soap Co.* v. *Pittsburg, Cincinnati and St. Louis Railway* (1890), 4 I.C.C.R. (U.S.A.) 41, at p. 77. While the case cited is not binding upon this Court, it is instructive and interesting. It was held that a manufacturer's description of an article to induce its purchase by the public is its description for transportation purposes also. In that case the shipper advertised and sold his goods as toilet soaps—though in fact he contended that it was not superior to ordinary laundry soap, which is carried at a lower rate. So in this case the defend-

ONT.

C. C.

CANADIAN PACIFIC R. CO. v. RYAN.

Denton, Co.J.

ant represented the preparation to be a medicine and sold it to the public as such, and ought not now to be heard to say that it was only a beverage in order to get the reduced rate. I hold that where a preparation is in point of fact either a medicine or a beverage, or both, and the shipper labels the bottles as medicine to induce the public to buy them as medicine in drug stores, or elsewhere, as having curative properties, he must pay the charges applicable to medicines and cannot claim the lower rates simply because he chooses to call them beverages on his bill of lading.

There will be judgment for the plaintiff for the amount claimed $132.82. The parties have agreed upon the amount of the counterclaim, which is allowed at $59. The plaintiff will be entitled to the costs of the action and the defendant to the costs of the counterclaim. *Judgment accordingly.*

ALTA.

S. C.

REX v. CESSARSKY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck and Ives, JJ. February 4, 1920.

CRIMINAL LAW (§ XII L—994)—CONVICTION—APPEAL—EVIDENCE—CONVICTION OF THIRD PARTY—PRESUMPTION OF GUILT—CODE, SEC. 986.

The evidence of the conviction of a third party is not admissible in a criminal charge.

The extraordinary presumption of guilt referred to in sec. 986 of the Cr. Code, if established, is sufficient to uphold the conviction.

Statement.

APPEAL from a conviction for being, without lawful excuse, in a common gaming house. Affirmed.

G. C. Valens, for appellant; *W. G. Harrison*, for the Crown.

Harvey, C.J.

HARVEY, C.J., concurs with Ives, J.

Beck, J.

BECK, J. (dissenting):—I agree with my brother Ives in what he says regarding the improper use as evidence of a conviction against a third party and also regarding the insufficiency of the evidence of the contents of the search warrant, but I take a different view of the effect of sec. 986 of the Cr. Code*, or rather of the second part of that section. I do not think that wilful prevention, obstruction or delay is a condition for the application of the second part of the section but I think that the words "fitted or provided with any means or contrivance" are not intended to include those things specified in the preceding section, namely "cards, dice, balls, counters, *tables*, and other *instruments* of gaming," but refers to

*See amendment 3-4 Geo. V. 1913, ch. 13, sec. 29..

things which are means in the nature of contrivances which by reason of their nature or customary method of use are, or are capable of being fitted in the sense of set in, or set up, or made to fit, as for instance wheels of fortune, roulette tables or other specially constructed tables specially adapted for gaming as distinguished from use in the various ways ordinary tables are used. I think the association of the quoted words distinctly suggest this as their primary sense and that the view that this sense is the one intended is strengthened by comparison of the 2 secs. 985 and 986.

If my interpretation of the second part of sec. 986 is correct there was nothing found which would constitute evidence under it.

I would therefore quash the conviction.

IVES, J.:—This man was convicted for that he without lawful excuse was found in a disorderly house, to wit., a common gaming house.

From the evidence it would appear that the Crown put in a conviction of one Max Holtzer found guilty of being the keeper of the same premises, as evidence of the character of the premises. It should be pointed out that such a conviction is not evidence upon this or any other criminal charge against an accused other than Holtzer.

The next objection is that sec. 985 of the Cr. Code is not applicable here, because there is no evidence of a search warrant. The officer making the arrest says that he had a search warrant for a gambling house. No warrant was produced. The absence of the warrant was not accounted for, no secondary evidence of its contents was offered, and no further reference made to it. A search warrant is a written document. It must, to be valid, comply with certain requirements as to form and substance. To hold, in its absence at the trial, that a bald statement of the police officer that he "had a search warrant for a gambling house," to be sufficient to raise the extraordinary presumption of guilt derived by force of sec. 985 is not in my opinion permissible.

But the circumstances under which the extraordinary presumption of guilt is raised in sec. 986 would seem to have been sufficiently established here. In that section two circumstances are mentioned, the existence of either of which I think sufficient. First, an (active) obstruction of the authorized officer entering;

ALTA.

S. C.

REX v. CESSARSKY.

Ives, J.

secondly, if the premises are found fitted or provided with any means or contrivance for playing any game of chance. This section is more comprehensive than sec. 985. The 2 circumstances I have mentioned are divided by "and," which is disjunctive, and which must be so to be of value in the case of a charge involving a bawdy house, where the presence of gambling paraphernalia would not necessarily be contemplated.

In the present case the evidence consisted of round top padded card tables, numerous decks of cards, poker chips and money on the table at which players were sitting. This I think comes within the words of the section "provided with any means or contrivance for playing any game of chance, etc."

I think the judgment appealed from was right and this appeal should be dismissed with costs.

Appeal dismissed.

ONT.

S. C.

REX v. FRECHETTE.

Ontario Supreme Court, Appellate Division, Magee, J.A., Clute, Riddell, Sutherland, and Masten, JJ. January 13, 1920.

NEW TRIAL (§ II—8)—ACCOMPLICES—EVIDENCE FOR AND AGAINST ACCUSED—RULE AS TO CORROBORATION—STATEMENT TO JURY—OBJECTION—APPEAL—NEW TRIAL.

There is no rule applicable to the evidence of accomplices called as witnesses on behalf of the accused, such as the rule of practice and experience which requires the testimony of accomplices against such accused to be corroborated. A new trial will be granted where the jury has not regarded the evidence on behalf of the accused because, in their opinion, it was not corroborated.

[See *Rex* v. *Morrison* (1917), 38 D.L.R. 568, 29 Can. Crim. Cases, 6; *Rex* v. *Baskerville*, [1916] 2 K.B. 658; *Rex* v. *Dumont* (1918), 29 Can. Crim. Cas. 442; *Green* v. *McLeod* (1896), 23 A.R. (Ont.) 676; *Rex* v. *Walker* (1910), 16 Can. Crim. Cas. 77.]

Statement.

CASE stated by the Chairman of the Court of General Sessions of the Peace for the County of Hastings, after the trial and conviction of the defendant upon a charge that he did, at the township of Thurlow, in the county of Hastings, on the 13th September, 1919, unlawfully steal a quantity of whisky over the value of $50, the property of the Grand Trunk Railway Company of Canada, contrary to sec. 347 of the Criminal Code.

Several questions were stated by the learned Chairman, relating to the evidence of accomplices and the necessity for corroboration and the objections to the Chairman's charge made by Mr. Porter, counsel for the defendant. The second question was:—

ONT.

S. C.

REX v. FRECHETTE.

"Was I right in overruling Mr. Porter's objection and in explaining to the jury as I did how they might determine who is an accomplice and the necessity for corroboration?"

The facts sufficiently appear in the judgment.

E. G. Porter, K.C., for the defendant.

Edward Bayly, K.C., for the Crown.

The judgment of the Court was delivered by

MAGEE, J.A.:—In this case the learned Chairman of the Court of General Sessions of the Peace for the County of Hastings has asked the opinion of the Court upon several questions, not all of which were argued. It is only necessary, we think, to deal with the second question.

Magee, J.A.

The indictment upon which the prisoner was convicted charged him with the theft of a quantity of whisky, the property of the Grand Trunk Railway Company. He was an engine-driver on the railway. It was alleged—and evidence was given to prove—that several others were concerned with him in the commission of the offence.

One of these alleged accomplices, named Nicholson, a fireman on the prisoner's engine, gave evidence on behalf of the Crown, and two others of them, Summers and Logan, who were separately indicted, were called for the defence. At the trial the propriety of requiring the evidence of the accomplice who was called by the Crown to be corroborated was recognised, and the learned Chairman instructed the jury in that regard. The sufficiency of his instructions as to the nature of the corroboration is here challenged, but need not now be referred to. Summers and Logan, the two alleged accomplices called for the prisoner, denied, as did the prisoner, any part taken by themselves or him in the theft of the liquor, several cases of which had been stolen from a car of the railway company.

It appears from the statement of the case by the learned Chairman that the Crown counsel, in addressing the jury, argued that the two witnesses for the defence referred to were also accomplices, and it was necessary that the evidence of each should be corroborated, the same as the evidence of the one called for the prosecution, before their evidence could be acted upon. Counsel for the prisoner objected that they were not properly proven to be accomplices at all, and the rule did not apply. The learned

ONT.

S. C.

REX
v.
FRECHETTE.

Magee, J.A.

Chairman then ruled against the objection, and, later, in his charge to the jury, explained to them that the Crown counsel had raised the question that, if the fireman Nicholson had to be corroborated as an accomplice, then so had the other two, Summers and Logan, to be corroborated, or the jury ought not to take their evidence, and that, while he, the Chairman, could not take the time to look up all the law in regard to that, he found one or two statements that looked as though the Crown counsel might be right, at least to some extent. He then read to the jury some authorities as to who were accomplices and as to warning the jury against accepting their evidence against the prisoner without corroboration, and went on to state a test by which to determine whether one is an accomplice, and later told the jury that, if they considered these three witnesses accomplices, then they ought not to accept their evidence without corroboration, and one accomplice could not corroborate another—the corroborative evidence must be from some other source; and, if the jury considered Summers and Logan to be accomplices, then Logan could not corroborate Summers and Summers could not corroborate Logan, and they should be corroborated.

The statement of the case proceeds thus: "After the jury had retired, and after objection taken by Mr. Porter, I recalled the jury and stated to them as follows: 'It was on the question of the accomplices, the evidence and the corroboration. Mr. Porter understood me to say that, if you consider Summers and Logan accomplices, then, unless it was corroborated, you couldn't take their evidence at all. I didn't intend to put it that way, but to put it to you just as I put Nicholson's: the evidence of an accomplice ought not to be accepted in itself; you may accept it if you wish, and find your verdict on it; but the rule of law is that it ought not to be accepted unless it is corroborated. And, just the same as Summers and Logan, if you consider them accomplices, you ought not to consider their evidence either unless corroborated: the rule works both ways. I don't want to make it any stronger for Nicholson than for the other two; the question of corroborating their evidence is the same in all cases.' I asked Mr. Porter if this explanation was satisfactory, and he raised no objection to it."

The second question asked by the learned Chairman is this: "Was I right in overruling Mr. Porter's objection and in explaining

ONT.

S. C.

REX v. FRECHETTE.

Magee, J.A.

to the jury as I did how they might determine who is an accomplice and the necessity for corroboration?"

We think that this question must be answered, as to the necessity for corroboration, in the negative. It would seem manifest that the weight of the objection, as it presented itself to the learned Chairman, was rather to the proof that the two witnesses for the defence were accomplices, the evidence of Nicholson against them, and the prisoner being said to be uncorborated, than as to any difference in the rule as to corroboration. But there is no rule applicable to the evidence of accomplices or alleged accomplices, who are called as witnesses on behalf of the accused person, such as the rule of practice and experience which exists relative to the evidence of accomplices against him, which requires that the jury be warned against the danger of convicting on such evidence without corroboration. It is well and proper to call the attention of the jury in criminal as well as civil cases to the possible interest of any witnesses on either side and the necessity of applying their own judgment and common sense to the weight to be attached to their testimony, but that is very different from instructing them that the rule as to corroboration is the same as to both.

In this case there was some corroboration of Nicholson's evidence against the prisoner, and the jury upon the instructions given them may very well have considered that, he having been corroborated, and the other two not being, in their judgment, corroborated, they should not pay attention to the evidence of the latter in the prisoner's favour.

Mr. Bayly, for the Crown, submitted that the verdict was well-warranted under the evidence, and that under sec. 1019 of the Criminal Code it should not be disturbed, unless some substantial wrong or miscarriage of justice had been occasioned; but, as the Court cannot say that the jury may not have been affected to the prejudice of the prisoner by the instructions given to them, we cannot be assured that there was no substantial wrong or that that section should be applied.

The conviction should be set aside, and a new trial ordered.

The prisoner should be admitted to bail in a substantial amount.

Judgment accordingly.

ALTA.

S. C.

CARLSON v. CANADIAN PACIFIC RAILWAY.

Alberta Supreme Court, Walsh, J. February 16, 1920.

NEGLIGENCE (§ IC—36)—INJURY TO LICENSEE—DUTY OF OWNER OF PREMISES —TRAP—DAMAGES.

The owner of private premises is under no obligation to a bare licensee, other than to give him warning of any concealed danger or trap upon the premises of which the owner has knowledge.

[*Thyken* v. *Excelsior Life Ass'ce Co.* (1917), 34 D.L.R. 533, 11 Alta. L.R. 344, referred to.]

Statement.

ACTION to recover damages for injuries sustained through falling through an opening in defendant's railway platform.

H. C. Macdonald, for plaintiff; *D. W. Clapperton*, for defendant.

Walsh, J.

WALSH, J.:—The plaintiff went to the defendant's station in Edmonton for a purpose entirely of his own, namely, to consult one of the defendant's employees who had quarters in the station, on a matter of private concern to himself. In passing along the platform in front of the station to reach these quarters, he slipped on some ice and fell against a barrier which was erected around an opening in it. The barrier gave way and he fell through the opening to a floor several feet below the platform and was badly hurt in consequence. His action is to recover damages for this injury.

The opening was made originally for the operation of a hoist by which engine repairs and supplies were carried to the basement but except in very cold weather was kept open as an air shaft for the ventilation of the basement. It was brought right up to the wall of the building which thus protected it on one side. Two of the other sides were protected by the metal doors which formed the covering for it when it was closed. These stood up practically at right angles to the platform and were held in place by a wooden barrier between them which formed the protection to the remaining side of the opening. These iron doors were originally on hinges to permit of the opening and closing of them. The hinges on the door against which the plaintiff fell were broken when and before this accident occurred, and it was because of that that it gave way and let him into the hole. These hinges had been broken for more than 6 months before the accident.

The plaintiff's visit to the station was upon business which in no way concerned the defendant. He therefore was not an invitee but was at best a bare licensee upon these premises.

A bare licensee as distinguished from a person invited or there upon the defendants' business as well as his own, must take the premises as he finds them, but the owner must not, after the permission is given, create by a negligent act a new danger not there before.

Thyken v. *Excelsior Life Ass'ce Co.* (1917), 34 D.L.R. 533 at 538, 11 Alta. L.R. 344 at 351. The plaintiff had been at this station before for this same purpose. According to his evidence at the trial he had on some of these occasions got to the quarters of the employee whom he was seeking by climbing over this barricade and going down a ladder that led from the platform to the floor below, though this seems to be in conflict with what he said on his examination for discovery. The hinges of this door were broken before the first of these visits, for Ford, the plaintiff's friend, by whose evidence alone their condition is disclosed, says they were broken when he first came there to work, 6 months before the accident, and that they remained in that condition until the accident. There was therefore no new danger superadded after the plaintiff's use of the platform for this purpose began.

It is suggested though not decided in the *Thyken* case at page 538 that

it may be that even in the case of a bare licensee the owner owes him a duty not to keep in existence a secret hidden trap or peril known to him to be dangerous and not discernible by the licensee even if it had been there before the permission was given.

If this duty was owing by the defendant to the plaintiff, I do not think that the facts of this case establish a breach of it which is responsible for the plaintiff's misfortune. I doubt very much if these broken hinges can properly be called a secret hidden trap or peril. I think their condition must have been obvious to anyone who looked at them. It is true that for months they had escaped the notice of the men charged with the duty of repairing them but that was apparently because they had made no examination of them. Ford had no difficulty in seeing that they were broken. The plaintiff did not meet with his misfortune because he trusted to what appeared to him to be a perfectly safe barricade. It served the purpose of warning him of the existence of the hole and that undoubtedly is the purpose it was mainly intended to serve. If relying upon its apparent strength he had voluntarily imposed the weight of his body upon it his case would have been stronger. But that is not his case at all. The proximate cause

ALTA.

S. C.

CARLSON v. CANADIAN PACIFIC RAILWAY.

Walsh, J.

of his accident was his slipping upon the icy platform and no negligence is alleged against the defendant in that respect. If he had not slipped he would not have fallen and if he had not fallen he would not have come in contact with the door. I think it would be placing entirely too large a measure of responsibility upon the defendant to hold it liable for the consequences of an accident for the origin of which it is blameless and against the ultimate results of which I do not think that it was bound to provide.

The action is dismissed with costs.

Action dismissed.

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 22, 1919.

TAXES (§ III B—119)—ASSESSMENT—DESIGNATION OF LAND AND OWNER—SUFFICIENT—ESTOPPEL BY CONDUCT—APPEAL TO COURT OF REVISION—MUNICIPAL ORDINANCE OF N.W.T., CON. ORD. 1898, CH. 70, SECS. 134, 135, 136.

When an assessment of certain lands and premises has been made, and the essential constituents of an assessment, even though wrong and defective, are shewn in each case, the owner, having notice of the same, and having the right to make the same the subject of a complaint before the Court of Revision, who, by virtue of sec. 134 of the municipal ordinance, may rectify such assessments, is precluded by sec. 136 of the municipal ordinance from urging such mistakes in an appellate Court as objections to the validity of the assessments.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1919), 45 D.L.R. 482, 14 Alta. L.R. 307, affirming the judgment of the trial in favour of the respondent in an action for arrears of taxes. Affirmed.

F. H. Chrysler, K.C., and *S. B. Woods*, K.C., for appellant.

Frank Ford, K.C., for the respondent.

Davies, C.J.

DAVIES, C.J.:—In concurring, as I fully do, in the reasons stated by my brother Duff for dismissing this appeal, I desire to emphasize how greatly the conduct and actions of the appellants have operated on my mind not only as shewing that no possible injustice has been done them in the judgment appealed from but that they have by their conduct and actions estopped themselves from raising in this Court the points on which Mr. Chrysler relied.

That counsel based his argument for the allowance of the appeal upon the contention, as I understood him, that the lands of the appellants had never been legally assessed for the years for which

the taxes were sued, first because the proper name of the appellants had not been entered upon the assessment roll, as required by the statute, opposite each lot of land assessed, and secondly because the unsubdivided lands assessed had not been described so as to be identified or capable of being identified. His contention, therefore, was that their assessment was utterly void and that the correspondence negotiations, appeals to the Court of Revision and District Court Judge and general conduct and actions of the appellant could not be invoked to sustain such assessments.

I cannot accept or accede to this argument and desire to add a few lines to my brother Duff's reasons to shew that in my judgment at least the conduct and actions of the appellants have been such, and the judicial action to which they appealed such, as to preclude them from raising these points in this Court at this stage of the controversy.

These appeals to the Court of Revision and District Court Judge stand on an entirely different footing from the negotiations for time for payment of the taxes and for release from the statutory penalties their non-payment involved and any admissions which might be drawn from the correspondence.

The appeals, limited as they were specifically to the one point of "excessive valuation of the lands," necessarily involved a decision by the Judge appealed to, having full jurisdiction over the subject matter, of the location and description of the lands he was called upon to value. How else, indeed, could he have reached a decision as to whether and to what extent they had been overvalued?

The appeal to the District Court Judge succeeded to the extent that the assessment was reduced from $500 per acre to $300 per acre, or from $89,800 to $53.880.

The slightest reflection must, therefore, satisfy one that in making such a substantial reduction in the assessment the District Court Judge must, either from the evidence brought before him or from the admissions of the parties, have been informed of and have adjudicated upon, the location and description of the unsubdivided lands assessed and now in question.

This adjudication not having been further appealed from seems to me conclusive against the appellants not only as to the

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Davies, C.J.

value of the lands as found by the District Court Judge, but as to all the essential questions necessary for him to have determined before making that valuation and reduction in the assessment, one of them being the fact that the lands had been properly and legally assessed as against the now appellants, defendants.

No question was raised at the trial or here of the ownership at all material times by the appellant company of the lands in question and the strictly limited appeal of the appellants to the District Court Judge on the one question of overvaluation and their acquiescence in the judgment of that Court precludes appellants from now raising any questions as to the validity of the assessments which were necessarily involved in the adjudication of the District Court Judge, as I submit the questions raised by Mr. Chrysler were.

Idington, J.

IDINGTON, J. (dissenting):—The respondent got judgment at the trial before Scott, J., for taxes alleged to be due by appellant by virtue of assessments made for the years 1916 and 1917 and that has been maintained by the Appellate Division for Alberta from which this appeal is made.

The chief items in question are founded upon an alleged assessment in each of said years for "179.60 acres unsubdivided."

These are spoken of by the trial Judge as follows:—

The form of assessment roll given by The Municipal Ordinance requires that it shall describe the lands in full and the extent thereof shewing the section, township and range or lot or block or other local description. It is shewn that the 179.60 acres intended to be assessed is not one parcel alone but is the aggregate area of several separate and distinct parcels. I may here point out that it would require about thirty folios to give such a description of the several parcels as would enable a surveyor to locate the boundaries thereof.

The question raised in respect of them is that this is not such an efficient description as required by the Municipal Ordinance, N.W.T. Con. Ords. 1898, ch. 70, providing for the assessment of lands in sec. 122, as follows:—

122. The assessor or assessors shall prepare an assessment roll after revision by the assessment committee as in form F in the schedule to this ordinance setting down in each column as accurately as may be after diligent inquiry the information called for by the heading thereof.

The only heading in the assessment roll to which this item of the assessment can be attributed is "Lot" or "Lot, Block, Plan."

How, I submit with respect, such a description embracing several parcels of undivided lands, as the trial Judge states it is,

can be held to be anything approaching the requirements of the section just quoted, passes my understanding.

And when we pursue the inquiry of what uses the assessment roll and assessments so made are intended to lay the foundation for, we find, as is usual in such cases, a provision by sec. 147 for distress being made, not only upon the goods of the party assessed, but also the goods, if found on the premises, the property of or in the possession of any other occupant of the premises.

How could there be by any possibility a legal distress made upon the goods of such occupant when each lot or parcel might be occupied by a different person? Then how could the provisions of sec. 182 and following sections for proceedings to sell the lands for taxes be complied with?

Each section relevant to the definition or description of the land provides for a specification of each lot and the arrears of taxes due in respect thereof to be set out.

Under this group assessment, of many parcels, that would be simply impossible.

Are we to hold the assessment roll good for one purpose or mode of recovery and absolutely null for another?

Can the curative sec. 136, to which we are referred, be, by any mode of interpretation and construction, extended so far? I think not.

We are referred to a number of cases wherein the curative sections in or supplementary to the Assessment Act have been held to furnish an effective validating remedy, but not one of them has gone so far as we are asked to go herein.

We are also referred to the recent case of *Hagman* v. *The Merchants Bank* (1918), 13 Alta. L.R. 293, upheld on appeal here. It is sufficient to say that was under the Town Act, 2-3 Geo. V. 1911-12 (Alta.), ch. 2, which is differently worded and left it open to say that what was described therein was ascertainable by the facts the description presented, and in other aspects of the case it is easily distinguishable from this.

I fail to see what *MacLeod* v. *Campbell* (1918), 44 D.L.R. 210, 57 Can. S.C.R. 517, has in it to support any such contention as set up herein.

The gross overvaluation against which the party assessed appealed to the Court of Revision and failed, and then failed to

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Idington, J.

pursue her appropriate statutory remedy of appeal to the District Judge against such an assessment was all that was involved therein.

If it could be applied at all, it would be against respondent according to my reasoning. It certainly was open for the municipal authorities and the appropriate remedy on the appeal to the District Judge in 1917 by present appellants either to have asked on that appeal being heard to rectify the roll or to have directed an appeal by the assessor or anyone else qualified to do so, to rectify the same and cure a blunder. Indeed, I incline to think, it was not only the right but also the duty of those representing the respondent on the appeal so taken, to have asked the Judge to rectify in respect of the blunder now complained of and set down opposite to each parcel the assessment settled by the Judge.

I cannot find any legal duty resting upon the appellant to have done so against its own interest.

I must conclude that the assessments in question of the "179.60 acres unsubdivided" were null.

Toronto v. *Russell*, [1908] A.C. 493, in the Privy Council, decided the neat point of whether or not the respondent could waive the notice which the statute in question required to be personally given him. He having been one of the governing body directing the proceedings and knowing his lands were involved, was held not entitled thereafter to complain.

All else in that case is mere dicta.

Coming to the collector's roll, I cannot see how the secretary-treasurer was at all justified in adopting a novel plan of framing such a roll without the slightest authority in law.

As Harvey, C.J., points out in the Appellate Division, 45 D.L.R. 482, 14 Alta. L.R. 307, the amendment, 4 Geo. V. 1913, ch. 8, of the Town Act permitting such a novel experiment did not apply to respondent city.

The duty imposed by the statute here in question, ch. 70 Con. Ords. 1898, in sec. 144, was very plain. It reads as follows:—

144. The secretary-treasurer shall on or before the first day of September in each year prepare a tax roll containing columns for all information required by this ordinance to be entered therein in which he shall set down in full the name of every person assessed, his post office address and the assessed value of his real and personal property and taxable income as ascertained from the assessment roll as finally revised; he shall calculate and set down opposite

each such entry in columns headed "General fund," "Debenture fund," "School fund," "Statute labour fund," as the case may be, the sum for which such person or property is chargeable on account of each rate and under the column headed, "Arrears of taxes" the sum which may appear on the books of the municipality as arrears on such parcel of land at that date; and in the column headed "Total" the total amount of taxes for which each parcel of land is liable.

Such a collector's roll as he made omitting all names of those liable and the description of each parcel of land and its liability, ought not to be held a compliance with the Act. Yet it is on a certified copy of this nullity that the action rests in virtue of sec. 152 of the Act.

Trenton v. *Dyer* (1895), 24 Can. S.C.R. 474, cited by appellant, is worth looking at in this aspect of the case. That, to my mind, disposes of the other items in the claim made herein.

Had there been a proper collector's roll I should, under the authorities and curative section coupled with the response of the appellant's agent to the notice of its assessment indicating a recognition of the name, have been inclined to examine more closely than I have done the question of whether the mere mistake of name was not overcome so far as other items were concerned. In the view I have expressed it does not seem to me necessary to do so.

The taxes are imposed by a by-law striking the rate and thereby a valid debt is created, if and so far as, founded upon a valid asses ment roll. It is not the collector's roll that constitutes the debt. Sec. 152 declares the taxes to be a debt and proceeds to declare that as a piece of evidence which entitles to recover, a certified copy of the collector's roll will suffice. I submit proof of a valid assessment and valid by-law fixing and imposing the rate, would be equally efficient. Hence if that proof had been properly adduced the respondent should, perhaps, have succeeded as to the minor items if as fairly arguable on the decided cases the name could be held sufficient. I would reserve that right if worth pursuing.

Nor need I enter at length upon the question of the doubtful possibility hinted at the argument of holding independently of the roll that a debt was created by means of the imposition of rates by by-law and conduct of the parties, for that was not attempted below or seriously here, though I imagine had the case

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Duff, J.

been so directed at the trial as to establish such a proposition, possibly something more arguable might have been produced than the support of this assessment roll as to the main items.

I think the appeal should be allowed with costs throughout without prejudice to a recovery hereafter in respect of minor items.

DUFF, J.:—This appeal arises out of an action brought by the respondent municipality against the appellant company for the recovery of taxes alleged to be payable for the years 1916 and 1917 in respect of certain real property owned by the company.

The defence is that owing to non-compliance by the municipality with the procedure laid down in the statutes of Alberta in relation to the assessment of property and the levying of taxes, the taxes demanded never became lawfully collectable.

1. It is alleged that there was no lawful assessment of the company's property and 2nd, there was no collector's roll within the meaning of the law, and 3rd, the by-law levying the taxes was invalid because the rate was in excess of that which the corporation was entitled by law to exact.

As to the last mentioned point, the by-law was not produced and I concur with Harvey, C.J., 45 D.L.R. 482, 14 Alta. L.R. 307, of the Court below in the view that in the absence of the by-law it cannot be assumed that no part of the rate levied was for defraying the cost of local improvements.

The assessor in assessing the property of the company did not enter the name of the company in the column provided for the name of the owner but used the name "Townsite Trustees," which has been accepted as sufficiently descriptive. In the case of the great majority of parcels, moreover, the assessor did not—and this is one of the points relied upon as vitiating the assessment—actually write the name "Townsite Trustees"—in the owner column opposite the number of the parcel, his practice being where there was a sequence of parcels assessed to the company to write down the name "Townsite Trustees" in the "owner" column for the first member of the sequence leaving blank the space provided in that column for each of the other parcels. The law, it is said, specifically requires that the name of the owner shall be actually written in the "owner" column in a space assigned for that purpose for each parcel.

A special objection relates to the assessment of parcel 1562, sheet No. 63; and summarily stated, the objection is that the

entries in the roll in relation of that parcel do not include what is alleged to be an essential element of a valid assessment, a description of the property conforming to the provisions hereafter quoted.

The law governing the decisions of the questions raised is to be found in the Municipal Ordinance of the N.W.T. (ch. 70 of the Consolidated Ordinances of 1898). By the provisions upon which the appellant relies, the assessor is required to prepare an assessment roll as in form "F," "setting down in each column as accurately as may be after diligent inquiry the information called for by the heading thereof," the heading of the second column in form "F" being in these words: "The name in full if the same can be ascertained, of all taxable persons who have taxable property or income within the municipality, and the name of the owner when the occupant is not the owner"; and that of the 5th column being this: "The description in full or extent and amount of property against each taxable person or any interest which is liable to assessment, township and range, or lot and block, or other local description."

The word "taxable person" in the heading of the second column is defined by sub-sec. 12 of the interpretation section as: "(a) any person receiving an annual income or the owner of any personal property not exempted from taxation; (b) the owner of lands not exempted from taxation where the same are occupied by the owner or unoccupied, otherwise the occupant."

The appellant company contends that as regards those parcels in relation to which the entries do not include some actually written name or description in the second column professing to designate the owner, there is therein a departure from the directions of form "F" that invalidates the assessment of those parcels. As regards parcel No. 1562 there is, it is said, no description of property in compliance with the requirements of form "F," and that this again is a fatal defect nullifying the assessment of that parcel.

Before entering upon the discussion of the points raised by these contentions it will be necessary to refer briefly to other provisions of the statute.

By sec. 126 every person assessable is required to give all information to the assessor and it is provided that he may deliver to the assessor a statement in writing setting forth the particulars

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Duff, J.

of the property for which he should be assessed. Sec. 123 provides for the appointment of an assessment committee, whose duty it is, on completion of the assessment roll, to check over the roll and to make such corrections as they may decide upon, and then a right of appeal is given to a Court of Revision. The right of appeal may be exercised not only by the person assessed but also by any ratepayer as well as by the municipality. The jurisdiction of this Court is defined by sec. 134, which is in the following words:—

> The Court shall try all complaints in regard to persons wrongfully placed upon the roll or omitted therefrom or assessed too high or too low in regard to any property of any person which has been misdescribed or omitted from the roll or in regard to any assessment which has not been performed in accordance with the provisions and requirements of this ordinance as the case may be.

And by sec. 136:—

> The roll as finally passed by the Court and certified by the secretary-treasurer as passed shall, except insofar as the same may be further amended on appeal to a Judge, be valid and binding on all parties concerned notwithstanding any defect or error committed in or with regard to such roll or any defect or error or mis-statement in the notice required by sub-sections 4 and 5 of the foregoing section of this ordinance or the omission to deliver or transmit such notice.

The enactments of the statute prescribing the method of preparing the assessment roll and the duties of the assessor in relation to the preparation of it must be read, of course, and applied in the light of secs. 134-5-6. The first of these sections we have seen gives to the Court of Revision jurisdiction to correct the roll in respect of overvaluation or undervaluation, the omission of property from the roll or misdescription of property entered in the roll; and further in respect of any failure to observe in the assessment the "provisions and requirements" of the statute; by sec. 135 this jurisdiction may be invoked by the person assessed or by the municipality, and then there is sec. 136 which, as appears above, enacts that after the roll has passed the Court of Revision and been certified as prescribed, it shall be "valid and binding on all persons concerned notwithstanding any defect or error committed in or with regard to such roll."

Now, I do not at all dissent from the argument forcibly presented by Mr. Chrysler, that it is a "roll" which by virtue of sec. 136 is to be "valid and binding upon all parties" and that it is an "assessment" which is the subject of appeal by virtue of sec. 134; and that in order to bring these two sections into play, you must

have something which, within the intendment of them, is an "assessment" and a "roll."

But it is one thing to say as regards a given state of facts: Here is no assessment—here is no roll. It is another thing to say: Here are a roll *de facto* and an assessment *de facto*, but a roll and an assessment which because some essential requirement of the law has been neglected in preparing and effecting them are, from the point of view of the law, invalid.

Secs. 134 and 136 both contemplate such departure from the provisions of the Act as would but for these sections make the assessment invalid. On this point, the meaning of the language is unmistakable and the combined effect of these sections is that if the property is assessable and if the person is a taxable person, then an assessment which contains the elements of a *de facto* "assessment" within the meaning of sec. 134, may be appealed against and corrected by the Court of Revision and that notwithstanding the departures from the requirements of the statute "in or with regard to the roll" such an assessment once the roll has passed the Court of Revision and been certified in the manner provided for, shall be valid.

The lurking fallacy in the argument presented in support of the appeal resides in the confusion between an assessment inoperative in law because of the failure to observe some legal requirement and something which cannot be described as an "assessment" in fact, within the contemplation of sec. 134.

The questions before us in this appeal must be distinguished from the questions which arose in *Toronto R. Co.* v. *Toronto*, [1904] A.C. 809, and in other cases in the Ontario Courts which preceded that decision. In the *Toronto R. Co.'s* case, [1908] A.C. 493, the assessor had professed to assess property which by law was exempt from assessment. In *Nickle* v. *Douglas* (1875), 37 U.C.Q.B. 51, the property that the municipality was endeavouring to tax was held to fall within the scope of an exemption clause. In *London* v. *Watt & Son* (1893), 22 Can. S.C.R. 300, a similar question arose and the Supreme Court of Canada held that the assessor having professed to assess property which was not subject to taxation in the municipality where it was assessed, the validity of the assessment was not a question cognizable by the Court of Revision, and the assessment roll in consequence not binding upon the defendant.

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Duff, J.

It is, of course, not disputed in the case before us that the lands assessed were subject to taxation and it was accordingly the duty of the assessor to assess them and if through neglect of the assessor the owners were to escape taxation in respect of these lands, it would, of course, be manifestly unjust to the taxpaying community as a whole. Where property is taxable, justice and convenience seem to require that mere errors or deficiencies in procedure shall, so long at all events, as no substantial injustice arises, not have the effect of conferring an exemption contrary to law. This is the principle of secs. 134, 135 and 136, and the scope of 136 is indicated by the last sentence which makes the roll valid and binding notwithstanding the failure to give notice under sub-secs. 4 and 5 of sec. 135.

The argument pressed upon us by the appellant is that sec. 136 has no application where some requirement of the statutory procedure has been omitted or departed from and the requirement and omission or departure are of such a character that in the absence of secs. 134, 135 and 136 the assessment must have been held to be of no legal validity. The argument proves too much. The result of its rigorous application would be to deprive of all effect the declaration in sec. 136 which makes the roll "valid" notwithstanding defects in it. Section 136 obviously contemplates proceedings which otherwise would be invalid; indeed all the enactments of the statute prescribing what is to be done in respect of the assessment roll, including those provisions which are alleged to have been disregarded in the assessments now in question, must be read subject to and qualified by the provisions of secs. 134, 135 and 136.

Coming now to the question whether in the years 1916 and 1917 this property was in fact assessed so that in those years there was something which could properly be described as an assessment within the language of secs. 134, 135 and 136, and 1st, as to those cases in which the name or description of the owner is not actually written in the "owner" column opposite the number of the parcel, I have no doubt that for the present purpose one is not obliged to treat each parcel as a water-tight compartment; one must look at this assessment roll and consider it as a whole. When that is done, one finds abundant evidence that the assessor has done what people frequently do, that is to say, instead of repeating the same

name or the same description through a long list of items he has simply written the description at the head of the list and left spaces blank where a more meticulous or more fussy person would have rewritten the entry. No person looking at the document and forming a practical judgment upon it could doubt the intention or the meaning of these entries and blank spaces.

Then as to the description of the property included in item 1562. It is difficult to suppose that anybody reading this could have any doubt that a parcel of acres of unsubdivided land was intended to be assessed and when the roll is looked at as a whole and it is seen that all the other property assessed in the names of the same owners is subdivided land it seems to be reasonably clear from the roll itself that this parcel included all the assessable unsubdivided property of these owners in the municipality and I think this is not seriously disputed. But the description, "all the unsubdivided land" owned by a given person within a named area is a good description, even for the purposes of formal conveyancing. The citation of authorities in such a point should be superfluous but *Miller* v. *Travers* (1832), 8 Bing. 244, 131 E.R. 395, may be referred to; see also Hals. Deeds, vol. 10, at 465. We have therefore as regards all these impeached assessments abundant evidence of an attempt on the part of the assessor to make an assessment, an attempt carried out in conformity with his practice and an attempt which has at least resulted in this, that he has, for the purposes of the assessment, identified the owners and that he has also identified the property.

And continuing the history of the assessment roll we have an examination by an assessment committee and the acceptance of these entries as sufficient. We have, moreover, the notice sent to the company, we have in one year, 1917, an appeal to the Court of Revision by the appellants on the ground of overvaluation in the case of item 1562 and a reduction of the valuation by the Court of Revision. This appeal to the Court of Revision I shall refer to again in another aspect, in the meantime I mention it as one of the facts bearing upon the question whether or not there is here something which can fairly be described as an "assessment" *de facto* within the meaning of these sections. But in this connection the acts of the appellants themselves are not without significance. *Toronto* v. *Russell*, [1908] A.C. 493.

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Duff, J.

In the year 1915 communications took place between the company and the assessor and the company furnished the assessor with some information. The letter written by the appellant to the assessor was excluded by the trial Judge, upon what principle I do not quite understand, but there is plenty of ground for the inference that what the company furnished was the aggregate number of acres comprised in all the "unsubdivided" land in respect of which it was taxable. The assessor purporting to assess this property made the entry quoted above (the entry relating to parcel 1562) and this entry was copied first in the roll for 1916 and then in the roll for 1917.

The demand for taxes addressed to the appellants in 1916 is in evidence and through that the appellants were informed that this land was described in the roll in the manner mentioned. The notice of assessment for 1916 is in precisely the same form and so also as regards the notices and demands for 1917. The appellants, moreover, in prosecuting their appeal from the assessment of 1917 described this property as "our unsubdivided property." I have already called attention to the fact that in 1917 not only was the appeal prosecuted but a reduction of the assessment, that is to say, a reduction of the valuation was obtained. It might very plausibly be argued on the principle of *Roe* v. *Mutual Loan Fund Ltd.* (1887), 19 Q.B.D. 347, and *Smith* v. *Baker* (1873), L.R. 8 C.P. 350, that as this appeal proceeded on the basis of there being at least a real assessment within the meaning of sec. 134 and that on this basis they got a judgment of the Court of Revision reducing the assessment the appellants are now precluded from setting up the contention now relied upon.

But I prefer to treat this proceeding as very important in the light it throws upon the question of fact, whether there was or was not a *de facto* assessment of the property and in this view the proceeding is just as significant in its bearing upon the question raised with regard to the assessment of 1916 as with reference to that of 1917.

I conclude that the impeached assessments were real assessments, assessments within the purview of secs. 134, 135 and 136.

The last question is whether the tax roll was fatally defective. I concur with Harvey, C.J., in the view that there is nothing in the Act prohibiting the course taken by the assessor, who also is the

collector and the treasurer, in making use of the assessment roll so far as it went for the purpose of compiling his tax roll. I think the Towns Act and the practice under the Towns Act affords sufficient evidence that there is nothing in this procedure inconsistent with legislative policy.

Of course it does not necessarily follow that the defects in the assessment cured by secs. 134, 135 and 136 might not be fatal in the case of a tax roll to which these last mentioned sections do not apply. But when the roll is looked at as a whole, I think there is a substantial and sufficient compliance. The statute does not require literal conformity with the directions of form "F" in the case of a tax roll.

Anglin, J.

ANGLIN, J.:—The material facts of this case and most of the statutory provisions bearing upon them appear in the judgments delivered in the Courts below, 45 D.L.R. 482, 14 Alta. L.R. 307, and in the opinions of my learned brothers.

The exigibility as debts of the taxes sought to be recovered from the defendants is attacked on several grounds which can best be dealt with separately.

(1) It is urged that the name of the defendants does not appear in the assessment rolls and collector's rolls at all—that some of the parcels on which taxes are demanded from them are entered on the rolls in the name of "Townsite Trustees" and that as to others no name whatever appears in the column of the roll headed "Owner or Occupant."

Upon the evidence I am satisfied that "Townsite Trustees" was, under the circumstances of this case, a sufficient designation of the defendant company. It is clear that it had notice of all the assessments and it saw fit to allow them to stand in that name, which it might readily have had changed on appeal to the Court of Revision (sec. 134). On this point I desire to add nothing further to what has been said by Harvey, C.J.

In most instances the parcels in question, in respect of which no name appears in the "Owners," column of the assessment roll, immediately follow in sequence other parcels assessed to the "Townsite Trustees." A more painstaking and exact assessor would, no doubt, have entered the name of the owner opposite each of the succeeding parcels in the several groups or would at least have placed the word "ditto," or its abbreviation "do," or

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Anglin, J.

dots commonly used as signifying that word, in the owners' column, or would have bracketed the numbers of the separate assessments or the descriptions of the parcels comprised in each group.

But I have no doubt that the blanks left in the rolls before us would be readily understood by any person reading them as implying the assessment of the lots opposite which they occur to the persons whose names respectively appear in the owner's column opposite the first member of each group or sequence of assessments.

As put by Scott, J.:—

> An inspection of the rolls shews that the practice followed by the assessor was that where a number of lots of the defendant in the same locality were entered the name "Townsite Trustees" would be entered in the owner column opposite the first one only. The plain inference is that the name was intended to apply to all subsequent lots until the name of another person appeared in that column in the same manner as if the word "ditto" had been entered opposite each lot.

The extracts from the rolls in evidence shew, however, that the application of this method of dealing with a consecutive series of assessments of properties belonging to the same owner was not confined to properties owned by the appellant. It extended to other ratepayers as well. In fact, it appears to have been general. This objection is thus disposed of except as to the assessment numbers 1535, 1536 and 1537 on the roll of 1916, and No. 1212 on the roll of 1917, which upon the facts cannot be so dealt with. I shall reserve them for special consideration towards the close of this opinion.

(2) The sufficiency of the description of the property included in assessments numbered 1562 of 1916 and No. 1251 of 1917—"179.60 acres unsubdivided"—is challenged. I strongly incline to the view that this description is *in se* inadequate. *Re Jenkins and Enniskillen* (1894), 25 O.R. 399; *Blakey* v. *Smith* (1910), 20 O.L.R. 279 at 283; *Wildman* v. *Tait* (1900), 32 O.R. 274 at 280, (1901), 2 O.L.R. 307; *Carter* v. *Hunter* (1907), 13 O.L.R. 310 at 319-20; *Whitemouth* v. *Robinson* (1916), 26 Man. L.R. 139 at 144, 154; *Clive School District* v. *Northern Crown Bank* (1917), 34 D.L.R. 16, 12 Alta. L.R. 344; *Municipality of Minto* v. *Morrice* (1912), 4 D.L.R. 435, 22 Man. L.R. 391. It is certainly not the "accurate and sufficient" description which the Assessment Acts

require, *Russell* v. *Toronto*, [1908] A.C. 493 at 500. When it is borne in mind that these two assessments covered several parcels of land scattered over the town area, its insufficiency becomes more obvious. It is argued that taking the assessment roll as a whole the description was equivalent to "all the taxable unsubdivided property held by the Townsite Trustees," and that such a description would be good. But this argument, if sound, would justify an assessment (embracing numerous scattered parcels owned by one person not named elsewhere in the roll) in which the owner's name is followed merely by the words "all (his) assessable real property in the municipality." I cannot accept the view that this would be a sufficient description to render such an assessment valid.

It may be that such a description would suffice to enable the owner to identify his property. But others than the owner are interested. Every taxpayer is entitled to find in the assessment roll information by which he can identify any other owner's property in order to satisfy himself that it is fairly assessed. He has a right of appeal if he thinks it is not. As Beck, J., says in *Clive School District* v. *Northern Crown Bank*, 34 D.L.R. 16 at 19, the provision of the Assessment Act requiring that the roll shall contain a description of the property assessed is one of those "intended for the security of the citizen, or to ensure equality of taxation, or for certainty as to the nature and amount of each person's taxes."

Here again, however, the appellant had notice that all its unsubdivided land in the municipality was assessed under the description "179.60 acres unsubdivided" and it did not see fit to avail itself of its right of appeal to have it rectified and made more accurate and precise.

As remedial of all "defects and errors" in the assessment rolls the respondent invokes sec. 136, Con. Ord. 1898, ch. 70, which reads as follows:—

> 136. The roll as finally passed by the Court and certified by the secretary-treasurer as passed shall, except in so far as the same may be further amended on appeal to a Judge, be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll or any defect or error or mis-statement in the notice required by subsections 4 and 5 of the foregoing section of this ordinance or the omission to deliver or transmit such notice.

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Anglin, J.

After some hesitation I have reached the conclusion that inasmuch as there was jurisdiction to make the assessments in question, the essential constituents of an assessment, though defective and erroneous, were present in each case and the appellant had notice of them as assessments in respect of which it was intended to demand taxes from it, and since the matters now urged were all proper subjects of "complaints in regard to persons wrongfully placed upon the roll or omitted therefrom or . . . in regard to property . . . which has been misdescribed" to the Court of Revision, where they might have been easily rectified (sec. 134); sec. 136 precludes the appellant urging them elsewhere as objections to the validity of its assessments. As "one of the parties concerned" it is bound by the assessment rolls, "notwithstanding (these) defect (s) or error (s) committed in, or with regard to such roll."

I agree with Mr. Chrysler's contention that sec. 136 cannot be invoked to validate and give efficacy as an assessment to that which can in no sense be said to be an assessment. But we are here dealing with what purport to be assessments and they contain the essential constituents of assessments—designation of owners and descriptions of properties—imperfect no doubt, and perhaps so much so as to invalidate the assessments. But sec. 136 was not needed to remedy mere irregularities. It must have been to rectify and overcome the consequences of defects otherwise fatal that it was enacted, and we have before us in this case, in my opinion, just such defective assessments as it was designed to cure and render unexceptionable.

The appellant's conduct in seeking a remission of penalties for default added to the 1916 taxes and its appeal to the Court of Revision against the valuation of its unsubdivided property in 1917, if they fall short of what would be necessary to raise an estoppel against it, at least cast grave suspicion on the good faith of its present attempt to escape payment of these taxes.

(3) I agree with the disposition made by Harvey, C.J., of the objection taken to the collector's roll or tax roll. (4) I also agree with Harvey, C.J., that the constitution of the assessment committee is not open to the objection taken.

(5) If the appellant meant seriously to contest the legality of the rate for 1917, under sec. 8 of the Wetaskiwin Charter, 6 Edw.

VII. 1906 (Alta.), ch. 41, because in excess of 20 mills, it should have shewn that no part of the rate was levied "for the purpose of meeting the cost of any public work, or works under the provisions of an 'Act to incorporate the City of Wetaskiwin'." In the absence of such evidence it cannot be presumed that the rate of 21¼ mills did not include such costs.

(6) As already stated, assessments Nos. 1535, 1536 and 1537 of 1916, and No. 1212 of 1917, call for special attention. No name appears in the owner's column in these assessments. Assessments Nos. 1535, 1536 and 1537 immediately follow 1533 and 1534, which are assessments of properties in the name of Alex. Hinchburger, in the roll of 1916; in that of 1917, No. 1212 follows No. 1211, which is an assessment in the name of the City of Wetaskiwin itself. Taking the same view of these assessments as indicated above in regard to others where blanks occur in the owner's column, the lots covered by them, although belonging to the appellant, were wrongfully assessed to Alex. Hinchburger and the City of Wetaskiwin respectively. It is said, however, that these errors were manifestly proper subjects of "complaints in regard to persons wrongfully placed upon the roll or omitted therefrom," for the correction of which the Court of Revision had appellate jurisdiction, and since the appellant had notice of the intention to assess it for the properties covered by these assessments and failed to avail itself of its right of appeal, the rolls are valid and binding upon it as one of the parties concerned (sec. 136). But as to what are they valid and binding? The assessments stand as to numbers 1535, 1536 and 1537 of 1916 as assessments to Alex. Hinchburger, and as to No. 1212 of 1917 to the City of Wetaskiwin; and the appellant and "all (other) parties concerned" are bound, as to all matters dependent on those assessments, to treat them as rightfully so made. There is not—there never was—an assessment in Nos. 1535, 1536 and 1537 of 1916 and in No. 1212 of 1917 of the appellant, and making the rolls valid and binding upon it cannot convert the Hinchburger and Wetaskiwin assessments into assessments of C. & E. Townsites Limited. The effect of sec. 136 in this view of the matter is merely to preclude the appellant and the respondent alike from averring that the properties covered by these assessments were not rightly made to Alex. Hinchburger and the City of Wetaskiwin respectively.

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Anglin, J.

On the other hand, if the blank in the "owner's" column in each of the three assessments for 1916 should not be treated as filled in with the name "Alex. Hinchburger" and that in assessment No. 1212 for 1917 with the name "City of Wetaskiwin," they must all be dealt with as omissions of the name of a known owner in contravention of sec. 122. From each an essential constituent of an assessment is entirely lacking—with the result that there was not merely a defective or erroneous assessment which might be cured by sec. 136, but no assessment at all and therefore no subject matter for the remedial operation of that section.

Now taxes are recoverable as debts only by virtue of statutory authority. *Lynch* v. *The Canada North West Land Co.* (1891), 19 Can. S.C.R. 204 at pages 208 *et seq.*, *per* Ritchie, C.J., and *Pipestone* v. *Hunter* (1916), 28 D.L.R. 776, 28 Man. L.R. 570. Sec. 152 of the Municipal Ordinance (Con. Ord. N.W.T., 1898, ch. 70), reads as follows:—

> 152. Taxes may be recovered with interest and costs as a debt due to the municipality in which case the production of a copy of so much of the tax roll as relates to the taxes payable by such person purporting to be certified as a true copy by the secretary-treasurer of the municipality shall be *primâ facie* evidence of the debt.

The certified extracts from the tax rolls on their production afford *primâ facie* evidence either that Alex. Hinchburger is the person liable to pay the taxes levied under assessments Nos. 1535, 1536 and 1537 of 1916, and of the like liability of the City of Wetaskiwin as to the assessment of No. 1212 of 1917, or that no person was assessed for any of the properties covered by these four alleged assessments. The debts, if any, evidenced by the rolls in respect of these assessments, are those of Hinchburger and the city respectively and not of the appellant. Sec. 152 does not make the taxes in respect of these assessments recoverable as debts from a person or body not in any way named in respect of them in the tax rolls. The appellant is in this position. As to these assessments therefore, were it not for what I am about to say, I would have inclined to the view that the appeal should succeed and that the judgment should accordingly be modified by reducing the amount recoverable for 1916 taxes by $18.04, and that for 1917 by $6.99, with corresponding reductions in interest.

But there is no plea specially directed to these items, and the points in regard to them, which I have been considering, though

made in this Court, do not seem to have been discussed at the trial or in the Appellate Divisional Court. At least, I find nothing in the record to indicate that they were. Moreover, they would seem almost to fall within the ancient maxim *de minimis non curat lex*. I am therefore not disposed to dissent in respect of these comparatively trifling items from the judgment of the majority of my brothers, especially since, even had I done so, my inclination would have been, subject to a modification of the judgment as indicated, to dismiss the appeal, and with costs because, in view of the comparative triviality of the variation effected, it would have substantially failed.

Anglin, J.

MIGNAULT, J.:—The question here is as to the validity of the assessment made by the respondent against different parcels of land belonging to the appellant for the years 1916 and 1917, the amount of which is claimed in this action by the respondent from the appellant. Many objections to the validity of the assessment were made by the latter in its plea, but I propose to discuss only two objections, which appeared to be the only ones really insisted on, being content as to the others to rely upon the reasons given by the Judges in the Courts below for deeming them unfounded, 45 D.L.R. 482, 14 Alta. L.R. 307.

Mignault, J.

These two objections are serious if they are true in fact and if, in the circumstances of this case, it is open to the appellant to urge them as a reason for escaping liability for the taxes claimed from it in this action. I will consider these objections only in connection with the assessment of the unsubdivided property belonging to the appellant.

The first objection is that there is no name of owner on the assessment roll in connection with these properties (as well as in connection with many other parcels bearing subdivision numbers), and the second, as I understand it, is that no properties are indicated as being assessed. If these objections are well founded there would be no assessment, and the question would not be of an informality or irregularity covered by the curative provisions of the Municipal Ordinance, but of the total absence of any assessment whatever.

That the proceedings of the assessor in preparing the assessment rolls were very informal cannot be denied. The appellant was a large property owner, and its name appears frequently in the

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Mignault, J.

assessment rolls. But when several properties of the appellant were assessed, its name as "Townsite Trustees" was given in the column with the heading "name" opposite the first parcel, and a blank was left in that column opposite the other parcels, without a "ditto" or any sign indicating that the appellant was the owner of the following parcels, until another name appeared in this column. With regard to the unsubdivided property, which is under number 1562 of the roll for 1916, there is a blank in the "name" column opposite that number, and opposite the preceding numbers up to No. 1558, where the name "Townsite Trustees" is inserted. Similarly in the roll for 1917, also in connection with the unsubdivided property, under No. 1251, there is a blank in the "name" column at that number and opposite Nos. 1250, 1249, and 1248, while at No. 1247 we find the name Townsite Trustees.

The 1916 and 1917 rolls are even more informal in so far as any description of the unsubdivided property to be assessed is concerned. Both rolls, as required by the statute, have a column for "description of the property," and in the case of subdivided property belonging to the appellant the subdivision number is given, but in both rolls, as regards the unsubdivided property, there is a blank in the column for description of the property. In each roll, however, in the "address" column, there is the entry "179.60 acres unsubdivided," and further on, on the same line in the 1917 roll, covering the four columns entitled respectively "description of personalty or business floor space," "No. of acres assessed," "No. of acres under cultivation," "Remarks and Court of Revision notes," is the entry; "reduced on appeal to $53,880 being $300 per acre" and below the signature "W. A. D. Lees, J.D.C.", being the signature of Judge W. A. D. Lees of the District Court. I may add, always with regard to this unsubdivided property, that the assessed value is $89,800 in the 1916 roll and $53,880 in the 1917 roll, being the correction made after the reduction above referred to.

The secretary-treasurer of the respondent, Mr. Roberts, who also acted as assessor on appointment by the latter, was the only witness examined. He filed some correspondence to which I shall refer, and stated that the description "179.60 acres unsubdivided" was taken from the 1915 assessment roll, adding, however, that the city had come to an agreement with the Townsite (meaning, I presume, the appellant), as to the acreage, this agreement being

on the occasion of an appeal taken in 1917 against the valuation of the subdivided property.

It appears by the statement of Mr. Knox, counsel for the respondent before the trial Court, that the unsubdivided land described as "179.60 acres unsubdivided" is made up of several parcels, one portion in one part of the city and another portion in another part of the city, and so on. Certificates of title of the unsubdivided land belonging to the appellant were filed, but the total acreage is not given, but I presume could be calculated, although it would be no doubt a complicated process. But Roberts testified that the acreage had been adjusted between the appellant and the city, and no contradiction of this statement was made by the former.

The correspondence filed is important. On February 8, 1917, Roberts wrote to Osler, Hammond & Nanton, agents of the appellant, calling their attention to the fact that two years' taxes were then due and threatening action if the same were not paid. To this letter, Osler, Hammond & Nanton replied on March 3, 1917, enclosing a cheque for $600 on account of the 1915 taxes, and asking for time to make financial arrangements in order that they might pay the taxes of 1915 in full and at least pay something on account of the 1916 taxes. On April 2, 1917, they wrote to Roberts that they had a limited amount of funds on hand for paying taxes and would like very much to know if the city council would deduct all penalties charged against their property provided all arrears were paid in three instalments, say on the 30th April, May and June. The request for deduction of penalties was not granted and the secretary-treasurer again wrote demanding payment. It appears that the balance of the 1915 taxes, however, was paid and this action is only for the 1916 and 1917 taxes.

It is to be observed, and this was brought out by the counsel for the appellant in his cross-examination of Roberts, that the description of the unsubdivided land as "179.60 acres unsubdivided" was taken from the 1915 roll, taxes under which were paid by the appellant without it appearing that it objected to this description. The same description was repeated in the 1916 roll and the appellant's agents applied for time to pay the 1916 taxes without complaining of the description. When the 1917 roll with the same description was made and an assessment notice was sent

CAN.

S. C.

C. & E. TOWNSITES LTD. v. CITY OF WETASKIWIN.

Mignault, J.

to the appellant, the latter appealed to the Court of Revision, composed, I understand, of the city council, which rejected its appeal, and then the appellant, on July 14, 1917 (the notice of appeal is dated June 14, but this is an obvious error), appealed from the Court of Revision to the District Judge against

the assessment of their unsubdivided property within the City of Wetaskiwin in so far as the same refers to the land therein without buildings or improvements, and in particular against the lands mentioned in assessment notice as number 1251.

The grounds of said appeal are that said assessment is excessive, and on other grounds sufficient in law to support this appeal.

It is on this appeal that Roberts testifies that the acreage of the unsubdivided property was fixed by an agreement between the parties, and this must be so because the District Judge reduced the valuation of the unsubdivided property to $300 per acre, which, for the 179.60 acres, would give the total valuation of $53,880 certified by the signature of the District Judge on the 1917 assessment roll.

It is under these circumstances that when sued for the 1916 and 1917 taxes, the appellant complains of the insufficient description of the unsubdivided property and of the fact that no name is inserted in the two rolls as owner of the same.

I am of opinion that the appellant cannot now be heard to urge these two objections. Although no name was inserted in the roll opposite the assessment of the unsubdivided property, the appellant received the assessment notice containing the entry of the unsubdivided land, and it never complained that this assessment was not against it, but on the contrary asked for delay to pay the 1916 taxes, and appealed from the 1917 assessment on the ground of excessive valuation and actually succeeded in having the valuation reduced. The appellant clearly understood that it was the party assessed and had no doubt as to the identity of the unsubdivided land referred to, and this being so, how can it now pretend that no name of owner was given in the roll and that the description of the unsubdivided land was insufficient? If insufficient, to transpose the words of Lord Atkinson in the case of *Toronto* v. *Russell*, [1908] A.C. 493, at 499, its alleged insufficiency was not shewn to have misled anybody, least of all the appellant.

In the case just referred to the description was: "$8\frac{57}{160}$ acres 1240 x 300 east side Carlaw Avenue, north of Queen street."

I am free to admit that this might have been better as a local description than "179.60 acres unsubdivided," referring as it did to parcels situated in different parts of the city, and if no question of acquiescence in this description arose I would have great difficulty in coming to the conclusion that it satisfied the statute, but the appellant, in its notice of appeal against the 1917 assessment, adopted this description as referring to its unsubdivided property within the City of Wetaskiwin, and actually claimed and obtained a reduction in its valuation. On that ground my opinion is that the appellant cannot now attack the assessment roll of 1917 for misdescription or rather want of description of its unsubdivided property, and the objection, however serious it appears at first sight, cannot now be entertained.

As to the assessment of 1916, there is the fact that the description was taken from the 1915 roll, and the appellant paid the 1915 taxes. Moreover, by their letter of March 3, 1917, the appellant's agents asked for delay in order that they might pay the 1915 taxes in full and at least something on account of 1916 taxes. There was here no complaint against the assessment of the unsubdivided property, and more, there was an unquestioned assumption of liability for the assessment as made. So in my opinion the objection also fails as to the 1916 roll.

I base my decision on this ground of complete acquiescence and assumption of liability, and do not require to consider whether the curative provisions of the municipal ordinance dispose of the appellant's objections. I may perhaps add that municipal authorities place themselves in a rather perilous position when they proceed in the loose manner which characterized the preparation of these rolls. The assessment is here sustained but it owes its success to the conduct of the appellant rather than to its own merits.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

STANDARD TRUSTS Co. v. CANADA LIFE ASSURANCE Co.

ALTA.
S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck and Ives, JJ. February 4, 1920.

INSURANCE (§VI D—275)—CONTRACT—MORTGAGEE—ASSIGNMENT OF POLICY AS COLLATERAL—PURCHASERS OF EQUITY—PROVISION TO BUY BACK POLICY—DEATH OF ASSURED—RIGHTS OF ESTATE.

When an assured, who is one of several mortgagors of certain mortgaged premises, at the request of the mortgagee, takes out a policy of insurance

ALTA.

S. C.

STANDARD TRUSTS CO. v. CANADA LIFE ASSURANCE CO.

on his life, which is assigned to the mortgagee as collateral security, and subsequently sells a portion of his interest in the equity to certain parties, who agree to buy back the policy and fail to do so, his estate on his death is entitled as against the purchasers to the proportion of the face value of the policy and profits as was borne by the assured during his life.

APPEAL by the plaintiff from a judgment of Stuart, J. (1919), 48 D.L.R. 685, after trial without a jury on an insurance policy.

J. E. Wallbridge, K.C., for appellant; *C. F. Newell*, K.C., for The Canada Life Assurance Co.; *S. B. Woods*, K.C., for the other respondents.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff is the executor of the will of one Ferris, who in his lifetime was a half owner of certain Edmonton property upon which a mortgage for $50,000 was given to the defendant assurance company. It was a condition of obtaining the mortgage at the rate of 7% payable $5,000 a year for 4 years and the balance in 5 years that an insurance policy for an amount equal to the principal should be given and assigned to the company as collateral security. The policy was issued to Ferris and assigned but half the first premium was charged to his co-owner.

The second premium was paid by Ferris, one half being charged to and paid by the individual defendants who had then acquired the half interest of Ferris's co-owner, but before the third premium became due the individual defendants had acquired the whole interest in the lands mortgaged. A term of the mortgage made the insurance premiums a charge on the land if not paid by the assured and upon the acquisition by the defendants of Ferris's interest on July 10, 1914, an agreement was entered into between them which provided as follows:—

1. The assured hereby assigns, transfers and makes over unto and to the use of the owners, their executors, administrators and assigns, ALL THAT the said policy and all the benefits and advantages thereof TO HAVE AND TO HOLD the same unto and to the use of the owners, their executors, administrators and assigns for ever. SUBJECT NEVERTHELESS to the payment of the premium from time to time payable in respect thereof (other than the premiums hereinafter covenanted to be paid by the assured). And to all claims and rights of the company thereto under and by virtue of the said mortgage and the assignment of the said policy as collateral security as aforesaid.

2. In the event of the said policy not having become payable by reason of the death of the assured previous to the date of the repayment of the moneys secured by the said mortgage, the owners hereby covenant and agree to and with the assured to assign and make over the same at such date to the assured upon payment by him to the owners, their executors, administrators and assigns, of a sum equivalent to the cash surrender value of the

said policy at such date and the assured hereby in such event covenants and agrees to and with the owners, their executors, administrators and assigns to pay the said sum forthwith after the repayment of the moneys secured by the said indenture of mortgage.

3. Upon repayment by the owners, their executors, administrators or assigns of any and every instalment of the principal secured by the said mortgage or any other sum on account of principal in accordance with the terms of the said mortgage the assured shall forthwith upon demand pay to the owners, their executors, administrators or assigns a sum equivalent to what would be the cash surrender value under the said policy of the amount of such instalment or other payment or both at the date or respective dates of payment based on the proportion which the amount of any such instalment or other payment bears to the total surrender value of the said policy at such date or respective dates and shall thereafter pay to the owners, their executors, administrators or assigns as and when the same become payable a sum equivalent to the premium in respect of any such instalment or other payment so repaid based on the proportion which the premiums in respect of the instalment or instalments or other payment so repaid bears to the total premium payable in respect of the said policy. In the event of any default or delay on the part of the assured in payment of the sum or sums equivalent to the said cash surrender value or in payment of the proportion of the said premium or premiums as aforesaid, the assured shall pay to the owners, their executors, administrators or assigns interest on such sum or sums from the due date or respective due dates until the actual date of payment at the rate of ten per cent. (10%) per annum.

4. In the event of the said policy becoming payable by reason of the death of the assured before the due date of the said mortgage but after the assured shall have paid to the owners, their executors, administrators or assigns the cash surrender value in respect of any instalment or other payment on account of the principal paid by the owners, their executors, administrators or assigns as aforesaid, the owners shall pay to the estate of the assured or the parties entitled thereto under any will, testamentary or other disposition of the assured the amount of any instalment or other payment on account of principal repaid by the owners, and in respect of which the assured shall have paid them the equivalent of the cash surrender value as hereinbefore provided upon receipt of the same by the owners from the company.

5. Upon payment by the assured of the said cash surrender value and all other moneys payable by the assured to the owners by virtue hereof, the owners, their executors, administrators or assigns hereby covenant and agree to assign, transfer and make over unto the assured the said policy and all the benefits and advantages thereof.

6. In the event of the mortgaged premises being sold by the owners or of any of them disposing of his interests therein during the currency of this agreement, the owners or the owner so disposing of his interest shall be entitled to have this agreement cancelled and be freed and released from all further obligations or liability hereunder upon procuring the purchaser or purchasers to enter into an agreement with the assured in the same terms as this agreement.

Although one instalment of $5,000 was past due at the time of this agreement it had not yet been paid. One instalment of

ALTA.

S. C.

STANDARD TRUSTS CO. v. CANADA LIFE ASSURANCE CO.

Harvey, C.J.

$5,000 was however subsequently paid and Ferris paid the defendants $110 which was one-tenth of the surrender value at that time, of the policy, and reimbursed the defendants one-tenth of the next annual premium. Before any other instalment was paid or any further premium paid, Ferris, who had gone to the war, was killed in action.

When the necessary proofs to obtain the insurance moneys were forwarded it was found that a mistake had been made by Ferris in understating his age and that at his actual age the premiums paid would be the premiums for an insurance of $47,500 instead of $50,000 and in accordance with the terms of the policy the policy was treated as one for $47,500.

Just how this little error effects the terms of the agreement and the rights of the parties is what is in issue in the action.

The company with its defence makes a statement in which it shews an amount of $755.10 added to the policy as profits and deducts from it $45,000 the principal unpaid on the mortgage and $1,248.15 accrued interest, and the difference with legal interest from the date of proof of death is paid into Court. The statement is not questioned and the contest is entirely between the plaintiff and the individual defendants.

I agree with the trial Judge that the plaintiff is not entitled to the full beneficial interest in the policy subject to any claims of the defendants for reimbursement of the premiums paid and have nothing to add to the reasons he gives for reaching that conclusion.

I also agree with him that the plaintiff is not entitled to an interest in the policy represented by three $5,000 instalments which were payable by the terms of the mortgage but only one of which had been actually paid at the death of the assured. My reason is much the same as that of the trial Judge. While the defendants ought not to be allowed to benefit from their own default I doubt whether under the terms of the agreement and the mortgage, Ferris could have compelled them to pay any instalments at any time if the mortgagee did not press them and if so he could not by the terms of the agreement become entitled to redeem any portion of the insurance policy for instalments not actually paid. Then, as the trial Judge points out he, with a knowledge of their default, made no protest or request to them to

remedy it, and thereby may be deemed to have acquiesced in it. Moreover it was not entirely in their interests and against his that there should be delay. If he lived, as most people contemplate that they will, then in the condition he was, it was to his interest to have the delay because it meant that some one else was paying the premiums on an insurance policy which ultimately would be for his sole benefit.

I agree with the trial Judge also that the plaintiff is entitled to one-tenth of the profits because Ferris was bearing the burden of one-tenth of the policy which had been released to him. And, because he was bearing one-tenth of the burden and because in my opinion one-tenth of the policy had been released to him, I think that his estate is entitled also to one-tenth of the face of the policy or $4,750 and in this I differ from the learned trial Judge. The reason the trial Judge came to the conclusion that the plaintiff should bear the full burden of the $2,500 reduction in the policy and be entitled to only $2,500 seems to me to be shortly set out in two sentences. He says:—

> On the other hand, there is no doubt that when the agreement was made, the defendants thought they were getting an assignment of a $50,000 policy equal to the amount of the mortgage which they assumed and they thought they were paying the premium on a policy of that amount. Through a mistake of Ferris alone they found themselves protected only by a $47,500 policy which did not cover the whole mortgage as they thought it did.

Having regard to the circumstances as disclosed by the evidence I think that for the word "protected" should be substituted the word "burdened" and that gives one quite a different point of view.

As I have already pointed out this policy was taken out for the protection of the mortgagee and upon its demand. No doubt the mortgagors received a benefit in the way of a larger amount advanced or a lower rate of interest. When the defendants acquired the property their agent wrote to the mortgagee pointing out their substantial position and stating that the security on the personal covenant was increased. A short time later after the $5,000 instalment had been paid they approached the branch manager of the mortgagee who communicated with his principals by letter which was put in evidence as establishing the facts stated in it. It is stated in it: "They claim the policy is a very heavy burden to them and they wish us to surrender $45,000 and

ALTA.

S. C.

STANDARD TRUSTS CO. v. CANADA LIFE ASSURANCE CO.

Harvey, C.J.

issue Ferris a new policy on the same basis for $5,000 which is the amount he is now entitled to."

One of the essentials for relief on the ground of misrepresentation is that the misrepresentation induced the act of the party to whom it is made. It is quite apparent from the facts I have stated that in this case that condition did not exist. If the correct age of the assured had been known the mortgage company might have insisted upon further insurance with further premiums which would have involved a further burden on the defendants which they clearly wished to avoid for it seems to me quite clear that they were not depending upon this policy as any security or advantage to themselves. By virtue of its existence, however, for the payment of two premiums and one half of another less the amount reimbursed by Ferris they have been relieved of a payment of nearly twenty times the amount of their actual payment. Such being the case I see no reason why they should receive any greater advantage than they are strictly entitled to. They have borne the burden of nine-tenths only of the policy and in my opinion much upon the same principle that the plaintiff cannot be allowed anything in respect of the instalments past due but not paid by the defendants they should not be allowed a protection which they did not ask for, did not pay for and did not want.

It is urged that this conclusion is at variance with the intention of the parties as shewn by the provisions of the agreement that the share of the Ferris estate was to be paid when received by the defendants from the company.

Now, if there had been no mistake as to age or otherwise it must have been within the contemplation of the parties that if the mortgage were paid by the appropriation of the insurance moneys there would almost certainly be some interest payable which would be deducted from the insurance moneys and therefore if "receipt" means a receipt in cash or its equivalent the owners would not receive sufficient to pay the full amount to which the assured's estate would be entitled, because it would be the exact amount of the principal of the mortgage that the defendants would be entitled to have paid out of the insurance moneys, the remainder having been released to Ferris. That satisfies me that "receipt" is to be interpreted to include an appropriation for the

credit of the defendants and that the moneys were received within the meaning of the agreement when the debt was admitted and the moneys applied to the payment of the mortgage.

The defendants have indeed been allowed a deduction of interest for 3 months prior to that no doubt on account of the delay in establishing a claim of which the company had notice so that they can hardly complain if the obligation is imposed on them of paying interest on the amount payable to the plaintiff from the later date. It is contended that it was the plaintiff's notice to the company that prevented this balance in its hands from being paid over, but that is of no consequence because the company did in fact pay interest on the amount which it was liable to pay until it was paid into Court, and it was the defendant's refusal to pay the plaintiff what it was entitled to receive that has caused all the delay and litigation.

Harvey, C.J.

I would therefore allow the appeal and declare that the plaintiff is entitled to one-tenth of the amount of the policy and profits amounting to $4,750 and $75.57 respectively. The plaintiff should have judgment against the individual defendants for $4,825.57 with interest at the legal rate from January 16, 1917.

The individual defendants should pay the proper costs of all parties both of the action and the appeal. The defendant company should be entitled to its costs out of the moneys in Court and the remainder of the moneys in Court should be paid out to the plaintiff on account of its judgment.

BECK, and IVES, JJ., concur with HARVEY, C.J.

Beck, J.
Ives, J.

Appeal allowed.

GETTY & SCOTT v. CANADIAN PACIFIC R. Co.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith C.J.O. and Maclaren, Magee, Hodgins, and Ferguson, JJ.A. December 19, 1919.

CARRIERS (§ III C—394B)—NEGLIGENCE—CONVERSION—LIABILITY—TERMS OF SHIPPING ORDER—RAILWAY ACT—MERCANTILE LAW AMENDMENT ACT.

Where carrier has seized goods pursuant to sec. 345 of the Railway Act, R.S.C. 1906, c. 37, and has the right to sell them, payment of the shipping tolls having been refused, and a telegram is received which explicitly directs delivery of the goods and offering to pay the charges, sufficient time being given to prevent the sale of the goods, the carrier is guilty of negligence in allowing such goods to be sold. The right of action is under the Mercantile Law Amendment Act (R.S.O. 1914, c. 133, sec. 7)

ONT.

S. C.

GETTY AND SCOTT v. CANADIAN PACIFIC R. CO.

Statement.

and the damages are governed by the shipping bill, which makes the value of the goods at the place and time of shipment the limit of the carrier's responsibility.

[*Swale* v. *Can. Pacific R. Co.*, (1913), 15 D.L.R. 816, 29 O.L.R. 634, referred to.]

APPEALS by both parties from the judgment of Masten, J., in an action for damages for breach of contract in the failure of the defendants to deliver certain goods shipped over their railway. Affirmed.

The grounds of the defendants' appeal were as follows:—

1. The said judgment is against law, evidence, and the weight of evidence.

2. The learned trial Judge erred in holding that the facts proved at the trial established negligence or breach of legal duty on the part of the defendants towards the plaintiffs.

3. The defendants, having once carried the goods in question to the destination and there tendered them to the consignees, were under no obligation to carry them there again, in the absence of a new agreement to that effect, and no such agreement was shewn.

4. The plaintiffs, having refused to accept the goods, and having denied all interest in them until after sale proceedings had actually begun and expense in connection therewith had been incurred, were not entitled to have the sale proceedings stopped without at least making formal tender of all charges and expenses lawfully incurred.

5. The defendants' liability to the plaintiffs, if any, arises under sec. 345, sub-sec. 3, of the Railway Act, R.S.C. 1906, ch. 37, and is for the surplus remaining in their hands after sale of the goods and payment of all lawful charges. The plaintiffs refused to accept such surplus or to claim under the said sub-section, and their action, based otherwise than on the said sub-section, should have been dismissed with costs. The defendants had at all times been ready and willing to pay the said surplus to the persons entitled thereto in accordance with the statute, and had notified the plaintiffs; and at the trial, by leave of the Court, they paid into Court the whole of the said surplus, being the sum of $1,136.54, and judgment should have been for that amount at most, with interest thereon, at the rate allowed by Rules of Court, and without costs.

6. No evidence was given by the plaintiffs as to the quality, condition, or value of the goods in question, either at the time and place of shipment or at the time of sale; and, in view of the evidence given as to the efforts to obtain a good price, the learned trial Judge should not have found the goods to be of any greater value than the amount for which they were sold, and should not have given judgment for any sum greater than that amount, less the lawful charges against the said goods.

The grounds of the plaintiffs' appeal were the following:—

1. The learned trial Judge erred in holding that the value of the goods was to be computed as of the date of their receipt by the defendants.

2. The provision in the bill of lading limiting the amount of loss or damage to the value of the goods at the place and time of shipment is not binding on the plaintiffs, in the circumstances of the case, the goods having reached their destination about the 20th May, 1915, and the defendants having sold them on the 21st January, 1916.

3. The plaintiffs are entitled to the value of the goods at the time of the sale thereof by the defendants; and the value at that date, according to the evidence, was 26 cents a foot.

4. The plaintiffs are entitled to interest at the legal rate from the 21st January, 1916, the date of the sale of the goods by the defendants, or in any event from the date of the issue of the writ.

J. D. Spence, for the defendants.

M. A. Secord, K.C., for the plaintiffs.

The judgment of the Court was read by

HODGINS, J.A.:—Appeal by the defendants from the judgment of Masten, J., dated the 15th April, 1919, whereby he directed judgment to be entered for the plaintiffs against the appellants for the sum of $1,477.39. The action was for the conversion of certain goods which the respondents had bought from one J. A. Scott, of Quebec. Hodgins, J.A.

The history of the events which preceded the sale of the goods by the appellants in Montreal, at their customary sale for unpaid freight, is clearly set out in the reasons for judgment of the learned trial Judge, and it is unnecessary to repeat it.

A great deal of the evidence is taken up with regard to events antecedent to the 18th January, involving the movements of, not

ONT.

S. C.

GETTY AND SCOTT v. CANADIAN PACIFIC R. CO.

Hodgins, J.A.

only the goods in question, but those arriving in Galt at an earlier date. There was undoubtedly, from one cause or another, a considerable amount of confusion with regard to the actual goods now sued for, their location, the cases they were contained in, and the number of shipments they represented. It is sufficient to say that on the 18th January, 1916, the goods involved in this action were identified by the agent at Galt, in his telegram of that date to Riddell, the assistant freight claims agent at Toronto, and that he requested the return of them to Galt, stating that the respondents "will pay charges."

These goods had been shipped by Riddell to the freight claims agent in Montreal a few days earlier, namely, on the 13th January. Riddell, on the 19th January, sent a telegram as follows:—

"Three cases and one bundle of leather sent you January 13/16 in car C.P. 135022 lot No. R. 674 ship Getty & Scott Galt to my order advance charges $15.14 plus freight Toronto to Montreal and Montreal to Galt."

This telegram, the learned trial Judge finds, was received on the 20th January in Montreal; but, notwithstanding that, the sale proceeded, and on the 21st January, 1916, at about 2 o'clock in the afternoon, the goods were sold, at 15½ cents per square foot, having been originally purchased by the respondents from F. A. Scott at 16½ cents.

The learned trial Judge has held that the appellants were negligent, and he has fixed the damages at 16½ cents per square foot, holding that the respondents are bound by the shipping order, which makes the value of the goods at the place and time of shipment the limit to the carriers' responsibility. Were it not for the explicit terms of the telegram I have quoted, I should not be disposed to think that the appellants were shewn to have been negligent.

These goods had been refused, without being opened, by the respondents, as far back as the 17th May, 1915. They had been held by the railway company somewhere until October, 1915, when the agent at Galt was asked to have them looked up and to hold them on the respondents' account. It was not until the 3rd January, 1916, that the respondents notified the appellants that they wanted the goods back, and would take them and pay the freight. However, I am not disposed to differ in any way

from the view taken by the learned trial Judge, that, on the evidence as presented, time enough was given to the appellants to have prevented the sale of these goods, and to have complied with the request to return them to Galt.

It was argued, on behalf of the appellants, that the sale was justified and that they were not liable at all because there was no tender of the charges, and that the arrangement made with the local agent at Galt by the respondents that they would pay the charges was not equivalent to a tender, and that a tender had never been waived. Effect cannot be given to this, in view of the evidence of the arrangement which existed between the parties at Galt, one of long standing, under which the custom was that the appellants would deliver to the cartage company, who would themselves pay the charges, so that it was really not necessary to consult the respondents at all. The station-agent, in view of that arrangement, says that, if the respondents asked for the return of the goods, the question of tolls was of no consequence, that he knew they would have paid them, and that was the reason he did not demand the tolls to be paid in advance.

A second contention was that both parties were under the impression that the goods were in Toronto, and consequently both parties had in their minds only the payment of freight charges from Toronto, and that the respondents could not be said to have agreed to pay the charges mentioned in the telegram I have quoted.

As I have mentioned, these goods were, for something like 7 or 8 months, knocking about in the custody of the railway company, with no one paying any attention to them; and, while the respondents and the local agent of the appellants may have surmised that they were in Toronto, there is no evidence of any kind that that was a factor in the arrangement made. Much clearer evidence would need to be given, even if such an understanding could make void an arrangement such as is alleged. I do not, however, think the point is open to the appellants. It is perfectly clear that the respondents intended to pay the charges, and this must be referable to the legal charges which the appellants were entitled to make, whatever they might be. I doubt very much whether it was competent to give any evidence of what was in

ONT.

S. C.

GETTY AND SCOTT v. CANADIAN PACIFIC R. CO.

Hodgins, J.A.

the minds of the parties, as to the point from which those charges would be calculated; but, as I have already said, no such evidence exists, and it is therefore unnecessary to consider this minute point further.

There would have been room, I think, for the contention that there never was any concluded bargain between the appellants and respondents which would put the railway company again in the position of carriers so far as the respondents are concerned, or render them liable for more than the proceeds of sale under sec. 345 of the Railway Act. They had seized the goods pursuant to that section, payment of the tolls having been refused, and had the right to sell them. All that could have affected this right, as gathered from the evidence and exhibits, is a search for the goods, a belated offer to pay the charges on them on the 18th January, 1916, and an endeavour to prevent them being sold on the 21st. I find no clear and definite engagement to re-deliver them. That was no doubt the intention when they could be got hold of. The Galt agent did not know where they were or what had become of them; Riddell, in Toronto, perhaps became aware on the 13th January, when he shipped down a car of unclaimed goods for sale in Montreal, that these goods were among the car-load. He telegraphed on the 19th to the claims agent in Montreal to "ship Getty & Scott Galt *to my order* advance charges $15.14 plus freight Toronto to Montreal and Montreal to Galt."

Whether shipment to Riddell's order was equivalent to shipment to the respondents, so that they would become entitled to delivery, is not elucidated, because the telegram was never acted upon. But, whether or not the appellants could escape liability for greater damages then the sale-price on that ground, I am quite unable to see how, if it is said they had agreed to deliver, the carriage could be upon any terms other than those contained in the shipping order. The sole right of the respondents to the goods was by virtue of that document, because they were then actively repudiating liability to the vendor for the price, and they had no independent contract with the appellants to deliver at all hazards. The goods were at the time, by statute (Railway Act, R.S.C. 1906, ch. 37, sec. 345), at the owner's risk; and, unless the respondents can rely upon the shipping order, they should, in my judgment, fail altogether.

A contention raised by the appellants was that the measure of damages was the price got in Montreal at their sale, and not the amount given by the learned Judge, nor the value of the goods according to the market-price at the date of sale. This question is fairly raised, because, I think, the evidence given of value in the market would be sufficient to warrant judgment at the rate of 26 cents a square foot, if the market-value was the proper measure of damages.

I think, however, the view of the learned trial Judge that the parties are bound by the agreement set out in the bill of lading or shipping order is right. He decides that, while the defendants on the 21st January held the goods in question as warehousemen, yet they were still carriers within the clause above quoted. It is to be observed that the transit contemplated by the shipping order was completed by the delivery of the goods at Galt, and that, having been refused, they passed into the hands of the respondents at Toronto, and subsequently at Montreal. When, however, the request was made on the 18th January, 1916, by the respondents, for delivery at Galt, I am of opinion that the contemplated transit would again become governed by the shipping order or bill of lading, as it would not be assumed that the appellants, on re-commencing the carriage of the goods at the request of the respondents, would not be carrying them pursuant to the shipping order under which they had originally received them.

For this reason, I agree with the view of the learned trial Judge that they were either still carriers or that their liability must be judged as if they were, because the resumption of the carriage under its original terms was within the contemplation of both parties, and the relation of the parties was not based upon the position of warehousemen, but that of carriers; if that is not so, then I should, as I have already stated, have doubts as to the right of the respondents to recover at all.

The request of the local agent, if it does not amount to a request to re-deliver under the terms of the original shipping order, would have to be taken as an offer to make a new contract with the appellants. There was not proved any definite acceptance of the offer of the respondents, but rather an expression of willingness to accept, provided the goods could be located and returned, and no communication that they had been found or that they

ONT.

S. C.

GETTY AND SCOTT v. CANADIAN PACIFIC R. CO.

Hodgins, J.A.

would be sent to Galt was made to the respondents. Before this could be done, the goods had been sold under statutory authority. If, however, the appellants are to be treated as warehousemen, then I think the condition as to limited liability applies as well after the transit has ended.

The learned trial Judge has, I think, correctly apprehended the scope and meaning of the case cited to us on the argument, *Swale* v. *Canadian Pacific R.W. Co.*, (1913), 15 D.L.R. 816, 29 O.L.R. 634. That case was intended to lay down, and I think did lay down, the principle that any stipulations clearly referable only to the transit ceased to be binding when the transit was ended, and that the stipulations contemplating conditions arising afterwards remained in full force.

The right of action of the respondents appears to me to be, in any case, governed by sec. 7, sub-sec. 1, of R.S.O. 1914, ch. 133, being the Mercantile Law Amendment Act, under which the following provision is made:—

"Every consignee of goods named in a bill of lading . . . to whom the property in the goods therein mentioned passes upon or by reason of such consignment . . . shall have and be vested with all rights of action, and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with him."

I can find no authority that where, innocently though negligently, a carrier has converted goods, damages have been limited to the price which he received at the sale, except in some cases where the person entitled to the damages was himself bound to sell, such as an assignee or trustee in bankruptcy. See *Whitehouse* v. *Atkinson* (1828), 3 C. & P. 344; *Clark* v. *Nicholson* (1834), 6 C. & P. 712; *Whitmore* v. *Black* (1844), 13 M. & W. 507.

In regard to the case of *Wilson* v. *Canadian Development Co.*, (1913), 33 Can. S.C.R. 432, also cited, where it was held that a similar limitation was not applicable in a case of either wanton or unjustifiable destruction or conversion of the goods, I find nothing in this case to which it applies. Here there was no wanton conversion, but an honest effort to prevent the sale, and nothing defeated it but some unexplained congestion in the appellants' Montreal departments. Indeed, had an effort been made to indicate just what the conditions were on the 20th and 21st January, 1916,

ONT.

S. C.

GETTY AND SCOTT v. CANADIAN PACIFIC R. CO.

Hodgins, J.A.

the appellants might perhaps have brought themselves within the principle of *Sims* v. *Midland R.W. Co.*, [1913] 1 K.B. 103.

I, therefore think the defendants' appeal must be dismissed.

It appears from the proceedings at the trial that amendments were permitted. These amendments included a plea bringing into the Court the sum of $1,136.54, proceeds of the sale of the goods in full satisfaction. As the amount found due is larger than that, I do not see that any change can be made in the disposition of the costs. I cannot see any reason why the defendants should not have originally paid into Court the amount for which they sold the goods, except that they were, by their pleadings, claiming the delivery of the original bill of lading, and declining liability until that was produced.

We were asked to allow interest from the date of the writ instead of from that of the judgment. Section 35, sub-sec. 3, of the Judicature Act, leaves the giving of interest by way of damages in actions for conversion to the jury, and their discretion will not be interfered with: Mayne on Damages, 7th ed., pp. 177, 178. The same rule should be applied to the decision of a Judge, especially where, as here, the defendants acted in perfect good faith. *Both appeals dismissed.*

ALTA.

S. C.

GALLAGHER v. DECKER.

Alberta Supreme Court, Hyndman, J. February 21, 1920.

VENDOR AND PURCHASER (§ III—37)—TRANSFER OF LAND—IN BLANK—SUBSEQUENT PURCHASER—INTERFERENCE WITH RIGHTS OF—LIABILITY.

One who has executed a transfer, in blank, of land has no further interest in the property and is liable in damages if he does anything which interferes with the rights of an unknown purchaser claiming title through such transfer.

ACTION to recover damages against the defendant, who having given a blank transfer of certain land, subsequently resold it to a third party who became the registered owner. Statement.

F. C. Jamieson, for plaintiff; *H. R. Milner*, for defendant.

HYNDMAN, J.:—This is an action to recover damages to the amount of $1,500 arising out of the following state of facts: Hyndman, J.

The plaintiff is an officer of the reserve of officers of the C.E.F., and prior to his enlistment was engaged in the real estate

ALTA.

S. C.

GALLAGHER v. DECKER.

Hyndman, J.

business in the City of Edmonton, and the defendant is a dentist also of the City of Edmonton.

About September, 1914, the defendant became the registered owner of Lot 10, Block 5, Belle Vue Subdivision, Plan 600 V, in the City of Edmonton, subject to a mortgage in favour of the Canada Permanent Mortgage Corp. for $1,000, and another mortgage in favour of Agnes W. Steadman for $650. In December, 1914, the defendant disposed of the said land subject to the mortgages mentioned, by way of an exchange to one Wenzel, and executed and delivered to him a transfer therefor leaving the name of the transferee in blank. In the following April, 1915, the plaintiff transferred certain farm lands to the said Wenzel in exchange for the said Lot 10, and received from Wenzel not a transfer executed by Wenzel, but the same transfer which had been delivered by the defendant to Wenzel, which still remained in blank so far as the name of the transferee was concerned. As a matter of fact the name of the transferee has not yet been inserted in it, and it still remains blank in that respect. No attempt has ever been made to register it, and the plaintiff says that when he received it in 1915 he placed it in his safe, where it remained until the early summer of 1919. After the plaintiff so acquired the property he went into possession in that he expended certain moneys for improvements and rented it to a tenant and collected one month's rent, but after that time the Canada Permanent Mortgage Co. collected the rents. In February, 1916, the plaintiff enlisted with the C.E.F., and later proceeded overseas and remained overseas until about July, 1919. On his return to Edmonton he found that the property had, during his absence, namely, on June 5, 1919, been transferred to one Harper by the defendant, under the following circumstances: It appears that in the early part of the year 1919, the mortgagees of the property pressed the defendant for payment of the mortgages. As a result the defendant got in touch with Wenzel, then living at Kansas City. On May 17, 1919, Wenzel executed a quit claim deed in favour of the defendant, and the following correspondence took place contained in Exhibits 4, 5 and 6 filed at the trial:

Dr. R. S. Decker,
402 Togler Building,
Edmonton, Alta., Canada.
May 9th, 1919.

Dear Sir,

Received your letter of the 4th instant to-day, and trust you have in the meantime got hold of my letter written about a week ago.

Note what you say about the house in Bellevue. As stated before, as far as I am concerned, I will give you a quit claim stating that I have no interest in that house. However, it may be that the transfer you gave me at the time is still out and has never been registered, and is not likely to. I have no record what became of same, as I traded so much that time, that I do not know with whom I traded the house.

I do not think it will be necessary to make out a great legal document as far as I am concerned, and herewith give you full possession of the house and lot, that is if I have any interest at all in it, which I doubt.

Yours truly,
M. WENZEL,
2029 Kansas Ave.
Kansas City, Mo.

R. S. Decker,
Dental Surgeon,
Edmonton, Alta., Canada.

May 1st, 1919.

Dear Sir,

In reply to your letter of recent date regarding the house you sold to me, would say that at that time I was dickering in real estate to such an extent that I have no exact remembrance of that deal.

My recollection, however, is that I got a house from you with some mortgages on—a first and second mortgage—and as the house was not worth what was against it, I traded same off again. You gave me the transfer in blank, signing your interest to nobody in special, and if I am not mistaken I traded same off that way again, getting, I presume, something else that amounted to nothing. Great old game alright, and not very business like.

Well, as far as I am concerned I am out of it, and of course as I have no transfer any more, I cannot do anything in this matter, otherwise would return same. Would not think that anybody now file that transfer.

This is all the information I can give you regarding this matter —I have no records of any kind, and would not know the lot and block number either.

Yours truly,
M. WENZEL.

ALTA.

S. C.

GALLAGHER v. DECKER.

Hyndman J

Edmonton, June 14, 1919.

Mr. Max Wenzel,
Kansas City.

Dear Sir,

I sent you a couple of weeks ago a quit claim deed to fill in and return, but so far I have not received it. I have now a buyer for the house at $1,850 cash, and by me putting in $115 in cash also I can clear the whole thing up, but we want a quit claim deed from you first before we make a new transfer and register it. Kindly forward it at your earliest convenience, so that I can get this cleared up.

I am,
Sincerely yours,
R. S. DECKER, D.D.S.
402 Tegler Bldg., Edmonton.

It will be seen from the correspondence that Wenzel thought he "doubtless" sold the property and gave the blank transfer to some third party though he has no recollection of the particulars.

With this information before him, and knowing nothing of Gallagher's interest, the defendant, after a good deal of trouble, and through the instrumentality of the Canada Permanent Mortgage Corp., effected a sale of the lot for a figure $115 short of the amount of the encumbrances against it, and he paid the deficiency out of his own pocket.

After all this had happened, and at a time when defendant no doubt was congratulating himself that he was now rid of a troublesome business, he was informed by the plaintiff that he, the plaintiff, had purchased the land from Wenzel in 1915, and held the blank transfer referred to, and demanded damages equivalent to the difference between the encumbrances and the present value of the property. I might add here that the transaction between Harper and the defendant was a perfectly *bonâ fide* one, and Harper having paid cash in full and become the registered owner, there is no ground on which the Certificate of Title can be set aside, and damages is the only possible remedy open to the plaintiff. The defendant also acted entirely honestly and believed that there was no equity in the land and had no thought of profiting personally otherwise than satisfying the mortgage and, as stated above, actually paid out of his own pocket the sum of $115. He is charged by the plaintiff with wrongfully transferring the said lands to the present owner in

consequence of which the plaintiff has suffered damages. The plaintiff does not contend that the defendant was a trustee for the plaintiff, but treats him solely as a trespasser; that he had parted with all his interest to Wenzel, and therefore that he had no right whatsoever to interfere with the title in the manner in which he did or in any other respect. The case is a peculiar one, and I have had no authority closely resembling it cited to me. The principal defence raised was that the plaintiff cannot maintain the action inasmuch as he has failed to shew any privity of contract between himself and the defendant or anything whatsoever in writing, even between himself and Wenzel, and that the transfer itself upon which the plaintiff relies does not and never did contain the name of any transferee, and still remains in blank in that respect. I must confess the case gives rise to much difficulty, and I have grave doubts as to the plaintiff's right to maintain the action, but nevertheless it seems to me that the defendant, being seized of the information contained in the letters from Wenzel, should have realized that having executed a transfer of the land, even though in blank, he had as a fact no further interest in the property, and should have done nothing which would interfere with the rights of the unknown purchaser from Wenzel notwithstanding the quit claim deed. The mortgages, of course, continued a liability against him, which induced him to act as he did, but even had the transfer been registered his liability would still remain, and I think his correct course would have been to allow the mortgages to be foreclosed in the usual way if necessary, and obtain leave to buy in at the mortgage sale. In that way any interest of an unknown purchaser might have been cut out. If this conclusion is correct then the plaintiff is entitled to whatever damages he may have suffered.

The evidence in respect of the damages is conflicting, running all the way from $1,800 to $3,500. It is difficult to fix any amount as being the true value. At the time of the trial, and for some considerable period previously values were considered much higher than in the early part of the year. Probably the best test is what actually happened at and prior to the date when the sale to Harper took place. I am satisfied an honest,

ALTA.

S. C.

GALLAGHER v. DECKER.

Hyndman, J.

reasonable, and businesslike effort was made to dispose of it for $2,000 and failed, and it was eventually sold to Harper for $1,856.20. That may possibly have been somewhat below its actual value, but I think $2,300 as much as it was reasonably worth at that time, notwithstanding the opinions of the witnesses for the plaintiff. The amount of the mortgages was $1,856.20; the sale price, plus $115, which defendant personally contributed, making in all $1,971.20; this deducted from $2,300 leaves a balance of $328.80, to which the plaintiff is entitled. Inasmuch as I consider the plaintiff himself largely to blame in the matter, I think it a case in which there should be no costs to either party.

There will therefore be judgment for the plaintiff for $328.80, each party to pay their own costs. *Judgment accordingly.*

N. B.

S. C.

GAUVIN v. DIONNE.

New Brunswick Supreme Court, Appeal Division, White, Barry and Grimmer, JJ. November 13, 1919.

MORTGAGE (§ VI G—103)—REAL PROPERTY ACT, NOVA SCOTIA—POWERS OF MORTAGEE UNDER.

Section 41 of ch. 152 of the Property Act (Con. Stats. N.B. 1903) confers upon a mortgagee not only the power to vary a proposed sale under the mortgage deed, but also if he so wishes, to buy in and purchase the property at the sale for himself in the same way as can be done when "leave to all parties to bid" is given by a decree for foreclosure and sale in Chancery, or if he so decides he may rescind the contract of sale and resell under the power without being answerable to the mortgagor for any loss occasioned thereby. Under sub-secs. 2 and 3 of the section the powers of sale may be regulated by the mortgage deed, and it is only where no provision as to notice is contained in the mortgage deed that the mortgagee is compelled to give the notices in accordance with the provisions of sec. 42 of the Act.

Statement.

APPEAL from a judgment of Hazen C.J. (1919), 46 N.B.R. 377, dismissing plaintiff's action for redemption of a mortgage or for an accounting by the defendant, as mortgagee, for the receipts, rents and profits. Affirmed.

A. Lawson, for plaintiff; *J. J. F. Winslow*, for defendant.

White, J.

WHITE, J., agrees with Grimmer, J.

Grimmer, J.

GRIMMER, J.:—The important point involved in the case relates to the interpretation of sec. 41 of ch. 152, Con. Stats. N.B. 1903, known as the Property Act, respecting the sale of real property under a power of sale contained in a mortgage, and

the powers intended thereby to be conferred upon a mortgagee. The section among other things provides as follows:

(1) A mortgagee, when the mortgage is made by deed, shall, by virtue of this chapter have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further, viz.:

(a) A power, when the mortgage money, or any interest thereon has become due, to sell, or to concur with any other person in selling the mortgaged property or any part thereof, and either together or in lots by public auction or by private contract, subject to such conditions respecting title or evidence of title, or other matter as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby.

The facts of the case, which involved questions under the above statutes, are as follows, as appear from the evidence and the judgment of Hazen, C.J. (1919), 46 N.B.R. 377:

"The plaintiff, Edith Gauvin, on June 18, 1912, gave to the defendant Joseph P. Dionne, a mortgage on certain land and premises of which she was the registered owner, to secure the payment of $1,200 in one year from the date thereof, with interest at the rate of 8% per annum. Default was made at maturity in the payment of the said sum and interest, and the defendant, Dionne, acting under the power of sale contained in the said mortgage caused the land and premises to be offered for sale at public auction on October 11, 1913, at which time and place William T. Perron bid the same in for the sum of $1,405, and on the same day the defendant Dionne conveyed the same to the said Perron, and a few days later Perron reconveyed the same to Dionne. No consideration was paid by Perron for the said lands and premises, and under the evidence submitted it is perfectly clear that in purchasing the lands and premises when the same were put up at public auction under the power of sale, he was simply acting as agent for the defendant Dionne, the mortgagee. On April 22, 1916, two years and six months after the sale took place, the defendant Dionne sold and conveyed the lands and premises described in the mortgage to the defendant, Cyprien Bouchard, for the sum of $2,600, of which amount $100 was paid in cash and the balance of the purchase price, $2,500, was secured by a mortgage given by the defendant Bouchard to the defendant Dionne. The female plaintiff shortly

N. B.
S. C.
GAUVIN
v.
DIONNE.
Grimmer, J.

before commencing this action demanded of the defendants the discharge of the said mortgage given by the plaintiff to the defendant Dionne, and a reconveyance to her by the defendant Bouchard, offering at the same time to pay the principal and interest due under the said mortgage, together with the cost and expenses incurred by the defendants, and for an account of the rents and profits received by them or either of them, and the defendant Dionne offered to account for the sum of $1,405, the amount for which the property was sold to him under the power of sale, but disclaimed liability to account for the amount for which he sold the property to Bouchard two and a half years after the mortgage sale took place."

These being the substantial facts of the case, the plaintiff asks for a declaration that the conveyance from Dionne to Perron, the conveyance from Perron to Dionne, and the conveyance from Dionne to Bouchard are inoperative, for a return of the said lands and premises, and account of the rents and profits received by the defendants, a discharge of both the said mortgages and a reconveyance of said lands and premises and possession of the said lands and premises, all on payment by her to the defendants or to such of them as may be entitled of the amount of principal and interest and costs due under and by virtue of the said mortgage, or if the conveyance to the defendant Bouchard is held to be legal and valid for an accounting of the rents and profits received and the benefit of the sale by the defendant Dionne to the defendant Bouchard and the payment to her of the surplus, if any, over and above the amount found to be due for principal, interest and costs under the mortgage.

The provisions of ch. 152, Con. Stats. N.B. 1903, referred to, follow closely in many respects the provisions of 44-45 Vict. (Imp.) ch. 41, sec. 41 of the former being similar to sec. 19 of the latter. The Imperial Statute, or Property Act, was ch. 145 of 23-24 Vict. By this the rights of mortgagees existing under the common law in similar cases where affected only so that in case of an absolute sale the mortgagee did not lose his power of sale, but might buy in and resell and again exercise his power of sale. In 1881 this section was amended, and the mortgagee

was given the added power "to buy in at an auction." It will thus be noticed that under the original statute he had only the power to rescind or vary contracts of sale or to buy in and resell the property from time to time in like manner, while the later Act gives him not only the power to vary any contracts and "to buy in at an auction" or to rescind any contracts for sale and to resell, etc.

This language was incorporated in full into sec. 41 of the Property Act of New Brunswick, Con. Stats. 1903, ch. 152, and I am of the opinion, as was Hazen, C.J., that it was intended to and did confer upon a mortgagee not only the power to vary a proposed sale under the mortgage, but also, if he so wished, to buy in and purchase for himself the property at the sale, or if he so decided to rescind altogether the contract for sale and to resell under his power of sale without being answerable to the mortgagor for any loss occasioned thereby.

The language quoted is to me clear, definite and purposeful, and I cannot discover any other meaning to be applied to it save as stated, nor can I conceive any other reason for the inclusion of the words "and to buy in at an auction" in the amended Imperial Statute nor in sec. 41 of ch. 152 Con. Stats. 1903. The several clauses of the section are to my mind separate and distinct, carrying different powers and confirming different principles.

Upon the argument, the appellant relied to some extent upon the following grounds which were not taken at the trial, viz.:

1. That the Property Act, ch. 152 Con. Stats. 1903, sec. 41, does not apply to this case, inasmuch as the provisions of sec. 42 of said Act have not been complied with. 2. That even if the provisions of sec. 42 of the Property Act were complied with, sec. 41 of said Act does not change the law which prohibits a mortgagee selling to himself or to a trustee for him.

I have very grave doubts whether the appellant having failed to take these points upon the trial is entitled to or should be allowed to take them now and so make them a factor in his case, but without deciding this, as in my view of the case it is immaterial, I shall proceed to state my opinion on the points named. As stated, the points were not seriously argued by the appellant or put forward in such a manner as to make it appear

N. B.

S. C.

GAUVIN v. DIONNE.

Grimmer, J.

to me at all events that he attached much importance to them or hoped much therefrom. However, two things are alleged, viz., that sec. 41 does not apply, because the provisions of sec. 42 had not been complied with, and that even if the provisions of sec. 42 had been complied with no change is made by sec. 41 to enable a mortgagee to sell to himself or to a trustee for him.

In view of the opinion I have given as to the purport and effect of sec. 41, the second of these grounds need not be further considered. If any doubt exists as to the meaning, intent and application of the sections mentioned, to my mind it is entirely removed by the provisions of sub-secs. 2 and 3 of sec. 41, which are as follows:

> 2. The provisions of this chapter relating to the foregoing powers comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were contained in this chapter.
>
> 3. This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

Section 42 provides as follows:

> A mortgagee shall not exercise the power of sale conferred by the last preceding section unless and until he shall have given to the mortgagor at least two months' notice in writing, specifying the time and place of sale, or unless such notice shall have been published for at least two months in the *Royal Gazette*, or some daily or weekly newspaper published in the county within which the lands lie, or in the case of chattels personal, where the mortgage is recorded or filed, and also in the case of lands by printed handbills, one at the Registry Office and one at some public place in the parish in which the lands are situate.

It will be noticed it refers only to the exercise of the power of sale mentioned in sec. 41, and not to any of the other powers conferred thereby. Then applying sub-secs. 2 and 3 it is found a contrary intention between the mortgagor and mortgagee so far as the notice of sale is concerned is distinctly expressed in the mortgage deed as is also an extension or variation of the powers conferred by the section whereby as the result whereof it became unnecessary in my opinion to apply the full provisions of sec. 42 as to the two months' notice in writing, etc., in order

to authorize the mortgagor "to buy in at the auction," the privilege conferred upon him by sec. 41, subject to the terms of the mortgage deed and the provisions contained therein, and this must have effect. In this case the mortgagor in the contract of sale stipulated for a shorter notice than was required by sec. 42, but instead of that operating against the mortgagee, in my opinion it is just such a case as was contemplated and provided for by sub-secs. 2 and 3. Undoubtedly if no power of sale was provided for in a mortgage made by deed, default being made in payment, the mortgagee by applying the provisions of the two sections could proceed to a sale of the mortgaged lands and "buy in at the auction," in which case, however, he would have to comply with the provisions of sec. 42 before exercising the power of sale. The powers conferred by sec. 41 are to the like extent as if they had in terms been part of and were conferred by the mortgage deed itself, and when these powers or any of them named in the section are wanting in the mortgage deed, they are supplied by the section for the express purpose of making a sale under the conveyance good and valid, and when necessary must be read into the deed. Further, if the mortgage deed provided for a sale in default of payment, but did not provide for notice to the mortgagor, no sale could take place under the sections quoted until the mortgagee had complied with the provisions of sec. 42. In this case, however, it seems to me that with the assistance of secs. 41 and 42, everything is provided to enable the mortgagee to proceed to sale, and if he desires, either by himself or his agent, to buy in the property at the auction and obtain a perfectly good and valid title thereto. It follows that, in my opinion, not only was Hazen, C.J., right in the conclusion he reached on the case as it was presented to him, and the interpretation he gave to sec. 41 of the Property Act, but the appellant fails upon the last above stated grounds.

The appeal will be dismissed with costs.

BARRY, J.:—The appellants' statement of claim asks that the conveyance from the respondent Dionne to Perron, the reconveyance from Perron back again to Dionne, and the conveyance from Dionne to Bouchard, be declared inoperative; (2) for the redemption of the lands and premises mortgaged by the appellants;

N. B.

S. C.

GAUVIN v. DIONNE.

Barry, J.

(3) for an account of the rents and profits; (4) a discharge of both mortgages; and (5) for the possession of the lands and premises upon payment of the principal, interest, and costs due under and in virtue of the mortgage given by the appellants to the respondent Dionne. Or failing that, in case it be held that the conveyance to the respondent Bouchard is legal and valid, then, in the alternative, the appellants ask for an accounting of the rents and profits received, and the benefit of the sale by the respondent Dionne to the respondent Bouchard, and the payment to the appellants of the surplus, if any, over the above amount found to be due for principal, interest and costs, under the mortgage from the appellants to Dionne.

In regard to the first of these claims set up by the appellants, Hazen, C.J., has found that the deed given by Dionne to Bouchard was, so far as the latter is concerned, *bonâ fide*, and that he was an innocent purchaser for value, without notice of any fraud or irregularity in the title which the seller undoubtedly possessed upon the records. The claim, therefore, for a decree declaring inoperative the three several conveyances mentioned, which if granted, would have the effect of defeating Bouchard's title, failed in the Chancery Division, and must, in my opinion, for the reasons given in the judgment appealed from, 46 N.B.R. 377, fail, also, here.

In regard to the alternative claim set up in the appellants' statement of claim, it appears that the mortgage deed which is the subject of the litigation, contained the provision that if default should be made in the payment of $1,200 and interest, or any part of the same, contrary to the proviso for payment, it should be lawful for the mortgagee, on giving one calendar month's notice in writing to the mortgagors, or on notice being published in one of the public newspapers published in Fredericton, for one calendar month, to sell and dispose of either by public auction or private contract, the mortgaged lands and premises. It is not disputed that, prior to the auction sale, which took place on October 11, 1913, notice of the sale, in terms of the mortgage deed, had been given.

At the sale, Perron ostensibly became the purchaser for the sum of $1,405. No money passed, and Hazen, C.J., has found,

and there appears to have been abundant evidence disclosed at the hearing to warrant him in so concluding, that Perron, in purchasing at the sale, was acting merely as agent of Dionne, the mortgagee. A conveyance of the property, bearing date October 11, 1913, was made by Dionne to Perron, and on the 21st of the same month, a reconveyance of the property was made from Perron and his wife to Dionne, who, from thenceforth, appears to have regarded himself as the owner, and on April 22, 1916, sold and conveyed the property to Bouchard for the consideration of $2,600, one hundred dollars of which was paid in cash, and the balance secured by a mortgage upon the property.

Speaking generally, a mortgagee has never been permitted either in England or in this Province, to become a purchaser at his own sale; and it may be useful to glance, shortly, at some of the earlier cases in which this doctrine has been promulgated. Where, in a conveyance of an estate by way of security for the re-investment of a specific sum of stock, with a power of sale in case of default, Lord Eldon, L.C. in *Downes* v. *Grazebrook* (1817), 3 Mer. 200, treating the mortgagee as a trustee for the mortgagor, held at pp. 207-8 that:

> A trustee cannot, (generally speaking) become a purchaser, either by private contract or publicly; and there is a case in Vesey where it was laid down by Lord Hardwicke, that such a purchase should not be allowed to stand, although not the trustee himself, but another on his behalf, had bought the estate at a public auction. (*Whelpdale* v. *Cookson* (1747), 1 Ves. Sen. 9). I take it, however, that the doctrine is not accurately stated in saying that under no circumstances whatever a trustee can purchase. A trustee for sale is bound to bring the estate to the hammer under every possible advantage to his *cestui que trust*. He may, if he pleases, retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser; and so he may purchase, not indeed from himself as trustee, but under a specific contract from his *cestui que trust*. But, while he continues to be a trustee, he cannot, without the express authority of his *cestui que trust*, have anything to do with the trust property as a purchaser.

But although Lord Eldon, L.C., in the case cited, treats the mortgagee as a trustee for the mortgagor, this only means that he must exercise the power in a prudent way, with a due regard to the interests of the mortgagor in the surplus sale moneys. *Robertson* v. *Norris* (1858), 1 Giff. 421. He is not a trustee for

N. B.

S. C.

GAUVIN v. DIONNE.

Barry, J.

the mortgagor as regards the exercise of the power of sale. He has his own interest to consider as well as that of the mortgagor, and provided that he keeps within the terms of the power, exercises the power *bonâ fide* for the purpose of realizing the security, and takes reasonable precautions to secure a proper price, the Court will not interfere. And where a mortgagee, under an improper exercise of a power of sale contained in his mortgage deed, himself became the purchaser of the mortgaged property, on a bill filed 15 years afterwards, the Court decreed redemption. *Robertson* v. *Norris, supra.* See, also, *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (1879), 4 App. Cas. 391, at 404; *Henderson* v. *Astwood,* [1894] A.C. 150, at p. 158. In the last named case, Lord Macnaghten puts the disability of a mortgagee from purchasing at his own sale, upon the ground that a man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of another.

Following the rule of the English decisions, it has long been held in this Province, prior to the passing of "The Property Act" Con. Stats. N.B. 1903, ch. 152, that a sale to himself by a mortgagee of the mortgaged premises, was no execution of the power of sale contained in the mortgage; and that where the land was bought in through the intervention of a third party as the agent of the mortgagee, and reconveyed to the principal, the sale was to be regarded as abortive, and the real purchaser a mortgagee in possession, and as such liable to account to the mortgagor for the surplus upon a second sale, together with the rents and profits during the interim. *Mitchell* v. *Kinnear* (1897), 1 N.B. Eq. 427; *Patchell* v. *The Colonial Investment & Loan Co.* (1907), 3 N.B. Eq. 429. "The Property Act," which first found a place in the statute law of this Province in the consolidation of the statutes in 1903, was obviously intended to change the law in this respect, and to permit a mortgagee becoming the purchaser at an auction under power of sale in a mortgage to himself; and now the mortgagee, where the mortgage is by deed, has power *inter alia* to sell and "to buy in at an auction," the mortgaged premises.

The construction of sec. 41, sub-sec. 1 (a) of "The Property Act" argued for both here and in the Court below, that is, as I understood it, that the words "with power to vary any contract for sale, . . . and to resell, without being answerable for any loss occasioned thereby" give to the mortgagee, not the power of buying in and of becoming the real owner of the mortgaged property, but only the power of buying it in for the purpose of reselling it without becoming answerable for any loss occasioned by the resale, is, I think, untenable. I agree with the construction put upon the sub-section in the judgment appealed from, where it is said, 46 N.B.R. at p. 381, that,

> The language in this section (sec. 41, sub-sec. 1 (a)) appears to be clear and free from doubt, and to confer upon a mortgagee, when the mortgage is made by deed, power to sell, after default, the mortgaged property or any part thereof, by public auction, with power to buy in at an auction; and the words "to buy in at an auction" convey to my mind the meaning that power is given to the mortgagee, at the time of the auction sale, to buy in the mortgaged premises in the same way as can be done when "leave to all parties to bid" is given by a decree for foreclosure and sale in Chancery.

If the legislation was not intended, as Hazen, C.J., says it was, to remove the disability which existed against mortgagees becoming purchasers at their own sales, and to put them in the position of open competitors with other prospective purchasers at a *bonâ fide* public auction held after the publicity required by the statute had been given, then it is difficult indeed to discern what the legislation was really intended to remedy.

There is a question, and to my mind an important question whether, the mortgage which is the subject of this litigation having been drawn in entire disregard of the provisions of sec. 42, and the publicity required by that section in regard to the notice of sale not having been given, the mortgage is such a one, and the sale was such a sale as, under "The Property Act" would permit of the respondent becoming a purchaser at his own sale. Section 42, which, in the interpretation of the Act, must be taken into consideration, provides that:—

> A mortgagee shall not exercise the power of sale conferred by the last preceding section unless and until he shall have given the mortgagor at least two months' notice in writing, specifying the time and place of sale, or unless such notice shall have been published for at least two months in the *Royal Gazette*, or some daily or weekly

N. B.

S. C.

GAUVIN v. DIONNE.

Barry, J.

newspaper published in the county within which the lands lie, . . . and also, in the case of lands, by printed hand-bills, one of which shall be posted up at the Court House, one at the Registry Office, and one in some public place in the parish in which the lands are situate.

In no single particular have the conditions precedent in regard to the notice of sale and publicity prescribed by sec. 42 been complied with in the present case. Notice in writing of the proposed sale was served upon the mortgagors not 2 months, but 1 month only, before the day of sale; the notice of the sale was published in neither the *Royal Gazette*, nor in some daily or weekly newspaper published in the County of Madawaska, the county within which the mortgaged lands lie. According to the proofs in evidence, notice of the proposed sale was published in the *Semi-Weekly Gleaner*, a newspaper published in the City of Fredericton, in the County of York, not even for one calendar month, as required by the terms of the mortgage itself, but for 29 days, that is, from September 9 to October 7, both dates inclusive. No printed hand-bills announcing the time and place of the sale were posted up at any one of the three places directed by sec. 42.

The provisions of the Act relating to the powers conferred upon mortgagees, and the exercise of those powers may, it is true, be varied or extended by the mortgage deed (sec. 41, subsec. 2) and the section is not applicable at all, where a contrary intention is expressed in the mortgage deed itself. (Sec. 41 (3).) It would seem, therefore, that every mortgage must be looked at in order to see if there be any "variations or extensions" properly speaking, of the powers conferred by the Act upon mortgagees, or whether the parties have by the mortgage deed, expressly contracted themselves out of the provisions of the Act, which, apparently, they are at liberty to do. It is undoubtedly true that the parties to a mortgage may make any contract they like, and may insert in it any terms, not contrary to law, that they may choose; and if, by express words or necessary implication they say that the mortgage is not to be taken as an instrument coming within the provisions of "The Property Act," then, doubtless, such a mortgage would be valid enough and enforceable as to all its provisions, excepting always that upon a sale

of the mortgaged premises under the power of sale contained in it, the mortgagee could not himself become a purchaser. To become a purchaser at his own sale it is necessary that the mortgage should conform to the provisions of the Act, and proceed within the limits of the powers there conferred upon him, or within the limits of such "variations and extensions" of those powers as by the mortgage deed should be stipulated.

Now to my mind, these are, as I have already stated, very important questions; but because they were not raised in the Chancery Division and have been mentioned only in the most casual manner here, and having regard to the growing disinclination of appellate Courts to hear substantive claims which are raised for the first time in the Court of Appeal, *Att'y-Gen'l for Canada* v. *Ritchie Contracting & Supply Co.* (1915), 26 D.L.R. 51, at 54, 52 Can. S.C.R. 78, at 92, (affirmed, 48 D.L.R. 147, [1919] A.C. 999); *City of Vancouver* v. *Vancouver Lumber Co.*, [1911] A.C. 711 at 720, I think we should decline to express any opinion upon those questions in the present appeal. It may be said, however, that it is not every mortgage, no matter how carelessly it has been drawn, and no matter what may be its provisions in regard to giving publicity to the notice of sale, that will give to the mortgagee the right to become a purchaser at his own sale. That, clearly, could never have been the intention of the Legislature.

I am of the opinion that upon the ground of appeal which I have been discussing, the appeal must fail. There is another ground upon which it has been held in the judgment appealed from that the respondents are entitled to succeed, but in view of the conclusion arrived at on the other ground, this requires but a moment's consideration. If the result of the appeal were to depend solely upon the answer to the question whether the owner of the property did or did not deliver up the possession of it to Dionne, then I think the result must have been favorable to the appellants, for with every deference, I find myself unable to agree with the conclusion reached by Hazen, C.J., upon this branch of the case.

It appears that on the very day that the property was reconveyed from Perron to Dionne, the latter commenced an

N. B.

S. C.

GAUVIN v. DIONNE.

Barry, J.

action to recover possession of it. The writ of summons, which was indorsed with a claim for the possession of the property, was served upon the defendants (the plaintiffs and appellants here) in the suit, but the action was proceeded with no further. At about the same time, Dionne or his solicitor sent Sheriff Gagnon to obtain peaceable possession of the property. This the sheriff did. After removing some things which he had in the house, Paul Gauvin gave to the sheriff the key of his wife's house and, so far as he was competent to do so, the possession of the lands upon which it was situate. Upon these facts, Hazen, C.J., holds that the appellants, having, by giving up possession of the property, settled the suit for possession begun against them by Dionne, are thereby precluded from claiming an accounting for a sale by the respondents after that date.

It seems to me to be reasonably clear from the evidence that Edith Gauvin, the owner of the fee simple or the equity of redemption of the property in question, never concurred in the symbolical delivery of the possession of the same to the sheriff. The sheriff says that, as far as he can remember, he went to Baker Brook where Mrs. Gauvin was living at the time, and her husband, he thinks, came to the place—to the property there, and gave him the key of the house and he took possession. There were a few things left in the house, and these Paul Gauvin removed before handing the key to the sheriff. The latter says that when he went to Baker Brook to get the key, he thinks he saw Mrs. Gauvin there, and that she referred him to her husband; but the sheriff must, I think, be clearly wrong in this, for Mrs. Gauvin swears that while she remembers the visit of the sheriff from having heard others speak of it, and that he was sent by Dionne to get the key of the house, she was not at home at the time of the visit, and that she did not give him the key of the house. "I think," she says, "it was my husband that delivered the key, but," she adds, "he had no business in that." My own opinion is that Mrs. Gauvin is quite right in regard to her husband's absence of authority to give up possession of, or, indeed, to deal in any way with his wife's separate property, which the lands and premises in question were. Con. Stats. 1903, ch. 78, sec. 4 (2). Without her consent he would have no more author-

ity to give up possession of her separate property than an entire stranger would have, and this consent appears to me to have been wanting. The mere fact of marriage does not imply agency. But aside altogether from that phase of the question, Dionne, as the mortgagee of the property and the legal owner of the fee, would, as such owner, have the right at any time, even if the sale under the power contained in the mortgage were abortive and inoperative—he would have the right immediately on the execution of the mortgage for that matter, to enter into possession of the property, for from that time the fee and the right of possession were in him. I do not think, therefore, that Mrs. Gauvin could be deprived of any right that she might have to an accounting, simply because, in respect of the mortgaged property she has done something—assuming that she did it, which I do not concede to be the fact—that the law would oblige her to do in any circumstances.

So also, in regard to the suit for possession commenced by Dionne and ended with the service of the writ. Such a suit with such a termination, could not, in my opinion, work any estoppel against Mrs. Gauvin, so as to preclude her from insisting on an accounting. Because such a suit, if carried to judgment, could have but one ending, it cannot, in my judgment, alter the rights of Mrs. Gauvin in the slightest degree, so far as her claim for an account is concerned. But because upon the whole case the appeal must, in my opinion, fail, these matters are perhaps of little importance.

Appeal dismissed.

FULLER v. GARNEAU.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Ives and Hyndman, JJ. February 13, 1920.

MINES AND MINERALS (§ II A—32)—SALE OF LANDS—RESERVATION—RIGHT TO MINES AND MINERALS—IMPLIED RIGHT TO ENTER.

A sale of lands with a reservation of mining and mineral rights implies a right to enter on such lands in order to exercise such rights.

[*Cardigan* v. *Armitage* (1823), 107 E.R. 356; *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348; *Hamilton* v. *Graham* (1871), L.R. 2 Sc. & Div. 166, applied].

APPEAL by plaintiff from the trial judgment (1919), 50 D.L.R. 405, in an action to determine the rights arising on a sale of land, reserving all mines and minerals. Affirmed. Statement.

ALTA.

S. C.

FULLER v. GARNEAU.

Ives, J.

J. R. Lavelle, for appellant; *Mr. Grant*, for respondent.

The judgment of the Court was delivered by

IVES, J.:—The plaintiff is the purchaser from defendant of certain lands, under an agreement of sale "reserving unto His Majesty, his successors and assigns, all mines and minerals."

The full reservation in the Crown grant is in the following words:

> Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands, together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same.

The issue is as to whether the words used in the Crown grant confer a wider power on the owner of the mines and minerals over the surface, than the words in the agreement, which admittedly are extended by the implied right to the mineral owner to enter upon the surface and dig for, get and carry away the minerals. Or perhaps we might put the issue thus: Do the words in the Crown grant enable more extensive colliery operations to be carried on to get the minerals than do the words used by the defendant vendor in the agreement, extended by the legal implication? I think not. The cases cited by plaintiff, and particularly the case of *New Sharlston Collieries* v. *Earl of Westmorland*, [1904] 2 Ch. 443 (note), are all upon the point of the common law right of the surface owner. And while the respective rights of the surface and mineral owner are settled according to the whole grant as the Court may in each case construe it, these cases are clear examples of grants wider in terms than the present Crown grant, and yet insufficient to give the mineral owner a right to destroy the surface.

It would seem to me that the language used in *The Earl of Cardigan* v. *Armitage* (1823), 107 E.R. 356, and in *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348, and in *Hamilton* v. *Graham* (1871), L.R. 2 Sc. & Div. 166, is authority for holding in the present issue that the implied powers conferred by the bare exception of the minerals, are equal to the powers expressly conferred by the Crown grant in the present case.

I would dismiss the appeal with costs.

Appeal dismissed.

McDOUGALL AND SECORD v. THE MERCHANTS BANK OF CANADA.

ALTA.

S. C.

Alberta Supreme Court, Scott, J. January 14, 1920.

CHATTEL MORTGAGE (§ III—31)—COLLATERAL—NOT REGISTERED—PREVIOUS MORTGAGEE IN ARREARS—DISTRESS BY SHERIFF—RIGHTS OF PARTIES.

A chattel mortgage given under an agreement that the same shall not be registered is void.

A prior mortgagee, whose mortgage is in arrear, and who has the sheriff distrain upon the goods and chattels covered in the chattel mortgage will is entitled to sell such goods and chattels.

[*Clarkson* v. *McMaster* (1895), 25 Can. S.C.R. 96, followed.]

Statement.

TRIAL of an issue between the plaintiff and defendant directed by the order of Harvey, C.J., dated November 2, 1919.

Frank Ford, K.C., and *C. J. Newell*, K.C., for plaintiffs; *S. B. Woods*, K.C., and *S. W. Field*, for defendants.

Scott, J.

SCOTT, J.:—The order was made upon an application by the plaintiff for an order for the sale of certain goods and chattels of one McDonald upon certain premises known as the Selkirk Hotel and the Yale Hotel in Edmonton which the plaintiff claimed to have distrained under the powers contained in a mortgage of real estate made to it by said McDonald.

The order directed that the question to be tried upon the issue should be whether the plaintiff is entitled to the order applied for as against the defendant which claimed to have security upon the goods under seizure (or a portion thereof) under a chattel mortgage made to it by McDonald.

The order further directed that the issue should be prepared and tried as pleadings are delivered and actions are tried in the Supreme Court, that all other rules relating to such actions should apply to the issue and that the question of costs and all other questions should be disposed of by the Judge at the trial of the issue.

By a mortgage dated June 28, 1918, McDonald mortgaged the premises known as The Selkirk Hotel and The Yale Hotel to the plaintiffs to secure payment of $560,000 with interest at 8% per annum. The mortgage contained provisions to the effect that for better securing the purchase payment of the interest, McDonald thereby attorned tenant to the plaintiff for the lands at a yearly rent equivalent to the annual interest, the legal relation of landlord and tenant being thereby constituted between them, and that, in case of default of payment of any part of the principal or interest, the plaintiff might enter, seize and distrain upon the

ALTA.

S. C.

McDOUGALL AND SECORD v. THE MERCHANTS BANK OF CANADA.

Scott, J.

lands, and by distress warrant recover by way of rent reserved as in case of demise of the lands the principal and interest then in arrears together with the costs, charges and expenses of such distress.

On August 27, 1915, the arrears of interest upon the mortgage then amounting to $25,199.24, the plaintiff delivered to the sheriff of this Judicial District a distress warrant directing him to levy on the goods and chattels in the Selkirk and Yale hotels for that amount and some time prior to September 1, 1915, the plaintiff applied to the Court for an order for the sale of the goods so distrained. By order of that date, Harvey, C.J., ordered that the application should be adjourned *sine die*, that the sheriff should continue in possession of the goods and chattels and that he should not proceed until further order to make an appraisement thereof. It was thereby further ordered that neither that order for the remaining in possession by the sheriff nor the delay in taking proceedings under the seizure or under the chattel mortgage, under which the defendant then claimed to be entitled to the goods and chattels distrained should prejudice the right of the defendant and that compliance with the order by the sheriff and by the mortgagees should not in any way prejudice the rights of the mortgagees.

On August 7, 1918, the plaintiff issued to the sheriff of this Judicial District a warrant directing him to distrain upon the goods and chattels of McDonald in the Selkirk and Yale Hotels for $104,415.78 being the amount of interest then in arrears upon its mortgage and, some time prior to November 23, 1918, the plaintiff applied to this Court for an order for the sale of the goods distrained under both warrants and, upon that application, the order referred to which directed this issue was made.

The defendant's claim to the goods and chattels distrained is under a chattel mortgage made to it by McDonald dated June 30, 1915, for securing the payment of a promissory note for $56,000 which mortgage was filed with the proper registration clerk on July 30, 1915, and was renewed on June 26, 1917.

This chattel mortgage is the last of a series of 9 or 10 chattel mortgages given by McDonald to the defendant to secure what was practically the same indebtedness. Those preceding the last one were never filed with the proper registration clerk. The

second of the series was given shortly before the expiration of the time for filing the first one and thereafter each was given shortly before the expiration of the time for filing the one next preceding it.

McDonald states that, before he gave the first of these mortgages, Belcher who was then manager of defendant's branch at Edmonton had asked him several times to give a mortgage on the goods in the hotels, that he had at first refused to do so, that Belcher told him that the mortgage would not be registered and that it would not hurt his credit and that his arrangement with Belcher was that, if he came in and renewed the mortgage every month, it would not be registered and that McFayden, defendants' assistant manager at Edmonton, who presented the first mortgage to him for execution then promised him that it would not be registered. McFayden admits that he made that promise.

Belcher states that when the first mortgage was given it was at his suggestion that it was not to be registered unless "we" felt inclined to do so and that, if McDonald gave a new mortgage every thirty days "we" would not register them and would keep on that system until "we" found it necessary in "our" interest to register it, that before taking the first mortgage, he talked the matter over with defendants' acting superintendent for Alberta and that it was at his suggestion that he told McDonald that, if he gave the mortgage, it would not be registered.

I must hold upon the evidence that the first of the series of chattel mortgages was given by McDonald on the express understanding and agreement that it was not to be registered and that subsequent mortgages were to be given by him from time to time before the expiration of the time for the registration of the current mortgage. That arrangement and agreement as to the first mortgage must be held to apply to those subsequently executed as it is shewn that the terms were not subsequently varied.

In *Clarkson* v. *McMaster* (1895), 25 Can. S.C.R. 96, it was held that a chattel mortgage given under an agreement that it should not be registered was in contravention of the Ontario Bills of Sale Act, R.S.O. 1914, ch. 135, the provisions of which with respect to the effect of non-registration are similar to those of our Bills of Sale Ordinance and was therefore void.

ALTA.

S. C.

McDOUGALL AND SECORD v. THE MERCHANTS BANK OF CANADA.

Scott, J.

The contrary view was expressed by Coleridge, C.J., in *Ramsden* v. *Lupton* (1873), L.R. 9 Q.B. 17, but I follow that expressed in *Clarkson* v. *McMaster*, *supra*, and I therefore hold that the chattel mortgage under which the defendant claims is void as against the plaintiff.

Upon the argument before me counsel for the defendant raised certain questions as to the right of the plaintiff to distrain for and sell the goods and as to the legality of the proceedings taken by them for that purpose, but I am of opinion that it is not open to the defendant to raise those questions upon the issue as framed and the pleadings thereunder.

The order of September 1, 1915, shews that, at that time, the defendants' sole ground for resisting the application of the plaintiff was that they were entitled to the goods under their chattel mortgage. The order of November 23, 1918, which directed the issue, shews that it was then the only ground of resistance and even in its pleading under the order the defendant relies entirely upon the validity of the chattel mortgage. It is true that in its pleading it charges that the plaintiff in its statement of claim discloses no ground upon which it can ask for the declaration claimed, but under r. 104 a charge in such general terms is ineffective as a pleading.

Under the order directing the issue the question of costs and all further questions were reserved to be disposed of by me. I interpret this to mean that I am to dispose of the plaintiff's application to sell the goods distrained and, as McDonald the owner of the goods does not appear to have opposed the application, I hold that the plaintiff is entitled to the order applied for.

The plaintiff will have the costs of the application against McDonald save and except the costs occasioned by the claim of the defendant including the costs of the issue. These will be paid by it to the plaintiff. All costs to be taxed under column 51 of the schedule of costs. *Judgment accordingly.*

ABRAMOFF v. PODRATZ.

FEODOROFF v. PODRATZ.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 30, 1920.

CONTRACTS (§ IV E—367)—WORKMAN—HIRING OF—REPUDIATION BY MASTER—COMPENSATION—DAMAGES FOR BREACH.

When a party to a hiring contract evidences a clear intention on his part to be no longer bound by such contract, the other party is justified in considering the contract at an end and is entitled to be paid for all the time he has worked; the party who renounces the contract is not entitled to damages for its breach.

APPEAL by plaintiffs from the trial judgment dismissing an action for wages and allowing defendant damages on his counterclaim. Reversed. Statement.

S. R. Curtin, for appellants; *H. A. Rutherford*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—These two actions were tried together. The plaintiff in each action was employed to work on the defendant's farm. Both plaintiffs worked from April 3, 1919, to July 14 of the same year. They both say they were hired at $80 per month. Lamont, J.A.

The defendant in his evidence says, "I hired them for 8 months, maybe 9 months." In his examination for discovery in the *Abramoff* case, the defendant was asked, "On what terms was he working for you?" To which he answered, "Eighty dollars a month for 8 months." The defendant further testified that after the plaintiffs arrived at his place the following conversation took place:—

> I said to them that they should get whatever they needed during season for clothes, tobacco or spending money but biggest part of their pay was to be due at end of season at end of 8 months. No definite amount agreed on except that they were not to draw more than a quarter or half. They were satisfied, said they didn't need much money during season.

The plaintiffs both deny that this conversation took place. They say their employment was arranged entirely by correspondence. Up to July 8 the defendant had paid $41.90 to Feodoroff, and $35.80 to Abramoff. On that day they both asked for money, Feodoroff wanted $150, and the other plaintiff $100. The defendant refused to give them this amount, but said he would give them $25 each. This amount was not sufficient for the plaintiffs, and they told the defendant that if he would not pay they would not work, and that he could get other men in their

SASK.

C. A.

ABRAMOFF v. PODRATZ.

FEODOROFF v. PODRATZ.

Lamont, J.A.

places. They worked until the 14th instant and then quit. The defendant having refused to pay them, they brought these actions.

In his statement of defence the defendant set up that the hiring was for 8 months at the rate of $80 per month, but that neither plaintiff was to be paid anything until the expiration of the 8 months, and he counterclaimed for damages for breach of contract. The District Court Judge at the close of the trial dismissed the action of both plaintiffs, and gave judgment in favour of the defendant for $30. The plaintiffs now appeal.

In my opinion the Judge erred in dismissing the plaintiffs' case. In the face of the evidence given by the defendant himself it must be held that the hiring was "$80 a month for 8 months."

In *Mosseau* v. *Tone* (1907), 7 Terr. L.R. 369, the bargain was to give the plaintiff $25 a month for 8 months. In giving the judgment of the Court *en banc*, Wetmore, J., at page 370, said:—

> But inasmuch as in this case the hiring was for eight months at $25 a month the plaintiff is entitled to recover at the end of each month, and the only remedy the employer would have would be a counterclaim or cross-action for damages for the servant's wrongful leaving.

The plaintiffs were therefore entitled to recover the wages earned up to July 3, the end of the third month of service. Were they entitled to the wages between July 3 and the day they left? That, in my opinion, depends upon whether or not they were justified in leaving their employment.

Assuming that the plaintiffs agreed, as stated by the defendant, that they would not draw more than one-half of the wages to which they were entitled, the defendant's offer of $25 amounted to a failure on his part to observe the terms of the contract. The question then is: where a certain sum is due for wages at the end of a month, does the neglect or refusal of an employer to pay that sum to the employee justify the latter in considering the contract repudiated and himself at liberty to rescind it?

The rule of law covering the right of one party to a contract to treat the contract at an end for breach by the other party of its provisions, is laid down by Lord Coleridge, C.J., in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, in the following language:—

> In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decision in

these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

This rule was affirmed by the House of Lords in *General Bill-posting Co.* v. *Atkinson*, [1909] A.C. 118.

In the well known case of *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434, the contract was for the purchase of 5,000 tons of steel blooms to be delivered 1,000 each month, with payment for each delivery within 3 days after receipt of shipping documents. Part of the first monthly instalment was delivered, but before the day arrived on which payment was due a petition was presented for the winding up of the company. The defendants were both able and willing to pay for what they had received, but were advised that, until the petition was disposed of, they could not get a discharge for the payment if they made it. Under these circumstances, they wrote to the plaintiffs suggesting that an order of the Court be obtained authorising the contract to be carried out and payments made for deliveries under it. The plaintiffs treated the refusal to pay as a breach of the contract by the defendants which relieved them from any further obligation under it. The House of Lords held that the payment for one instalment was not a condition precedent to the delivery of the rest, and that the conduct of the defendants had not been such as to shew an intention on their part to renounce the contract, and that the delay in payment was not a breach going to the root of the contract. In that case the Court affirmed the rule laid down in *Freeth* v. *Burr*, L.R. 9 C.P. 208, but held that the correspondence shewed that the defendants, far from renouncing the contract, were most anxious to have it carried out, for the very good reason that the price of iron had risen. It could not be said, therefore, that they evidenced any intention to be no longer bound by their contract. In his judgment in that case Lord Blackburn pointed out that, had there been an absolute refusal to pay, it might have been evidence to go before a jury for them to say whether it would not amount to a refusal to go on with the contract in future. Whether the conduct of one party to a contract evidences an intention no longer to be bound by that contract, is a question to be determined by the terms of the contract and the circumstances existing in each particular case.

SASK.

C. A.

ABRAMOFF v. PODRATZ.

FEODOROFF v. PODRATZ.

Lamont, J.A.

In the present case we have the refusal of the defendant to pay. In addition, we have the evidence of Feodoroff, which was corroborated by the other plaintiff and not denied by the defendant, as follows:—

Next morning (July 14) the defendant came into the barn and said to the co-plaintiff that he had brought a man in his place and that he could go away. Co-plaintiff then quit. I asked what he was going to do with me. He said I could stay by the day but not by the month. I said I hadn't come by the day but by the month. He said, "If you like, you fellows can go away." I asked if he would pay us. He said yes, $70 per month. I said I hadn't come for $70 but for $80 per month. He said "You can go and sue me. I will not pay $80 per month."

The defendant's refusal to pay, coupled with his unwillingness to pay the plaintiffs more than $70 per month instead of $80 as he had agreed, and his statement to Abramoff that he could stay on by the day but not by the month, evidences, in my opinion, a clear intention on his part to be no longer bound by his contract to pay the $80 per month. The plaintiffs were therefore justified in considering the contract at an end, and are entitled to be paid for all the time they worked. 7 Halsbury, para. 901, page 440.

As the defendant renounced the contract, he is not entitled to damages for its breach.

The appeal should therefore be allowed with costs; the judgment below dismissing the plaintiffs' action and awarding the defendant damages on his counterclaim set aside, and judgment entered for each plaintiff for the amount of wages earned, less the amount already paid. The wages earned in each case amount to $268.40. Feodoroff received $41.80, leaving a balance in his favour of $226.60. Abramoff received $33.80, leaving a balance due him of $234.60. There will be judgment for the plaintiffs for these amounts respectively, together with the costs of action.

Appeal allowed.

ALTA.

S. C.

SHRAGGE v. RABINOVITCH.

Alberta Supreme Court, Appellate Division, Beck, J. March 6, 1920.

JUDGMENT (§ II B—72)—DEFAULT—INTERLOCUTORY JUDGMENT SIGNED—IMPROPER CASE FOR—OLD RULE 92 (ALTA.)—ORDER SETTING ASIDE JUDGMENT—DEFENCE FILED—APPEAL.

When interlocutory judgment has been signed, in a case where the same should not have been signed, and the defendant, having obtained an order setting aside the judgment, has filed his defence, the defence cannot be removed from the files of the Court. As the interlocutory judgment might have been treated by the defendant as wholly ineffective, his motion to set aside the judgment was unnecessary.

APPEAL by the plaintiff from an order of the late Judge Jennison, Judge of the District Court of Calgary, made in October, 1919, setting aside an interlocutory judgment entered on April 23, 1913.

M. M. Porter, for the appellant; *S. Helman*, for the respondent.

BECK, J.:—The action was for damages for breach of an agreement in writing dated June 12, 1912, for the sale and delivery by the defendant to the plaintiff of certain quantities of goods at certain stated prices and claiming damages to the amount of $469.20.

There is an affidavit of service by a sheriff's bailiff sworn on March 26, 1913, stating that he had personally served the defendant on March 24, 1913, by delivering copies of the writ and statement of claim to and leaving the same with the defendant "at Calgary, Alberta."

In passing I take the opportunity of saying that I think it desirable that the precise place of service should be stated, *e.g.*, office, place of business, etc.

On April 24, 1913, interlocutory judgment was signed in the following form:

> The defendant not having appeared to the writ of summons herein it is this day adjudged that the plaintiff recover against the said defendant interlocutory judgment for damages to be assessed and costs to be taxed.

A new body of rules of practice and procedure came into force on September 1, 1914. As I shall point out later, this was not a case for signing interlocutory judgment at all; there were other cases in which such an interlocutory judgment could properly be signed; but had it been a case for such a form of judgment, the judgment in the above form was undoubtedly irregular. The proper form is given in Chitty's Forms, 14th ed., p. 96, as follows:

"No appearance having been entered to the writ of summons by the defendant herein, it is this day adjudged that the plaintiff recover against the defendant damages to be assessed."

The same form is given in Appendix F. Form No. 2 (a) (i) to the English Rules.

In the Annual Practice Notes, 1920, to Order 13, rule 5, it is pointed out (under Costs) that: "The term 'interlocutory judgment' means that such a judgment is interlocutory only as to amount and is final as to the right of the plaintiff to recover damages *together with such costs as the amount thereof when ascertained entitles him to.*"

ALTA.

S. C.

SHRAGGE v. RABINOVITCH.

Beck, J.

The right to costs is dealt with by the rules and the amount of them is by the rules made to depend upon the amount of damages ultimately assessed. There should have been no adjudication as to costs in the interlocutory judgment. The form of words used would mean that the plaintiff, as apparently he did in fact, could instantly tax his costs, but there was no right to do so. Wetmore, J., in *Perry* v. *Hunter* (1894), 3 Terr. L.R. 266, held that an interlocutory judgment was irregular because it awarded "costs to be taxed." Under our more recent rules interlocutory judgments on default have been replaced by the practice of "noting in default."

But the interlocutory judgment was not only clearly irregular in form, even had the case been one in which interlocutory judgment could properly have been signed; but such a judgment was not authorised at all.

Rule 92 of the old rules provided for the case of default by one defendant or all the defendants in an action for detention of goods and pecuniary damages or either of them; rule 94 for the case of default by some of several defendants in such an action. In the latter case interlocutory judgment might be signed against the defendants in default; the action would proceed against the defendants who had appeared and the trial Judge would assess damages at the trial against all the defendants. In the former case no interlocutory judgment was to be signed but on application to a Judge he was to assess damages or direct the mode of assessment and final judgment with costs could be entered after the damages were ascertained.

On October 17, 1919, over 6 years after the interlocutory judgment had been entered, the plaintiff obtained an *ex parte* order from Jennison, J., fixing October 27 for the assessment of the damages.

On October 21, the Judge made another *ex parte* order for the issue of a writ of attachment. The judgment being merely an interlocutory judgment for damages as yet unascertained, this latter order was clearly improperly made and was subsequently set aside by the same Judge. On October 23, a motion was made to set aside the interlocutory judgment so that the defendant might defend. The grounds of the application were, (1) that the defendant had never been served with the writ and statement

of claim, and (2) that he had a good defence, the grounds of which he set out in his affidavit, confirmed by the affidavit of another person.

The Judge set aside the interlocutory judgment and allowed the defendant to defend. It is from this order that the present appeal is taken. It is not expressly stated on which of the two grounds taken the Judge made the order, that is, on the ground that the defendant had not been served, or on the ground that the defendant was shewn to have probably a good defence on the merits; but from the disposition made of the costs it may be inferred that it was upon the second ground.

During the course of the argument it was suggested from the Bench that, when a defendant denies service, though there is a presumption in favour of the correctness of the officer's affidavit of service, yet an obligation falls upon the plaintiff to take steps to support the original evidence of service, as far as is reasonably within his power so as to exclude the suggestion of mistaken identity of the person served or of service other than personal.

We think this view is correct and accordingly we directed the plaintiff to get from the bailiff such further information as he might be able to give. He has done so and, as might be expected, the bailiff states that he has no recollection of the case, but states his invariable custom in such cases, and in view of the affidavit made at the time, is positive he made personal service of the writ and statement of claim on the defendant.

After the order of Jennison, J., allowing the defendant to defend was granted a statement of defence was filed. It is now on the files of the Court. In view of what I have said as to the proper practice under the old rules and inasmuch as naturally there was no noting in default under the new rules it seems evident that the defendant might at any time have treated the interlocutory judgment as wholly ineffective and have filed a defence without moving to set it aside. Inasmuch as he has in fact got his defence upon the files of the Court I do not think it can be removed. This leaves it unnecessary for us to deal with the difficult question dealt with by the Judge below—the propriety of allowing the defendant as a matter of grace to be allowed to defend in view of the claim set up by the plaintiff of prejudice owing to the laches of the defendant.

ALTA.

S. C.

SHRAGGE v. RABINOVITCH.

Beck, J.

The affidavits filed on behalf of defendant do, in fact, set up facts which, if proved, would constitute a good defence on the merits. The only ground therefore for refusing to allow him to have his defence tried is his laches and the consequent prejudice to the plaintiff who says that the contract for the breach of which he sued was written in Yiddish; that it was translated into English by a Mr. Cohen, then a solicitor practising in Winnipeg, who had custody both of the original and the translation and who has since died and that, after a diligent search, neither can be found, and that the plaintiff has now no evidence of the contents of the writing except his own recollection and the terms of the writing are disputed by the defendant.

For the reasons I have indicated we are relieved from having to decide on this state of facts whether had the proceedings been regular the defendant should have been allowed to defend.

In the result evidently the motion to set aside the judgment was wholly unnecessary. In the circumstances I think the proper order to make is this: dismiss the appeal, leaving the Judge's disposition of costs standing; give no costs to either party of the appeal. *Appeal dismissed.*

B. C.

C. A.

JONES v. CITY OF VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 19, 1920.

MUNICIPAL CORPORATIONS (§ II C—114b)—REGULATION OF POOL ROOM—BETTING—POWERS OF MUNICIPALITY—VANCOUVER INCORPORATION ACT.

A by-law of the City of Vancouver providing that "no keeper of a billiard and pool room shall permit or allow any person to play or have part in any game in any billiard, pool or bagatelle table . . . upon the result of which there is any wager or stake other than the price of the game . . ." is for "regulating and governing" and is within the powers given to the municipality by sec. 125 of the Vancouver Incorporation Act, 64 Vict. (1900), ch. 54.

Statement.

APPEAL by plaintiff from a judgment of Murphy, J., refusing to quash a by-law. Affirmed.

T. B. Jones, for appellant; *A. M. Harper*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The observations of Lord Hobhouse, in *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, at 449, 57 L.J.P.C. 73, seems to me to be particularly apposite to the situation here. He said: "It is difficult to see how the council can make efficient by-laws for such objects as preventing fires, preventing and

regulating places of amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people both in their freedom of action and in their enjoyment of property."

The prohibition of betting, which is said in the case at Bar to invalidate the by-law, is, I think, clearly aimed at regulation, and therefore *intra vires* of the council.

I would dismiss the appeal.

Macdonald, C.J.A.

MARTIN, J.A., would dismiss the appeal.

Martin, J. A.

GALLIHER, J.A.:—I would dismiss the appeal.

Galliher, J. A.

I am clear that the section in question in the by-law is governing and regulating and not prohibiting.

Toronto v. *Virgo*, [1896] A.C. 88, is not in point.

I am also clear that it creates no new offence and does not in any way trench upon the Criminal Law. The principle is fully discussed in the cases cited.

McPHILLIPS, J.A.:—In my opinion Murphy, J., arrived at the right conclusion in refusing to quash the challenged by-law. It is clear to me that the applicant, the holder of a Billiard and Pool Table license accepted the same subject to the provisions of the then existent by-laws of the City of Vancouver, and such further by-laws as might rightly be passed regulating and governing the carrying on of a billiard and pool parlor.

McPhillips, J.A.

Now, By-law No. 1362, was passed on May 27, 1918, the license being dated January 8, 1919. The challenged part in the By-law (No. 1362) reads as follows, sec. 11, sub-sec. 2:—

> No keeper of a billiard and pool room shall permit or allow any person to play or have part in any game in any billiard, pool or bagatelle table (in the premises occupied by him and for which a license has been granted to him to keep such tables) upon the result of which there is any wager or stake, *other than the price* of the game which *price* should not in any case be greater than the *price* usually charged for such game by such keeper.

It was urged firstly that the by-law was *ultra vires* of the mayor and council and trenched upon the powers of the Parliament of Canada. This point may be immediately dismissed by stating that it cannot be successfully established that the by-law in any way is relative to the keeping of a common gaming house, a crime which admittedly could only be dealt with by the Parliament of Canada, and were it that, the Provincial Legislature could not

B. C.

C. A.

JONES v. CITY OF VANCOUVER.

McPhillips, J.A.

empower a municipality to pass by-laws upon or deal with any such subject.

Secondly, that that which has been done amounts to a prohibition, not merely a regulation. The power the municipality has in the matter is set forth in sub-sec. 99, to sec. 125 of the "Vancouver Incorporation Act," 64 Vict. 1900 (B.C.), ch. 54, which reads as follows:—

> For licensing, regulating and governing all persons who for hire or gain, directly or indirectly, keep or have in their possession or on their premises any billiard, pool or bagatelle table, or who keep or have a pool, billiard or bagatelle table in a house or place of public entertainment or resort, whether such pool, billiard or bagatelle table is used or not.

It is abundantly evident that the by-law under review is in the subject matter objected to plainly, "regulating and governing," and that being the case, no valid objection can be maintained.

In *Toronto* v. *Virgo*, [1896] A.C. 88 at 93, 65 L.J.P.C. 4, at page 7, Lord Davey said:—

> No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time, and, to a certain extent, as to place, where such restrictions are, in the opinion of the public authority, necessary to prevent a nuisance, or for the maintenance of order.

Here it may be well said that, that which is aimed at is the maintenance of good order and good government in the billiard parlor and from the municipal authority solely goes the right to maintain the billiard parlor, being a place of public entertainment and resort. It is an understandable provision and in the interests of the public, and cannot be said in its provisions to be at all unreasonable. *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, 67 L.J.Q.B. 782.

In *London County Council* v. *Bermondsey Bioscope Co.*, [1911] 1 K.B. 445, 80 L.J.K.B., page 141, Lord Alverstone, C.J., at page 144, said:—

> This case is an illustration of the well-recognised principle that where there is a competent authority to which an Act of Parliament entrusts the power of making regulations, it is for that authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported unless they are manifestly unreasonable or unfair.

It follows in my opinion that the appeal should be dismissed.

Eberts, J.A.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

SMITH v. RAE.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., and Middleton J. December 19, 1919.

PHYSICIANS AND SURGEONS (§ II—43)—CHILDBIRTH—CONTRACT TO ATTEND —NOTIFICATION—DELAY—DEATH OF CHILD—AGREEMENT WITH HUSBAND—DAMAGES.

An action against a physician for neglect of a patient or malpractice should be tried by a Judge without a jury.

When a doctor undertakes to attend a woman in childbirth he does not thereby undertake to drop all other matters in hand to attend the patient instantly upon receiving a notification; he must act reasonably. A call being received at 7.30, failure to attend before 8.30 when the patient was in charge of an experienced nurse who said the birth would probably not take place before 11 or 12 o'clock is not unreasonable or negligent.

In any case the plaintiff could not sue for damages for breach of a contract which was made with her husband.

Statement.

APPEAL by the defendant from the judgment of DENTON, Jun. Co. C.J., upon the findings of a jury, in favour of the plaintiff, in an action, brought in the County Court of the County of York, for damages for the negligence or breach of duty of the defendant, a physician and surgeon, in failing to attend the plaintiff in childbirth, as, the plaintiff alleged, the defendant had agreed to do, whereby the plaintiff lost her child. Appeal allowed.

Gideon Grant, for appellant. *C. Carrick*, for respondent.

The judgment of the Court was read by

Middleton, J.

MIDDLETON, J.:—The action was brought by a married woman against a practising physician and surgeon residing in the City of Toronto. The plaintiff, expecting confinement, called, with her husband, upon the defendant, who undertook and agreed to attend her.

Upon the facts there can be no doubt that the contract was made with the plaintiff's husband. The confinement, which was expected to take place about the middle of November, did not take place until the 2nd December, 1918. The defendant did not attend the plaintiff, and the child died during delivery. The action is against the defendant for his alleged breach of duty in failing to attend at the time of confinement.

Although it has been repeatedly laid down that actions such as this should be tried by a Judge without a jury, this case was left to the decision of the jury, and the result is such as amply to justify the principle underlying the general practice, for it appears abundantly plain that the jury has either failed to apprehend the questions for trial or has acted from some improper motive.

ONT.
S. C.
SMITH
v.
RAE.
Middleton, J.

The main facts are not the subject of serious dispute. There is controversy, as will be pointed out, over some important matters.

Shortly after the arrangement made in October, the defendant called to see the plaintiff, and made some examination as to her condition. He asked that a sample of her urine should be forwarded to him so that he might ascertain the condition of her kidneys. This was never done. Early in November, the plaintiff suffered from an attack of influenza, and the doctor attended her during this. So far as the evidence shews, during these visits no discussion of her prospective confinement took place.

Arrangements had been made for a Mrs. Roberts, a midwife of some experience, to attend the confinement, and on the 2nd December she was with the plaintiff. Some time in the afternoon Mrs. Roberts sent her little boy with a message to a neighbour to telephone to the doctor asking him to call. This message was received by the doctor's wife during the doctor's absence. She explained that her husband would not return for some time, but could call in the evening, and was informed that this was all that was necessary. This message was delivered to the doctor upon his return home at 6.30.

At a time, variously given as 7.10, 7.20, and 7.30, the plaintiff's husband telephoned the doctor, and the first point of serious controversy is the exact nature of the message given. The husband says that the message was to go "right away." The doctor says that the man told him that his wife was in labour and to come and see her, that he asked how frequent the labour-pains were, and was informed that they were from three to five minutes, and he then told the husband that he had several patients in his office, and had an appointment with another patient coming from a distance for 8 o'clock, and he could not conveniently attend before 8.30, and that the husband told him that that would be all right, as the nurse said that the child would probably not arrive until 11 o'clock or midnight.

There is much to corroborate the evidence of the doctor, and the husband's evidence is very unsatisfactory. He admits that he had been told by the nurse that the child would not come until 11 o'clock or later, and he also admits that he thought the situation so little urgent that he did not at once return home.

The birth actually commenced at 7.30, and was complete by 8.20. It was a breech presentation, and the child died. The husband again telephoned to the doctor after the child was born, and in the result another doctor was called, who resided nearer to the plaintiff's house, and that doctor arrived fully as early as the defendant could have done. It is admitted that nothing really turns upon anything that then took place.

The plaintiff made a normal recovery, and has suffered no ill effects. The claim in the action is based upon the death of the child and upon the suggestion that the plaintiff endured physical suffering which she might have been spared had the doctor been present at the time of her delivery and administered an anæsthetic.

A series of questions was submitted to the jury, most of which are not now of importance. The 6th, 7th, and 8th questions are:—

"6. Was the defendant notified early enough on December 2nd to permit his attending in time to render the plaintiff effective professional aid? A. Yes.

"7. Did the notice which the defendant received justify him in believing that he would be in time if he reached the plaintiff at 8.30 p.m.? A. No.

"8. Was the defendant negligent in not attending? A. Yes."

Damages for such negligence were then assessed at $500.

These questions were not entirely satisfactory, for the exact nature of the intimation received by the doctor is not found.

I do not think that there is any evidence which justifies the answer to the 7th question. The doctor knew that an experienced midwife was in attendance, and upon the medical evidence the intimation admittedly given as to the frequency of the labour-pains, bearing in mind that this was a case of a first child, would indicate to the doctor that his attendance would not be necessary until a later hour than that named, 8.30, and the failure to attend before that time cannot, in my view, be rightly regarded as constituting negligence.

I do not think that the plaintiff is right in the contention that when a doctor undertakes to attend a case of this description he thereby undertakes to drop all other matters in hand to attend the patient instanter upon receiving a notification. The doctor must, having regard to all circumstances, act reasonably. Here the first message received did not indicate any urgency. It was

ONT.

S. C.

SMITH v. RAE.

Middleton, J.

a request for him to call some time during the evening, and the message received from the husband did not then indicate any extreme urgency. The doctor had other patients who had some claim upon his time and attention. Had he been given to understand that the plaintiff's situation was critical, undoubtedly he should, and I think he would, have dropped everything and gone to her assistance; but, in view of the information that he had, I do not think it could possibly be said that he acted negligently or unreasonably.

Quite apart from this, there is, I think, a serious difficulty in the plaintiff's way. The contract was with the husband. The action is by the wife. She cannot sue on the contract, and her claim must, therefore, be based upon tort. Had there been actual misfeasance in anything done to the plaintiff, she could undoubtedly recover for the tort, but where the action is for damages for failure to attend, then it must be based on a breach of a contract to attend.

The assessment of so large a sum as $500 for damages indicates that the jury failed to understand the matter before them, or else acted perversely. There was no evidence to shew that the plaintiff suffered any greater pain by reason of the failure of the doctor to attend. Obviously no action would lie concerning the death of the child, for that was not shewn to have been occasioned by the defendant's non-attendance, and furthermore the action does not purport to have been brought under the provisions of Lord Campbell's Act,* and the plaintiff's counsel at the trial expressly disclaimed any intention of invoking that Act.

For all these reasons, it appears to me that the verdict and the judgment founded thereon must be set aside, and that judgment should now be entered dismissing the action. *Appeal allowed.*

MONTREUIL v. CAMPBELL.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 30, 1920.

LIENS (§ I—2a)—THRESHER'S RIGHT TO SEIZE GRAIN—THRESHER'S LIEN ACT (SASK.)—INJUNCTION RESTRAINING—LEGALITY—DAMAGES FOR EXCESSIVE SEIZURE.

A creditor who has not been paid for threshing wheat has an undoubted legal right to seize the grain under the Thresher's Lien Act (Sask.), and should not be deprived by injunction of this right. If he seizes more than he is entitled to seize under the Act he is liable in damages.

*The Fatal Accidents Act, R.S.O. 1914, ch. 151.

SASK.

C. A.

MONTREUIL v. CAMPBELL.

APPEAL from the trial judgment in an action for an injunction restraining defendant from seizing and selling grain under the Thresher's Lien Act (Sask.).

F. W. Turnbull, for appellant.

L. McK. Robinson, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J. A.:—This is an action for an injunction. The plaintiff claims that defendant threshed his wheat for him under an agreement, that he paid defendant all that was due him, but that defendant claims in addition $317, and threatens to proceed under the Thresher's Lien Act, R.S.S. 1909, ch. 152, to seize and sell his grain for the purpose of satisfying said sum. The defendant claims the said sum is still due him for threshing said grain, and asks judgment for that amount. Newlands, J.A.

The Judge granted an injunction restraining said defendant from seizing said wheat. In his judgment the Judge says:

> It is in my opinion quite clear that a mere debt owing (if any) would give defendant no right at common law to seize such grain, and defendant has failed to plead any statutory right to a seizure.

This is not the case, the plaintiff alleges that defendant threatened to seize under the Thresher's Lien Act; the defendant does not deny this, and therefore admits that he threatened to seize under that Act.

As this is apparently the only ground on which the injunction was granted, I have only to consider whether there is any other ground on which the injunction could be sustained.

An injunction should only be granted where "it is just and convenient," and it should not be granted where damages will fully compensate the party applying for same for the damage done.

In this case, if plaintiff was still owing defendant for threshing his wheat, defendant had the undoubted legal right to seize the grain under the Thresher's Lien Act. It is not just that he should be deprived of that right. If he seized grain that he was not entitled to seize, damages would fully compensate plaintiff. Therefore it is not, in my opinion, a case in which an injunction should have been granted.

As to defendant's contention that the District Court had no power to grant an injunction, sec. 37 of the District Court Act, R.S.S. 1909, ch. 53, provides.

SASK.

C. A.

MONTREUIL v. CAMPBELL.

Newlands, J.A.

That every District Court in any action or proceeding in such Court shall have power to grant and shall grant such relief, redress or remedy or combination of remedies either absolute or conditional and give such and the like effect to every ground of defence or counterclaim equitable or legal as might and ought to be granted or given in the like case in the Supreme Court.

Under a similar section in the English Judicature Act, it has been held that the County Court had power to grant an injunction where the cause of action was within the jurisdiction of the Court (*Martin* v. *Bannister* (1879), 4 Q.B.D. 491) and even where the relief claimed is only an injunction, as in this case. *Stiles* v. *Ecclestone*, [1903] 1 K.B. 544. Both Bramwell and Brett, L.JJ., in *Martin* v. *Bannister* expressed a doubt as to the jurisdiction of that Court to grant an injunction where there was only a threat of a nuisance. The authorities are, in my opinion, in favour of the proposition that where there is only a threat to do something, as in the present case, an injunction should not be granted. See *Haines* v. *Taylor* (1846), 10 Beav. 75, and *Ripon* v. *Hobart* (1834), 3 L.J. (Ch.) 145.

No decision was given on defendant's claim for the sum of $317. I presume because the defendant did not say he "counterclaimed" for that sum. He however has claimed it, and asks for it and the costs of the action. I think this is, in effect, a counterclaim, and as defendant's right to this amount was an issue in the action, because, if defendant was entitled to it and had a lien under the Thresher's Lien Act, then there could be no possible grounds for an injunction. I think the trial Judge should have made a finding on this claim, and, if he found defendant entitled to that amount, have given him judgment, and I would remit this case to him to make such a finding and, if necessary, for a new trial of the action.

I would allow the appeal with costs.

Appeal allowed.

ONT.

S. C.

STOCK v. MEYERS AND COOK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 19, 1919.

SALE (§ IC—19)—CONDITIONAL SALE—AGREEMENT—DEFAULT—REPOSSESSION AND SALE—CONCEALMENT—RIGHT OF REDEMPTION—RIGHTS OF PARTIES—CONDITIONAL SALES ACT, R.S.O. 1914, CH. 136, SEC. 8.

The Conditional Sales Act, R.S.O. 1914, ch. 136, sec. 8, provides that a vendor may no longer, if default is made, put an end to the purchaser's rights by taking possession, but the purchaser is given the right, for twenty days after possession is taken, to redeem.

When the assignees of the vendor do something which they consider a taking of possession, and deliberately conceal this fact from the purchaser and his vendee, in order to prevent them from exercising the right given by the statute, the person to whom the goods were sold by the assignees of the vendor is precluded from setting up the retaking as one within the meaning of the statute.

[*French* v. *Row* (1894), 77 Hun (N.Y.) 380.

Cunningham v. *Hedge* (1896), 76 N.Y. St. Rep. 547, 12 N.Y. App. Div. 212, distinguished.]

ONT.

S. C.

STOCK v. MEYERS AND COOK.

APPEAL by defendants from the trial judgment in an action to recover damages for the conversion of four show-cases. Affirmed. Statement.

The judgment appealed from is as follows:—

LENNOX, J.:—McHale, a jeweller at Timmins, Ontario, was a conditional owner of the shop-fittings replevied in this action, and purported to sell them free of incumbrance to the plaintiff. McHale got the fittings from Martin J. Roche; and, at the time the plaintiff purchased from McHale, there was, as a matter of fact, at least a small sum for interest unpaid, although the plaintiff in good faith, and upon what might be regarded as reasonable ground, believed that the original purchase-money had been or would then be paid in full. The interest would only amount to about $28.32.

At the time McHale made his first remittance to Roche (a cheque for $500 on the 3rd August, 1917), Roche had other entries in his ledger against McHale of about $75, and Roche simply entered the cheque to the credit of McHale without any specific application and without notice to McHale. McHale says—and it is the only evidence on this point—that he only owed about $25 on an open account. If the $25 could properly be deducted from the remittance of the 3rd August, the balance claimed under the conditional sale would still be about $50 in excess of what it should be, that is, the amount of the disputed and unestablished claim and its interest. I am, however, of opinion that both remittances must be taken as payments on account of the fittings.

The fittings were transferred to the plaintiff by bill of sale duly registered. When McHale went out of business, the plaintiff also became lessee of the premises, and paid rent; while the plaintiff was in possession of the goods on these premises, the defendant Cook seized them, under Division Court execution

ONT.
S. C.
STOCK
v.
MEYERS
AND COOK.

against McHale, on the 4th May, 1918. For purposes of his own, but without justification, he, Cook, had the bailiff retain possession and adjourn the sale from week to week until the 17th June. Clark was in possession under the *Division Court bailiff* during all this time. The sale, on instructions of Mr. Cook, was again adjourned on the 17th. On the 17th, however, the replevied goods were missing when the bailiff reached the premises, and between 4 and 6 o'clock that evening Mr. Cook served notice on the bailiff abandoning the seizure, and said he had "a claim prior to the execution." The bailiff found the fittings in possession of the defendant Meyers.

The plaintiff takes the position of McHale, neither better nor worse. I have to trace the position of the defendants. The defendant Cook purchased Roche's claim (referred to as a lien), took an assignment of it, and paid the balance alleged to be owing, $94.90, on the 10th May, 1918.

The instrument representing the contract between McHale and Roche is as follows:—

"*Lien Note.*

"This note is given for two fifteen-foot mahogany wall-cases and two sixteen-foot mahogany show-cases.

"729.82. Timmins, 5th February, 1917."

"On the 6th of August, 1917, I promise to pay Martin Joseph Roche, or order, at the Royal Bank of Canada at Sturgeon Falls, Ontario, seven hundred and twenty-nine dollars and eighty-two cents, with interest at the rate of six per cent. per annum, *both before and after maturity*, until actually paid.

"The title of the property for which this note is given is not to pass but to remain in the payee of this note until the note is paid, and in case of default in payment the payee shall be at liberty, without process of law, to take possession of and sell the said property and apply the proceeds upon this note after deducting all costs of taking possession and sale.

"I acknowledge having received a copy of this note."

It is not accurate to speak of Roche's claim as a lien. Liens are not created by contract. They arise by operation of law: Boyd, C., and Rose, J., in *Carroll* v. *Beard* (1896), 27 O.R. 349, at pp. 357, 358, and 360; and MacMahon, J., at p. 353, referring to *Chambers* v. *Davidson* (1866), L.R. 1 P.C. 296, at p. 305. The

transaction was a conditional sale and subject to the provisions of the Conditional Sales Act.

Mr. Cook says that, on the 10th May, he went to the plaintiff's premises, found Clark in possession for the bailiff under his (Cook's) own execution, laid his hands upon the fittings in question, and said aloud, "I take formal possession," and delivered to Clark exhibit 14, which I have not read, for, phrased as it may be, I am not prepared to give legal sanction to a bit of adroit juggling intended to mislead the bailiff and subvert the process of a court. Clark was there as caretaker for the court; and, while the writ remained in the bailiff's hands for execution, no one had a right to force or tempt the legal custodian of the goods from the performance of his duties under the writ. All this was done in secret, not a word was said to the bailiff or the clerk of the court, or to anybody—on the contrary, just as before, this defendant, week after week, sent out from his office a typewritten adjournment and had the bailiff append it to the notice of sale. This Hyde and Jekyll operation is inoperative for the purpose intended. The defendant Cook did not, on the 10th May or thereafter, take legal possession of the goods in question under the Roche agreement or claim. This defendant says he sold the goods to Miss Whyte, his confidential clerk, for about $143—what he paid for them, plus $48 agreed to be paid Clark, and some travelling expenses. Eventually he paid Clark a little more. Miss Whyte sold to the defendant Meyers for $500, one half of it being represented by a lien note, overdue, but payment not being demanded. This transaction was closed and the goods removed on the 17th June, the day Mr. Cook adjourned the sale of these goods and other goods, and subsequently abandoned the seizure of all, as I have said.

On the argument it was urged, I think for the first time, that Miss Whyte, having a lien note, as it was called, is the owner and a necessary party to the action. One answer to that might be that replevin is a possessory action—Miss Whyte's note was current when proceedings were taken, but the obvious answer depends upon a conclusion of fact, namely, that Miss Whyte has no substantial interest in the matter. I am quite convinced, on the evidence, that Miss Whyte was a mere figurehead in the transaction—another name for Mr. Cook—and has not and

ONT.
S. C.
STOCK
v.
MEYERS
AND COOK.

never had a dollar staked on the deal; and, if I am in error in this conclusion, she is not shut out, and is not bound by the evidence or judgment in this action.

Early in June, the plaintiff, personally, endeavoured to find out about the Roche claim, and failed. Neither Roche nor the plaintiff were to blame for this. Mr. Devaney, too, tried to discover the owner, but he was not as prompt or energetic as he should have been. On the other hand, Mr. Cook says that all he wanted out of it was what he paid, and to enable him to get this he was glad to sell to Miss Whyte. Is that quite correct? He knew the position of the plaintiff, and he and Devaney frequently talked about the Division Court execution. He would have shewn only a common order of fair play and honesty had he given the plaintiff a chance to make payment; that is, of course, if he had no financial interest in the Meyers deal.

It is argued that default of payment in full at the stipulated time put an end to the contract, and thereafter there was no right of any kind remaining in the purchaser or his assignee. The Conditional Sales Act applies to the Roche contract, and sec. 8 is to be taken into consideration. I leave it for the moment; and, aside from the statute, I am of opinion that, on the facts of this case, the proposition is much too broad. Let the parties word the contract as they may, you cannot blink the fact that the dominant idea in all cases is a sale, at an agreed price; that the purchaser will have what he bargained for and the vendor his money; and the effort, assuming *bona fides*, is, in all cases, reciprocally to secure these rights to each. I need not discuss a case where the vendor takes action immediately upon default. This is not a case of that kind, and the agreement itself in terms contemplates default. The purchaser paid $500 on the due date—10th August—and asked for time. The vendor said nothing—that he acquiesced is the only inference I can draw; for, if he intended to put an end to the contract, he could not equitably invite the purchaser to make further payments. If he could, he could continue after default to gather in payments until 99/100 of the total had been paid, and then do what the defendants' counsel says Roche's assignees have the right to do.

I have not been referred to any direct authority, and possibly the point has not arisen in Ontario in connection with the sale

of chattels; but, on principle, I can see no reason why the vendor, having recognised the existence of the contract after the stipulated time by leaving McHale's letter unanswered, and by subsequent receipt of the $229 as the balance of principal money, without objection, should be in a stronger position than the vendor of land who makes time strictly of the essence of the contract and acts or deals on the basis of a subsisting contract after default. See *Kilmer* v. *British Columbia Orchard Lands Limited*, 10 D.L.R. 172; [1913] A.C. 319, and there are many Ontario cases.

Applying to this case essentially the principle so often applied to land transactions, I am of opinion, without reference to the statute, that a new time for the performance of the contract by McHale and his assignee was substituted for the original provision as to payment, and that the right of possession, and, by payment, the right to convert contingent into absolute ownership, were vested in the plaintiff at the time the goods were removed by Meyers on the 17th June.

I am of opinion, too, that, before Roche could enforce forfeiture, he was bound, on the facts of this case, to give notice, and notice allowing a reasonable time for payment. The defendants have no higher rights than Roche had. The defendant Meyers knew he was buying goods under seizure; he was buying them from a young lady without investigation; and I am quite satisfied that he knew a great deal more than he mentioned at the trial. He consulted with Mr. Cook, his legal adviser, and the evidence strongly points to the conclusion that he bought from Cook. Cook knew everything, and I will not assume that Cook concealed anything from his client.

There is no direct statutory provision for notice of sale in this case. Sub-sections (2) and (3) of sec. 8 of the Conditional Sales Act, R.S.O. 1914, ch. 136, apply only where the vendor is looking to recover purchase-money beyond what the goods will bring. Section 8 (1), however, provides that "where the seller . . . retakes possession of the goods for breach of condition he shall retain them for 20 days," and the purchaser may redeem them within that time. This will generally involve the knowledge of the purchaser, and it certainly precludes the idea of a secret or symbolical taking of possession. Section 8 applies "notwithstanding any agreement to the contrary" (sub-sec. 5). The

ONT.

S. C.

STOCK v. MEYERS AND COOK.

earliest act that can be regarded as a retaking under the statute was on the 17th June. The redemption-money includes interest and "actual costs and expenses of taking and keeping possession." It does not include an assignee's travelling or other expenses, negotiating or completing a purchase of the contract or goods. The alleged possession in this case must be attributed to the only position that Clark could fairly or legally occupy—that of one in possession under the writ of execution. I find that there was a proper legal tender made to each of the defendants, and of a sufficient sum, and within the 20 days, to wit, on the 27th June, 1918. I am strongly inclined to think that the defendants could not lawfully have insisted upon as large a sum as was tendered to them; but, as the costs the defendants have incurred will be quite considerable, I will make no finding on this point. Neither do I feel compelled to assess more than nominal damages.

There will be judgment declaring that the goods and chattels in question are the property of the plaintiff and that he was entitled to possession thereof prior to and at the date of the writ of summons by which this action was commenced.

And there will be judgment for $5 damages and the costs of the action—the amount tendered ($143.75) to be applied in reduction of the costs taxed to the plaintiff.

J. M. Ferguson, for appellants.

R. S. Robertson, for respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The action is brought to recover damages for the conversion of four show-cases, and the defence is, that the respondent is owner of them, having acquired title to them by purchase from Minnie Whyte, who, it is alleged, was the owner and in possession of them.

The show-cases were obtained by P. L. McHale, who carried on the business of a jeweller, at Timmins, from Joseph Roche, on the 5th February, 1917. The price to be paid for them was $729.82, and for that sum McHale gave his promissory note payable, with interest at six per cent. per annum, on the 6th August following, to Roche.

At the foot of the promissory note the following appears:—

"The title of the property for which this note is given is not to pass but to remain in the payee of this note until the note is

paid, and in case of default in payment the payee shall be at liberty, without process of law, to take possession of and sell the said property and apply the proceeds upon this note after deducting all costs of taking possession and sale."

McHale took possession of the show-cases and set them up in the premises in which he carried on his business at Timmins.

Payments were made by McHale on account of the promissory note, but a balance remained due upon it and was not paid until, as I shall afterwards mention, it was paid by Cook & Mitchell.

About the 1st May, 1918, McHale, who appears to have got into financial difficulties, sold the fittings and furniture of his shop, including the show-cases in question, to the respondent, and on that day McHale executed a bill of sale of them to him, which was duly filed on the 7th day of that month. It was arranged between them that McHale should remain in possession of the shop for a few days to enable him to complete some work for his customers which remained to be done, and which a man named Biscornet was commissioned to do.

The shop was owned by a Mrs. McInnis, and was leased to McHale, and the arrangement was that the respondent was to take over the premises and pay the rent, commencing with the month's rent which was to fall due on the 15th May.

Cook & Mitchell, a firm of solicitors carrying on business in South Porcupine, recovered a judgment in the Fifth Division Court of the District of Temiskaming against McHale for about $100; and in the month of May, 1918, a seizure was made, under an execution issued on this judgment, of a safe and three show-cases, which included two of those in question, and they were advertised to be sold on the 15th day of that month. The sale was postponed from time to time under instructions from Cook & Mitchell, the last postponement being until the 28th June, 1918. On the 15th June, Cook & Mitchell gave notice to the clerk and bailiff that they wholly abandoned the seizure, and to discontinue interpleader proceedings which had been begun in consequence of a claim to the goods seized having been made by the respondent; the claim was made by the respondent on the 9th May. Warren was the bailiff who made the seizure. Biscornet opened the store to enable Warren to make the seizure and gave up to him the key which he had. Warren then employed a caretaker, John Clark, to whom the key was given with instructions to let Biscornet and any one

ONT.

S. C.

STOCK v. MEYERS AND COOK.

Meredith, C.J.O

else who had business to transact there go in, and that nothing was to be taken out of the shop without Warren's permission.

About the time the seizure was made, Cook learned that there was a lien against certain of the goods; and, Cook & Mitchell having communicated with Roche's representative at Cochrane, arrangements were made by Cook to pay what was owing to Roche. The balance claimed to be owing was $94.90, and that sum was paid by Cook & Mitchell; and on the 8th May, 1918, Roche assigned to them by writing McHale's promissory note and all Roche's "right, title, and interest in the goods and chattels for which the note was given." The payment of the $94.90 was made on the 10th May, and the assignment was then delivered to Cook & Mitchell.

Armed with this document, Cook went, he says, to the shop, where he found the caretaker Clark and told him that his (Cook's) firm "had purchased the lien" from Roche, read the lien over to him, and explained that he had come over to take possession of "this furniture under the lien," shewed the assignment of the lien, and told him that "our firm was going to repossess them" (i.e., the show-cases) "under the lien;" that, after some discussion as to the expense of removing them, Cook asked Clark if he would take charge of them for Cook & Mitchell under the lien, and Clark agreed to do so; that Cook then took formal possession of the show-cases, putting his hand on each of them, and then gave Clark written instructions (exhibit 14). This exhibit reads as follows:—

"Timmins, May 11, 1918, 6 p.m.

"I have taken possession of two 15-foot wall show-cases and two 6-foot show-cases, all of mahogany and glass, now on the premises of P. L. McHale, jeweller, Timmins, by reason of his default under a lien note against said goods, dated 5th July, 1917, executed by the said McHale in favour of M. J. Roche, which lien note has been duly assigned by the said Roche to Cook & Mitchell.

"Cook & Mitchell, Timmins, Ont., *per* J. E. Cook.

"To John Clark, Esq., Timmins, Ont., the party in charge of said chattels.

"We hereby place the said John Clark in charge of said chattels so repossessed by us this day to hold possession of the same for us until further orders.

"May 11, 1918, 6 p.m.

"Cook & Mitchell,

"*per* J. E. Cook."

On the 12th June, 1918, Cook & Mitchell purported to sell to Minnie Whyte, for $158.40, the four show-cases, and on that day executed to her a conveyance of them; the conveyance recites the lien note, the default of McHale, the transfer of the lien note, and Roche's right, title, and interest in the show-cases, the taking possession of them by Cook & Mitchell on the 11th May, 1918, and the placing of them in the possession of Clark; that more than 20 days had expired since Cook & Mitchell took possession; and that the costs of taking and possession of the property for 32 days amounted to $48 and the solicitor's costs to $15, making a total of $158.40. This conveyance was duly filed on the 15th June, 1918.

On the 15th June, 1918, a sale of the four show-cases was made to the appellant Meyers, the consideration being $500, and on that day a conveyance of them was executed by Minnie Whyte to the appellant. The sum of $250 was paid on account of the purchase-price, and for the balance the appellant Meyers gave his promissory note, payable to her, with interest at 8 per cent. per annum, on the 13th September following, and an agreement similar in terms to that appended to McHale's note was appended to the appellant's note.

The respondent paid his purchase-money on the 4th May, and shortly afterwards his solicitor, Mr. Devaney, proceeded to make inquiry as to the position of the lien and whether anything remained owing on McHale's note; in the course of his inquiry he discovered that the note had been sent to a bank in South Porcupine, but he did not learn into whose hands it had passed, though he said he had reason for believing, from what Roche's solicitor had told him, that Cook might have it. On the 27th June Devaney tendered to Cook $143.75, made up of the $94.90 which Cook & Mitchell had paid, 85 cents for interest, and $48 for costs and taking and keeping possession. Cook refused to accept the money tendered. Cook and Devaney differ as to whether anything was said by Cook as to the amount tendered not being sufficient. According to Cook's testimony, he objected to the tender because "it was not a legal tender," and told the respondent's solicitor that the goods had been sold and passed entirely out of his possession, and that in any event the amount tendered was not enough. This last statement is denied by Devaney.

ONT.

S. C.

STOCK v. MEYERS AND COOK.

Meredith, C.J.O.

It should have been mentioned that the whole of the principal money of McHale's note had been paid by him, $500 on the 3rd August, 1917, and $229.83, on the 8th January, 1917. In sending the latter sum he asked to be advised as to the balance due (exhibit 9), but no reply was made to this request.

It appears to have been assumed by all parties that the claim that $94.90 was owing on the note was well-founded, and that Roche had properly applied part of the $500 sent to him by McHale on the 3rd August, 1917, on an open account against McHale. The right to so apply it I very much doubt, in view of the terms of the letters accompanying the remittances, which, fairly read, indicate that both payments were made on account of the note. If I am right in so thinking, there was owing upon the note only the interest on $729.82 for a few days and on $229.34 for a few days more than 5 months; in all less than $6.

I agree with the conclusion of the trial Judge that there was no real sale to Minnie Whyte; that the pretended sale was a mere sham. She was not called as a witness, nor was her father, who, according to Cook's testimony, must have been in a position to throw light on the transactions. Cook's testimony as to the part played by him in connection with the sale to the appellant is, to say the least, hazy and unsatisfactory, and it is difficult to read his testimony given in reply, and that of Devaney as to what the appellant told him was Cook's part in the transaction, without coming to the conclusion that Cook was the real actor, and that if Minnie Whyte acted at all it was to play the part of a mere dummy. It is inconceivable to me that Cook & Mitchell would have gone to the expense and trouble of acquiring the lien on the 10th May in order to sell the goods covered by it to Minnie Whyte for the exact sum they had expended.

Though that conclusion is reached, it is not of itself fatal to the appellants' case. The result of the transaction was that Meyers acquired whatever rights Cook & Mitchell had; and it is necessary, therefore, to inquire as to what those rights were, and whether, in the exercise of them, Cook could convey title to the goods in question sufficient to defeat the respondent's title as purchaser from McHale.

Apart from the effect of sec. 8 of the Conditional Sales Act, R.S.O. 1914, ch. 136, and the acceptance by Roche of payments

on account of the promissory note of McHale after default had been made in payment of the note at its due date, with which I shall afterwards deal, the right of a vendor in the position which Roche occupied appears to be well-settled. The vendor may, if default is made, repossess himself of the article agreed to be sold; and, if he does that, the purchaser's rights to it are at an end; or, having a power of sale, he may exercise it, but is not bound to do so: *McEntire* v. *Crossley Brothers*, [1895] A.C. 457.

Section 8 of the Conditional Sales Act provides:—

"(1) Where the seller or lender retakes possession of the goods for breach of condition he shall retain them for 20 days, and the purchaser or hirer or his successor in interest may redeem the same within that period on payment of the amount then in arrear, together with interest and the actual costs and expenses of taking and keeping possession."

This section, in my opinion, alters the rights of the vendor and purchaser as they would have existed but for the statute. The vendor may no longer, if default is made, put an end to the purchaser's rights by taking possession, but the purchaser is given the right, for 20 days after possession is taken, to redeem.

Cook & Mitchell appear to have acted in accordance with this view; for, after what they treated as taking possession, they waited the 20 days before going through the form of selling to Minnie Whyte.

I cannot think that what occurred was a retaking of possession within the meaning of sec. 8. The conclusion I come to upon the evidence is that Cook & Mitchell deliberately concealed from the purchaser McHale and his vendee that they had done what they deemed to be taking possession, and that for the very purpose of preventing them exercising the right which the statute gives.

For what other purposes was the sale under the execution from time to time postponed by their direction? They knew that the respondent had purchased the show-cases, and that he had made a formal claim to them to the bailiff, and that interpleader proceedings had been taken to determine whether or not he was entitled to them as against the execution creditors. It is in evidence that the respondent, after learning that there was a "lien" on the show-cases, by himself and by his solicitor Devaney endeavoured to find out by

ONT.

S. C.

STOCK v. MEYERS AND COOK.

Meredith, C.J.O.

whom it was held, and that inquiries were made by the respondent of Clark, the man who is said to have been put in possession of them to hold for Cook & Mitchell as assignees of the lien, and that Clark told the respondent that it was either in Toronto or in South Porcupine. The fact of this statement having been made by Clark would lead one to the conclusion either that he was not put in possession to hold for Cook & Mitchell as assignees of the lien, or that he was deliberately misleading the respondent. It is significant that Clark was not called to corroborate Cook's testimony as to his having been put in possession of the show-cases for Cook & Mitchell.

Upon the whole, I am of opinion that it is not proved that there was a retaking of possession within the meaning of sec. 8; and that, even if there was a retaking of possession, the concealment, with, as I think, the deliberate design of preventing the right conferred by sec. 8 from being exercised, precludes the appellant Meyers from availing himself of it as a retaking of possession within the meaning of the statute.

I do not mean by anything that I have said that I have come to the conclusion that in no case can there be a retaking of possession within the meaning of sec. 8 unless what is done is sufficient to give notice, to the person entitled to redeem, that possession has been retaken. All that I decide is that, in the circumstances of this case, there was not a retaking of possession within the meaning of sec. 8, and that the effect of the section is to postpone the right to exercise the power of sale until the expiration of 20 days from the time possession is retaken.

It was contended by counsel for the respondent that, by accepting payment after default, Roche waived his right to retake possession, and that that right could not be exercised without first making a request for payment of the balance remaining due of the purchase-price, and in support of that contention several decisions of New York Courts were referred to, and among them *French* v. *Row*, 77 Hun (N.Y.) 380, and *Cunningham* v. *Hedge*, 76 N.Y. St. Repr. 547, 12 N.Y. App. Div. 212.

These cases are, I think, distinguishable because in none of them was there any power of sale in case of default.

I would affirm the judgment of the trial Judge and dismiss the appeal with costs. *Appeal dismissed.*

Re HALIFAX LUMBER COMPANY'S ASSESSMENT.

N. S.

S. C.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ. and Ritchie, E.J. April 5, 1920.

TAXES (§ III B—123)—ASSESSMENT—POWERS OF BOARD OF REVISION AND APPEAL UNDER THE ASSESSMENT ACT, NOVA SCOTIA—RIGHT OF APPEAL TO COUNTY COURT—ASSESSMENT ACT, SECS. 26, 27, 32 AND 57.

The Board of Revision and Appeal (Nova Scotia) are not prevented by secs. 26 and 27 of the Assessment Act, 8-9 Geo. V. 1918 (N.S.), ch. 5, from dealing with the assessments of companies under the provisions of sec. 32 of the same statute.

On an appeal to the County Court by a company, the case should be dealt with under secs. 32 and 57 of the Act and the question determined as to whether or not the Board of Revision and Appeal were right in the conclusions which they arrived at.

Statement.

APPEAL from the decision of Wallace, Co. Ct.J., dismissing defendant's appeal from the assessment made by the Board of Revision and Appeal.

J. M. Stewart, for appellant; *T. Notting*, for respondent.

The judgment of the Court was delivered by

Harris, C.J.

HARRIS, C.J.:—The Halifax Lumber Co., Ltd., a corporation, having been served with a notice under sec. 25 of the Assessment Act, 8-9 Geo. V. 1918 (N.S.), ch. 5, and not having delivered a written statement under oath, was assessed under the provisions of sec. 27 of the Act by the assessors of the various districts of the municipality of the County of Halifax as follows: No. 18, $2,500; No. 20, $15,000; No. 21, $1,560; No. 22, $26,000; No. 26, $4,000; No. 27, $15,000; No. 35, $400; total, $64,460.

No appeal was asserted by the company from any of these assessments.

The Board of Revision and Appeal, sitting not as an Appeal Court, but for the purpose of revision under the provisions of secs. 31 and 32 of the Act, increased these assessments in each district as follows: No. 18, from $2,500 to $5,750: No. 20, from $15,000 to $37,500; No. 21, from $1,560 to $5,250; No. 22, from $26,000 to $65,000; No. 26, from $4,000 to $11,000; No. 27, from $15,000 to $37,500; No. 35, from $400 to $1,000; total from $64,460 to $163,000.

The company appealed from this increase to the County Court under the provisions of sec. 32 (2) of the Act.

The Judge of the County Court decided that as there was no evidence before him that the amounts fixed by the Board of Revision and Appeal exceeded the actual value of the properties

N. S.

S. C.

RE HALIFAX LUMBER COMPANY'S ASSESSMENT.

Harris, C.J.

he could not give the company any relief, by reason of these valuations being disproportionate and unjust in comparison with other assessments in the various districts. His opinion was that he could not deal with this latter question unless there was an appeal against the assessment of all the other individuals whose assessments were less proportionately than that of the company.

There is an appeal to this Court from the decision of the County Court Judge.

The first contention of the appellant is that the Board of Revision and Appeal had no jurisdiction to deal with the case because there was no appeal asserted against the assessment.

The argument is that in the case of corporations the special method of assessment provided by the Act is conclusive and the assessment once so fixed cannot be varied by the Board of Revision and Appeal, except upon appeal. I do not think this contention is sound.

Under the provisions of the Assessment Act, 8-9 Geo. V. 1918, ch. 5, the property of individuals is assessed by the assessors and there is a right of appeal from the valuation so fixed to the Board of Revision and Appeal sitting as a Court of Appeal. It is not disputed that the Board of Revision and Appeal sitting as a Board for the purpose of revision can deal with the assessment upon individuals in the case where the valuation has been fixed by the assessors and no appeal has been asserted and also in the case where there has been an appeal from the valuation of the assessors and the amount has been finally fixed by the Board of Revision and Appeal sitting as a Court of Appeal on assessments.

The contention that a different rule applies in the case of corporations is based on the provisions of secs. 26 and 27 of the Act. They read as follows:

26. Where the manager or resident agent of any such joint stock company delivers such written statement under oath to the assessors within such fourteen days, the assessors shall adopt the valuation sworn to, and such valuation shall be binding, subject only to appeal by the clerk under the provisions of this Act.

27. If such statement is not furnished within such fourteen days by such manager or agent, the assessors shall proceed upon their own original valuation, and such valuation shall then be binding, subject only to appeal under the provisions of this Act.

It will be noted that under sec. 26, where a statement has been filed by the corporation under oath, the valuation in the state-

ment is to be taken as binding subject only to appeal by the clerk of the municipality and under sec. 27, where a statement has not been filed by the corporation, the valuation of the assessors is made binding subject only to appeal by the corporation.

If we consider the scheme underlying these provisions we see at once why the word "binding" is used and it obviously is inserted to shew that the right of appeal is limited in each case. It is only another way of saying that the appeal in the one case is restricted to the clerk and in the other to the corporation.

In the case of assessment of the property of an individual there is only one appeal provided for and it was not necessary to make the distinction referred to and the language is different but the assessment is equally "binding" subject only to the right of appeal under the provisions of the Act. The whole scheme of the Act shews this. It is apparent that the words "subject only to appeal . . . under the provisions of the Act" were inserted with reference to the appeal to the Board sitting as a Court of Appeal and have nothing whatever to do with the work of the Board sitting for the purpose of revision or equalization of the assessment. Why should the Board when sitting for the purpose of equalization of the assessment be unable to deal with the assessment on a corporation where the corporation or the clerk has not given notice of appeal, and be able to deal with it when such a notice of appeal has been given? The appeal, of which notice has to be given, is an appeal to the Board sitting in a different capacity entirely and for an altogether different purpose than revision or equalization. Why should the jurisdiction of the Board depend upon whether or not a notice of another and different proceeding has been given? No reason can be given for so holding.

Again the interpretation contended for renders the provisions of the Assessment Act with regard to equalization of assessments nugatory.

Assume the case of one corporation assessed for more than the value of its property and another for one-quarter its value, and the rest of the assessments midway or somewhere between these two extremes? In interpreting the statute we must if possible adopt such a construction as harmonizes all the provisions and gives effect to the obvious intention. On the argument of the case I thought the contention under consideration was

N. S.

S. C.

RE HALIFAX LUMBER COMPANY'S ASSESSMENT.

Harris, C.J.

hopeless and subsequent consideration of the matter confirms and strengthens that view. I think the County Court Judge was right in deciding that secs. 26 and 27 did not prevent the Board of Revision and Appeal from dealing with the assessment on the company under the provisions of sec. 32 of the Act.

I am, however, unable to agree with the Judge of the County Court on the other branch of the case.

Sec. 32 (1) and (2) are as follows:

32. (1) The board shall revise the assessment rolls according to the best information they are able to obtain, and for that purpose the members of the board shall visit the several districts and personally value such and so many of the properties as are necessary to verify the valuation of the assessors, and secure a uniform standard of valuation, and may reduce or increase individual assessments in any polling district when satisfied that the same are disproportionate or unjust.

(2) When any change in an individual assessment is made, any person aggrieved thereby may appeal to the County Court, as provided in this Act, in the case of an assessment made by the board on appeal from the assessors.

And sec. 57 reads as follows:

57. The County Court shall inquire into the matter *de novo* and examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter. On such appeal the County Court shall have all the powers of the Court appealed from.

Section 32 (1) makes it clear that the Board of Revision and Appeal have power in order to secure a uniform standard of valuation to reduce or increase individual assessments in any polling districts when satisfied that the same are disproportionate or unjust.

Sub-section (2) gives any person aggrieved by "any change in an individual assessment" the right to appeal to the County Court and sec. 57 provides that the County Court shall "inquire into the matter *de novo*" and "shall have all the powers of the Court appealed from,"—that is, in this case, all the powers of the Board of Revision and Appeal under sec. 32 (1).

I am quite unable to understand why the question before the County Court is not the same identical question which the Board of Revision and Appeal had to deal with and the power of the County Court must be the same as that of the Board and exercised on the same principles. In effect the question before the County Court is as to whether or not the decision of the Board of Revision and Appeal was or was not right.

As I understand the decision of the County Court Judge, he did not deal with the matter from this standpoint but he was of opinion that the hearing was to be conducted as an appeal before the Assessment Appeal Court under sec. 35 (2). That section, in my opinion, has nothing to do with the case and the appeal should be allowed and the case remitted to the County Court Judge to be dealt with under secs. 32 and 57 and the question to be determined by him is whether or not the Board of Revision and Appeal were right in changing the assessment of the company as they did, applying to the consideration of that question the same principles which the Board of Revision and Appeal should have applied to it under sec. 32 (1). That section gave the Board power in order to secure a uniform standard of valuation to "reduce or increase individual assessments when satisfied that the same are disproportionate and unjust." The County Court Judge has to determine whether they arrived at the right conclusion with regard to the plaintiff's property under that section and the hearing before him is *de novo*. I think the company is entitled to the costs of the abortive hearing before the County Court Judge and of this appeal. *Appeal allowed.*

POLEHYKI v. CHROMIK.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Ives, JJ. March 26, 1920.

PLEADING (§ II K—245)—LIBEL AND SLANDER—FOREIGN WORDS—STATEMENT OF CLAIM—ALLEGATIONS—PROOF.

Where slander in a foreign language is alleged, the foreign words alleged to have been spoken must be set forth in the statement of claim, with an allegation that the persons who heard the words understood the language in which they were spoken, and at the trial the foreign words set out in the claim must be translated into English and evidence must be given that the particular foreign words were in fact uttered by the defendant.

[*Jenkins* v. *Phillips* (1841), 9 C. & P. 766; *Reilander* v. *Bengert* (1908), 1 S.L.R. 259, referred to.]

Statement.

APPEAL by plaintiffs from a District Court judgment dismissing an action for slander. New trial ordered.

A. C. Grant, for appellant; *W. H. Odell*, K.C., for respondent.

Stuart, J.

STUART, J.:—The plaintiff, an unmarried female under twenty one years, by her next friend her father, sues the defendant, her mother's sister, for damages for slanderous words imputing unchastity.

ALTA.
S. C.
POLEHYKI
v.
CHROMIK.
Stuart, J.

In the original statement of claim the exact words alleged to have been used were not set forth but there was simply an allegation that the defendant had said that the plaintiff and one Alec Sowiak had roomed together at a certain hotel and that the plaintiff had given birth to a child.

The plaintiff's solicitor obviously had the objection to such a statement of claim drawn to his attention because he filed an amended claim in which the exact words alleged to have been used were set forth in a foreign language, viz:—Ukrainian, and it was alleged that those words translated into English meant, (1) "Alex. Sowiak and Helen Polehyki both slept two nights together, one night in the hotel in Wetaskiwin and one night on their way home" and (2) "She (Helen Polehyki) used to go to church and sing before she was in the family way but now she does not go any more."

There was no allegation in the claim that those persons who heard the words understood the language in which they were spoken though this seems to be necessary, 18 Hals, 649.

The defendant denied the uttering of the words and made no plea of justification.

The action was tried by Lees, J., at Wetaskiwin and his reason for judgment dismissing the action with costs is given simply in this sentence: "Action dismissed with costs on ground that translation of alleged slanderous statements was not proved at the trial." He however in view of a possible appeal assessed the damages at $100.

The plaintiff now appeals.

It is common ground that two things were not done at the trial. First, there was no translation and no attempt at translation into English of the Ukrainian words set forth in the statement of claim. Secondly, there was no attempt made to prove to the Court what Ukrainian words were uttered by the defendant much less that the particular Ukrainian words alleged to have been uttered were in fact uttered by her.

The report of the evidence which is before us shews that the stenographer took down only English words. A number of witnesses were, indeed, called who testified through a sworn interpreter. There were in fact two different interpreters sworn, one interpreting the first witness only, the other the remaining

witnesses although the testimony of all related to the same conversation. But all that the plaintiff's counsel did in leading his evidence at the trial was to have his witnesses relate, presumably in Ukrainian, what they had heard the defendant say and to have the interpreter interpret the words into English. The trial Judge no doubt heard the interpreters and the witnesses speaking to each other in a foreign language but we must, I think, assume that he paid attention only to what was said in English by counsel and the interpreter with possibly of course some observation of the demeanour of the witnesses. There is no suggestion that the trial Judge understood the Ukrainian language, or could distinguish, though not understand, the separate words uttered by the witnesses so as to compare them with the Ukrainian words set forth in the statement of claim. And in any case we are confined to the record before us and that contains no record in Ukrainian of the words of the witnesses and therefore no record of any proof of the utterance of the words alleged and complained of.

The trial indeed took the form which it perhaps might properly have taken if in such a case as this, *i.e.*, in an action of slander, it were sufficient to allege that the defendant by the utterance of certain words, not set forth in the pleadings, had "conveyed to her hearers the meaning" that the plaintiff had been guilty of the misconduct referred to in the translation in English.

But it is undoubtedly the law that a plaintiff in a slander action cannot simply plead an innuendo without setting forth the words from which the innuendo is to be deduced. Clearly this is the law where no foreign language is concerned. The basis of liability is the physical utterance by the mouth of certain words. That is the first and essential step in grounding liability. The second step is to shew what meaning was conveyed by the words used. If they are plain and unambiguous of course no innuendo is necessary but in many cases an innuendo has to be added as a method of alleging what the words proven to have been uttered really did mean in the minds of those who heard them.

By the course adopted at the trial in this case nothing but the second step was ever presented to the Court as a problem for solution. The Court was not asked to find, no evidence was adduced from which the Court, not knowing Ukrainian, could

ALTA.
S. C.
POLEHYKI
v.
CHROMIK.
Stuart, J.

find, whether or not the defendant had ever in fact uttered the words complained of, or any other words with substantially the same meaning.

It seems to me that the authorities all without exception lay down the rule that where a slander in a foreign language is alleged, the foreign words alleged to have been uttered must be set forth in the statement of claim. This is clearly exactly the same thing as saying that they must be proven. For every essential fact which it is necessary to allege it is also necessary to prove, unless it is admitted. All the plaintiff's counsel had to do was to pay strict attention to his allegations and he would have seen at once what he had to prove.

In such a matter as this I think it is especially necessary to insist upon the proper method of proof. By the course adopted at the trial the interpreter occupied unconsciously a dual position. He was interpreting to the Court the meaning of the witnesses' words, it is true, but he was also a witness to an essential fact in the case. Where a witness who cannot speak English is giving testimony about extraneous facts, acts or occurrences, the interpreter simply interprets what the witness has to say about them and ordinarily he is accepted without question by the Court and the parties as a faithful interpreter. But where the gist of the action is the utterance by the defendant of certain words in a foreign language the interpreter in the procedure adopted here was placed in the position of, not merely an interpreter, but of a primary witness. He did not report to the Court what foreign words were used although that was necessarily the initial enquiry. He merely told the Court what the words used and reported, in the dark, as it were, by the witness, meant in English. As I have said he was engaged in giving evidence upon a secondary matter before the Court had made or had any basis upon which to make, a finding as to the underlying primary matter upon which the secondary matter must rest.

We have in this Province a large foreign population who speak many different languages. For my part I think it is extremely dangerous to permit such a method of trial as was attempted here. Every one having even a slight acquaintance with foreign languages knows that their words have many different shades of meaning. The same word in its primary sense may convey an innocent

meaning though by euphemism it may have acquired a secondary and harmful meaning. It therefore is extremely desirable that the Court should first ascertain what words were in fact uttered. It is I think improper to attempt to attach liability to a defendant for the utterance of words with his lips without ever proving to the Court what words his lips uttered.

It is suggested that the evidence was given though not taken down, that obviously the witness did testify to the Ukrainian words used. Aside from the objection that we can only go upon the record before us there is the further objection that obviously no one at the trial except the interpreter had the slightest idea of paying any attention to the Ukrainian words. Why we should be asked now to treat them as really being put in evidence is something which I confess I cannot comprehend.

By a roundabout method it is possible that proof of the uttering of some such words as the words complained of might have been reached if testimony had even been given that the Ukrainian words set forth in the statement of claim really meant what they were alleged to mean in English. But that was not done and the result is that if the method of proof followed in this case were approved then the rule that the pleading must set forth the foreign words is set aside entirely. Yet the rule is well settled and laid down by all the authorities. (See particularly *Jenkins* v. *Phillips* (1841), 9 C. & P. 766), 25 Cyc. 448; 18 Hals. 648. Moreover, the danger of the witness usurping the function of the Judge and jury by giving his idea of the meaning of the words is enormously increased. 18 Hals. 643-4.

In my opinion this is a salutary rule and one which cannot safely be revoked. Adherence to it and adherence to the consequent result that proof of the use of the foreign words must be given is not so troublesome a thing as may at first appear. An interpreter is supposed to be expert in the foreign language. He ought to be able to read and write it. Otherwise I hardly think he would be a competent interpreter. Being able to do that he can upon direction of counsel easily write down the foreign words which the witnesses testify to have been used by the defendant without yet proceeding to the translation of them. Defendant's counsel has had the alleged foreign words before him since the pleadings began. His own client has been charged

ALTA.
S. C.
POLEHYKI
v.
CHROMIK.
Stuart, J.

with uttering them and undoubtedly had an opportunity to instruct his counsel as to the exact form of words which he on his part claims he did use. Counsel are expected at times, and at times find themselves forced, to qualify themselves about the most abstruse subjects, such as medical theories or mechanical devices. A few short words in a foreign language should furnish no greater difficulty.

Then where the evidence as to what the foreign words were is exhausted an expert in the language should be put in the box as a regular witness to testify what the words mean in English and he would be then subject to cross-examination in the regular way. Here the interpreter was never subject to cross-examination as to the correctness of his translation. Technically perhaps he may have been so but it could not very well be done until counsel had got on the record the foreign words which the interpreter was translating.

Perhaps I may without pedantry suggest an example in a foreign language of the possible differences in meaning of the same word, an example very relevant here. The Greek word "sunoikein" primarily means merely to live together in the same house. But in a certain connection with other words and with a certain case it means to have carnal connection with a woman. In the present suit we have the word "together" referred to. It seems to me the example I give emphasizes very strongly the necessity of first getting the foreign words and then as a separate and independent piece of proof getting the correct translation.

The circumstances in the case of *Reilander* v. *Bengert* (1908), 1 S.L.R. 259, will, when examined, also illustrate very clearly the point which I am venturing to insist upon.

I am therefore of opinion that the plaintiff had no right to ask for judgment upon the evidence as her counsel saw fit to tender it to the Court and that we ought not to give a judgment now in her favour.

But there is this to be said. Neither the trial Judge nor defendant's counsel seems to have made any objection to the course adopted excepting possibly a suggestion at the close of the plaintiff's case and even then it was not the exact objection about which I have spoken. But before that stage and all through the plaintiff's evidence defendant's counsel actually acquiesced

apparently in the procedure. He himself cross-examined the plaintiff's witnesses upon exactly the same basis. True he was not bound to teach the plaintiff's counsel how to conduct his case but at any rate when it came to his own defence he quietly adopted the same method in getting from his client her account of what she actually had said.

For these reasons I think the judgment dismissing the action ought not to stand particularly in view of the very strong tendency in the whole evidence, such as we have it, pointing to a real liability in the defendant.

My opinion therefore is that, upon terms, the appeal should be allowed, the judgment below set aside and a new trial ordered.

But the plaintiff who was clearly wrong and primarily responsible for his method of conducting his case ought to be allowed this right only upon terms of his first paying the defendant's costs of the appeal and of the first trial.

Beck, J.

BECK, J.:—The action is one of slander. The parties are Ruthenians, or equivalently, Ukrainians. The statement of claim sets out the alleged slanders in the Ruthenian language and a translation of the words into English.

The English words are:—

Alex. Sowiak and Helen Polehyki both slept two nights together, one night in the hotel at Wetaskiwin, and one night on their way home, and: She (Helen Polehyki) used to go to church and sing before she was in the family way but now she does not go any more.

The first witness Troslak, was sworn through a sworn interpreter and gave his evidence in the Ruthenian language. This witness said:—

Q. Those are the words that Mrs. Chromik said? A. Yes, Mrs. Chromik said that Helen went with Alec. and slept in the hotel one night and another night they slept in the same place on the way home.

The second witness Mrs. Zroslak, who also gave her evidence through a Ruthenian interpreter, said:—

Q. What was said . . . by Mrs. Chromik? A. She said they (Sowiak and Helen) went to sleep after the Court together.

The third witness Osopko is not at the commencement of his evidence as set out in the appeal book stated to have given his evidence in the Ruthenian language with an interpreter but it is evident that he did so from an interjection by counsel during the course of his examination. He said:—

ALTA.

S. C.

POLEHYKI v. CHROMIK.

Beck, J.

Q. What did she (defendant) say (about Helen Polehyki)? A. She (defendant) said that when she (Helen) was a girl she went to church to sing, but after she got in the family way she was fainting, she came out because she had fainting fits. Q. Give the conversation word for word? A. Annie Chromik was at my place and she said: "Helen Polehyki was just a girl and she was going to church in the choir to sing, but after she got in the family way she got fainting fits and had to go out."

It is evident from other passages in the evidence the word translated "girl" meant one who had not had connection with a man.

Mrs. Osopko, another witness, gave similar evidence. It is not stated that she gave evidence through an interpreter but presumably she did so. She however says that the conversations she related took place in the Ukrainian language which was understood by those present.

There was much further evidence for the plaintiff. Some question was raised as to whether the evidence of some of the other witnesses for the plaintiff was given directly in English; but it seems to me that it is of no consequence.

At the conclusion of the plaintiff's case Mr. Odell, counsel for the defendant, moved for a "nonsuit."

The Judge said:—

I can only nonsuit if I am satisfied there is no evidence on which I can find for the plaintiff. I think there is some evidence on which I might find for the plaintiff, so I will hear the defence.

Mr. Odell said:—

Your Honour, there is another thing, I think for the plaintiff's case it is necessary that they should have put an interpreter in the box to testify that the foreign words mean what they are alleged to mean in the statement of claim.

The Judge said: "I decline to nonsuit. I will hear the defence."

Evidence was given for the defence.

The Judge then gave judgment as follows:—

"Action dismissed with costs on ground that translation of the alleged slanderous statements was not proved at trial. At request of plaintiff, for the purpose of obviating a new trial, I assess the damages at $100."

In my opinion not only was the translation into English of the slanderous words alleged to have been spoken proved but also the very words themselves in the Ruthenian (or Ukrainian) language. These latter were undoubtedly the very words (literally

or substantially), pronounced by the witness in the box and translated into English by the interpreter. The fact that the Ruthenian words were not taken down either by the stenographer or by the Judge cannot affect the question. The whole evidence was given *viva voce*; the taking of it down in writing or the omitting to do so has no bearing on the question of the trial Judge's obligation to consider the evidence actually given. If the counsel for the defence desired to question the accuracy of the witnesses' statement of the precise words used or the accuracy of the interpretation of them by the interpreter it was quite open to him to have the words used by the witness put down in writing; to cross-examine the witness as to the precise words used, and also to examine the interpreter as to the accuracy of his interpretation. Failing to take this course he ought to be assumed to have been satisfied with evidence both of the witness and the interpreter. I think, therefore, that the ground of the Judge's decision is not maintainable and it being fairly evident from the fact that he fixed the damage, in case his decision should be reversed that he would have found the alleged slanders proved. I think judgment should be entered for the plaintiff for $100; damages and costs to be taxed. I think the plaintiff should have the costs of the appeal.

Ives, J.:—I concur. *Appeal allowed.*

Ives, J.

MATHER v. BANK OF OTTAWA.

ONT.
S. C.

Ontario Supreme Court,. Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. December 19, 1919.

GUARANTY (I—6)—LETTER TO BANK SIGNED BY DIRECTORS GUARANTEEING INDEBTEDNESS OF COMPANY TO BANK FOR LIMITED AMOUNT—CONSTRUCTION OF GUARANTEE BOND—EXTENT OF GUARANTORS' LIABILITY.

A letter signed by directors of a company to a bank guaranteeing the indebtedness of the company to the bank for a limited amount was held to be not merely a guarantee of a certain amount of the company's indebtedness, but a guarantee of the whole indebtedness, the guarantors to be only called upon to pay the amount provided for in the guarantee.

Assuming that the guarantee only applies to a certain amount of the company's indebtedness, payment by the company of that amount on account of its indebtedness, if still owing more than that sum, does not discharge the guarantors.

The surety does not obtain the rights of a creditor, when payment is made by the principal debtor, and so long as any indebtedness exists, the surety is liable to make good any part of it, not exceeding the amount which he has guaranteed.

[*Ellis* v. *Emmanuel* (1876), 1 Ex.D. 157, distinguished.]

Statement.

APPEAL by plaintiffs and defendants by counterclaim from the trial judgment in an action for an account, a declaration that

ONT.
S. C.
MATHER
v.
BANK OF
OTTAWA.

the defendant bank had been repaid certain advances made by it, and for delivery up of a guarantee bond signed by the plaintiffs and four others. Affirmed.

The judgment appealed from is as follows:—

LATCHFORD, J.:—In consideration of advances made or to be made by the Bank of Ottawa, the plaintiff and four others, directors of the Ontario and Manitoba Flour Mills Limited, on the 15th November, 1911, duly executed and delivered to the bank a guarantee of the account of the milling company to the amount of $150,000. The bank made advances amounting to more than that sum; but these the plaintiff asserts that he and his co-directors have paid.

He brings this action for an account, a declaration that the defendant has been paid, and for the delivery up of the guarantee.

The bank defends, alleging that a large amount is still due by the guarantors, and claims against those who are living and the estates of Fraser and Orme, who are dead, the sum of $98,631.10, with interest from the 31st May, 1918.

When the action came on for trial, the application for probate of the will of the late A. W. Fraser was pending. On the application of the bank, and counsel for Mary Jane Fraser, the sole executrix and beneficiary named in the will, consenting thereto, I appointed the said Mary Jane Fraser to represent the estate of her deceased husband in the action.

In October, 1911, after advances to a considerable amount had been made to the company by the bank, negotiations took place for an extension of the company's line of credit. They were carried on between the late A. W. Fraser, then president of the milling company, and Mr. George (now Sir George) Burn, who was at the time general manager of the bank.

On the 1st November the following letter was addressed to Mr. Fraser:—

"Dear Mr. Fraser: Replying to yours of the 26th ultimo, the credit arranged for is $250,000.00—$150,000.00 of which is to be secured by the pledging of bonds covering the mill, water-powers, power-house, pole-line, and all the property of the company; by a pledge on wheat purchased; and by a guarantee from the directors of the company.

"$100,000.00 of the credit is to be on trade-paper, to the satisfaction of the bank. The bank is willing to discount this approved paper of the customers of the milling company with the endorsement of the company.

"I understand the bonds are now being offered for sale. When sold the proceeds are to be applied in retiring the direct debt of the company. When that debt is fully discharged, only the trade-paper will remain, and the guarantee of the directors can be surrendered.

"The above credit is to include the present indebtedness.

"Yours truly

"Geo. Burn,

"General Manager."

On the 15th November, Fraser and his fellow-directors executed and delivered to the bank a guarantee in these terms:—

"To the General Manager for the time being of the Bank of Ottawa:—

"Sir: In consideration of advances made or to be made by the Bank of Ottawa to the Ontario and Manitoba Flour Mills Limited, either by the discount of commercial paper or negotiable securities or by loans, payments, advances, overdrafts, or otherwise, from time to time, and for such amounts as the said bank may see fit, we jointly or severally do hereby guarantee to the Bank of Ottawa the repayment of the said advances, discounts, loans, payments, overdrafts, and other indebtedness, to the amount of $150,000, together with all interest, costs, charges, and expenses incidental thereto.

"This is a continuing guarantee and shall cover the whole indebtedness to the amount aforesaid or the ultimate balance from time to time due thereon to the amount aforesaid and shall cover any number of transactions up to the time of the demand of payment therefor upon us under this guarantee and we agree that the said bank may from time to time and at all times renew or extend the time for the payment of the said indebtedness or any part thereof either present or future without any notice to the guarantor and may also take and accept from time to time any and all securities from the said the Ontario and Manitoba Flour Mills Limited or any other person or persons whatsoever as security for the said indebtedness or any part thereof present or

ONT.
S. C.
MATHER
v.
BANK OF
OTTAWA.

future and may take from and deal with and compound with any party to such securities and may give up such security in whole or in part of any kind in their discretion and that the doctrines of law and equity in favour of a surety shall not apply hereto, and we hereby waive any and all defences that might be open to a surety in any action or proceeding to recover the said indebtedness or any part thereof, and it is agreed that the guarantors shall be liable for the ultimate balance remaining unpaid after all moneys which may have been received from other sources shall have been applied in reduction of the indebtedness which shall be owing from the Ontario and Manitoba Flour Mills Limited to the said bank; but the said bank shall not be bound to exhaust all such recourse against other party or parties previous to making a demand upon us for payment, the intention being that the Bank of Ottawa shall have the right to demand and enforce this guarantee in whole or in part from the guarantors, whenever the bank may deem it advisable to call upon the principal debtor to pay the indebtedness which may then be due.

"In witness whereof we have affixed our hands and seals this 15th day of November, 1911.

"A. W. Fraser, A. G. Mather, Geo. S. May,
J. W. Hennessy, Geo. L. Orme."

The plaintiff's defence to the counterclaim is adopted by the other persons in the same interest.

His contention is that by the proceeds of the sale of the bonds and by payments made by himself and his associates the entire direct indebtedness of the company to the bank was paid, and that accordingly, as agreed by Mr. Burn, the guarantee should be delivered up to be cancelled.

The only material fact in issue is whether or not the direct indebtedness of the company to the bank has been paid.

Upon the statements and admissions of counsel, as supported by the documents filed as exhibits, I find as a fact that, while the $90,000 and other large sums paid by the plaintiff and his fellow-directors were applied upon the direct indebtedness of the company to the bank, yet, owing to additional advances made from time to time by the bank, the amount of the company's direct liabilities to the bank, secured by the guarantee, amounted on the 31st May, 1918, to $98,631.10. Of this but $61,672.95

is for principal. Neither the plaintiff nor his co-defendants by counterclaim have established any defence to the bank's claim.

The plaintiff's claim is dismissed with costs, and the counterclaim of the defendant bank allowed for $98,631.10 with interest on $61,672.95 from the 31st May, 1918, and costs.

The judgment against Mrs. Fraser and the executors of George L. Orme will be limited to the respective estates which are in their hands to be administered.

G. F. Henderson, K.C., for appellants, the plaintiff and George S. May, defendant by counterclaim.

A. W. Anglin, K.C., for the appellants the other defendants by counterclaim.

I. F. Hellmuth, K.C., and *Wentworth Greene*, for the Bank of Ottawa, respondent,

MEREDITH, C.J.O.:—This is an appeal by the plaintiff and the defendants by counterclaim from the judgment, dated the 21st January, 1919, of Latchford, J., pronounced after the trial before him sitting without a jury at Ottawa on the previous 14th December. Meredith, C.J.O.

The controversy between the parties is as to whether the respondent is entitled to recover on a guarantee bond given to it by A. W. Fraser, since deceased, the appellants Mather, May, and Hennessy, and by George L. Orme, since deceased, in respect of the indebtedness of the Ontario and Manitoba Flour Mills Limited, which I shall afterwards refer to as to "the company," $96,631.10 and interest, or, as the appellants contend, their liability on the bond is at an end and they are entitled to have it delivered up to be cancelled.

The contention of the respondent is that the extent of the liability of the guarantors is to be determined upon a consideration of the terms of the bond alone; and that, according to its true construction, they are liable for the ultimate balance owing by the company as a direct debt to the respondent, the amount they may be called upon to pay being limited to $150,000; and the contention of the appellants is twofold: first, that according to the true construction of the bond the guarantee is one for a part of the company's indebtedness ($150,000), and, that sum having been paid by the company and them, their liability is at an end; and, secondly, that the bond was executed in pursuance of an agreement

ONT.

S. C.

MATHER v. BANK OF OTTAWA.

Meredith, C.J.O.

entered into between the guarantors and the respondent, the terms of which are evidenced by a letter of the 1st November, 1911, from the respondent's general manager (Burn) to Fraser, and that the terms of the bond are controlled by this agreement, and that, if they are not, the appellants are entitled to have the bond reformed so as to conform with the terms of the agreement.

The bond and the letter are set out in the reasons for judgment, and it is unnecessary therefore that I should set them out.

In answer to the second position taken by the appellants, the respondent says that the letter of Mr. Burn, if the meaning of it is what the appellants contended it is, was not admissible in evidence, because its admission violates the rule which forbids the admission of parol evidence to vary or contradict a written instrument; but the respondent contends that, according to the terms of the arrangement as stated in Mr. Burn's letter, the guarantors are answerable to the respondent for what according to its contention they are liable on the bond; in other words, that the extent of the liability is the same whether it is to be determined according to the provisions of the bond or of those of the letter.

The case comes before the Court in a not very satisfactory shape. No oral evidence was adduced, and the Court is left to spell out, from the fragmentary statement of facts by counsel at the trial and the documentary evidence that was put in, what the rights of the parties are. It would, I think, have been more satisfactory if the parties to the transaction who are living, including Mr. Burn, had given evidence.

The bond bears date the 15th November, 1911, and Mr. Burn's letter is dated the first day of that month. It would have been more satisfactory if it were known whether the bond had been prepared and was in the hands of the guarantors when Mr. Burn's letter was written, but the evidence is silent as to this; and the proper inference, in the absence of evidence to the contrary, is, I think, that the bond was prepared, as it undoubtedly was signed, after the letter was written. This question I view as an important one, because it follows, I think, that, unless it is clear that the terms mentioned in the letter differ from those of the bond, the inference is that the bond expresses the true extent of the liability the guarantors were to undertake.

It appears from the evidence that when the negotiations which resulted in the giving of the bond were entered into the

ONT.

S. C.

MATHER v. BANK OF OTTAWA.

Meredith, C.J.O.

guarantors were personally liable to the respondent for $60,000 which it had advanced to the company, and that the company was desirous of obtaining a line of credit, part of it on customers' paper, and part of it not so secured, but secured by the company's bonds, a pledge on wheat purchased, and a guarantee from the directors of the company (the guarantors).

It is not open to question, I think, that what they arranged for with the bank was "a line of credit." In Mr. Burn's letter it is spoken of as "a credit," but in his letter to Fraser of the 2nd October, 1911 (early in the negotiations), it is spoken of as "a line of credit."

That letter is, I think, an important one, and I therefore set it out in full:—

"*Re Ontario and Manitoba Flour Mills Ltd.*

"Regarding the application of this company for a line of credit, amounting in all to from $225,000 to $250,000, of which $150,000 is expected to be on the name of the company with the collateral of bonds and grain, having in view that the capital expenditure on account of the company has not yet been completed, the directors are of opinion that the board of directors of the milling company should make themselves personally responsible for the total amount of direct borrowings, $150,000, in the same manner as they are at the present time for the $60,000 now owing and which would form part of the new credit."

The company had then commenced business, and the line of credit was needed to enable it to carry on the business, which was evidently expected to be of considerable magnitude.

I do not understand that the naming of either sum as the amount of the line of credit involved any undertaking with the guarantors that it should not exceed the amount named. All that it meant was that the respondent was undertaking to make advances to the company up to that amount.

After the advances had reached the amount named, the company went on borrowing from the respondent, and borrowed in all upwards of $300,000, exclusive of moneys obtained by discounting its customers' paper. The guarantors were, as I have said, the directors of the company, and knew of these borrowings, if indeed they were not the persons on whose application they were made. There is no reason to doubt that these advances were made by the

ONT.
S. C.
MATHER
v.
BANK OF
OTTAWA.
Meredith, C.J.O.

respondent under the belief that they were secured by the bond and in reliance upon that security; and, in the absence of testimony to the contrary by the appellants, it is a fair presumption, I think, that they understood this and permitted the respondent to go on making the advances knowing that the respondent believed that the bond would cover them.

It is important also to look at the letter of the company, signed by Fraser as president, to which Mr. Burn's was an answer. That letter is dated the 26th October, 1911, and in it the writer says that the arrangement with regard to the credit was that the bond was to be surrendered when the proceeds of the sale of the company's bonds for $150,000, which were to be deposited with the respondent as security for its advances, were paid to the respondent.

So far from assenting to this view of what the arrangement was, Mr. Burn's letter in reply shews clearly that that was not his understanding of it. He set out the terms as he understood them, and I see in them nothing to support the appellants' contention. He first states what the line of credit is to be, and it is $250,000—"$150,000 of which is to be secured by the pledging of bonds covering the mill, water-powers, power-house, pole-line, and all the property of the company; by a pledge on wheat purchased; and by a guarantee from the directors of the company."

The letter then proceeds: "$100,000 of the credit to be on trade-paper to the satisfaction of the bank. The bank is willing to discount this approved paper of the customers of the milling company with the endorsement of the company."

Then follows what is said as to the surrender of the bond, and it is: "I understand the bonds are now being offered for sale. When sold the proceeds are to be applied in retiring the direct debt of the company. When that debt is fully discharged, only the trade-paper will remain, and the guarantee of the directors can be surrendered."

The surrender of the guarantee is to take place when "that debt is fully discharged," i.e., the "direct debt of the company," not the $150,000, but the direct debt of the company, which I take to mean what the company should owe the respondent apart from its indirect liability on trade-paper; and this view is emphasised by the words which follow, "only the trade-paper will remain,"

indicating plainly, I think, that the guarantee was not to be surrendered until the whole of the direct debt of the company, whatever it might be, should be fully discharged.

That view is strengthened by the fact that the bond executed, as the appellants contend, in pursuance of this arrangement, provides that the guarantors are to be liable on that footing.

It is true that by the bond the guarantors' obligation is made to extend to the company's indirect liability on trade-paper. What might be the result if the respondent were seeking to recover in respect of such a liability it is not necessary to consider; that question does not arise, as no such claim is made, and, according to the statement of counsel, none such exists.

In view of the terms of the letter of the 2nd October, 1911, to which I have referred, and the letter of Fraser and the reply to it and the conduct of the parties as to the extension of the line of credit, to which I have also referred, if these may be looked at, my conclusion is, that the guarantors are liable for the whole of the direct indebtedness of the company, but are not to be called on for more than $150,000 in all.

The subsequent conduct of the parties—and that is a matter for consideration, if the terms of the writings are ambiguous—throws light upon their understanding of the extent of the obligation they had entered into.

On the 26th February, 1914, the respondent's manager at Ottawa wrote to the appellant Mather, stating that, as he was aware, the indebtedness of the company was largely in excess of the amount of the bond, and was then due, and calling upon Mather "to forthwith make payment as of the full amount of your said bond or guarantee for $150,000 and interest thereon from this date."

A similar letter was written at the same time to each of the other guarantors.

There is nothing to shew that any of the guarantors in any way indicated to the respondent that they differed from its view as to the extent of their liability, and there is much in their subsequent conduct to shew that they did not, but acquiesced in it.

On the 25th March following, the appellants Mather, May, and

ONT.
S. C.
MATHER
v.
BANK OF
OTTAWA.
Meredith,C.J.O.

Hennessy wrote asking for an extension of a month, which was refused.

On the 15th July, 1915, each of the guarantors, Mather excepted, hypothecated to the respondent certain securities to be held by the respondent as collateral security for his indebtedness on the bond, and executed a transfer of them to the respondent, in which is recited the giving of the bond, that default had been made by the company in the payment of the loans and advances that had been made to it, and that the respondent had called upon the guarantors to make good the default, and that the guarantors were justly and truly indebted to the respondent under the bond.

This instrument contains a provision that "it is distinctly understood that this agreement shall not itself create or in any manner extend the liability of the said . . . to any further or greater extent in respect of his indebtedness under said collateral guarantee for the indebtedness of the Ontario and Manitoba Flour Mills Limited than exists at the present time, the intention of this agreement being to pledge the securities hereinbefore mentioned as additional collateral security for the said indebtedness of the said . . . under the said guarantee and shall not be construed as a new guarantee."

The statement as to the guarantors having been called upon by the respondent to make good the company's default, refers, I think, to the letter of the 26th February, 1914, calling upon them "to forthwith make payment" of the $150,000.

It was argued by counsel for the appellants that the provision I have just quoted was intended to guard against the instrument being treated as extending the liability of the guarantors beyond what it then was, and that the instrument therefore does not help the respondent's case, but with that contention I do not agree. The instrument, in my opinion, read in the light of the surrounding circumstances, shews that the guarantors recognised that their indebtedness to the respondent was $150,000, and that the object of the provision was to prevent the instrument being treated as increasing their indebtedness beyond that amount.

On the 12th November, 1916, the respondent's general manager sent to the appellant Mather a statement shewing his indebtedness to the respondent, two of the items of which are:—

Re Ontario and Manitoba Flour Mills guarantee $150,000—shares say 1-5	$30,000
Ontario and Manitoba Flour Mills guarantee $150,000 —accrued interest—shares say 1-5 $28,425	5,685
	$35,685

The letter accompanying this statement referred to it as a statement "of your liability direct and indirect to this bank," and it was added that it was made "on the assumption that each of the guarantors on the guarantee of $150,000 for the Ontario and Manitoba Flour Mills will be able to meet his share. Should any one fail to do this the shortage will fall on the others."

Previous to this, on the 11th November, 1916, the respondent's Ottawa manager sent to the appellant Mather a statement of his direct and indirect liability, one of the items of which is under the heading "contingent liability"—"Guarantee with A. W. Fraser, G. S. May, J. W. Hennessy, and G. L. Orme, dated the 15th November, 1912, Ontario and Manitoba Flour Mills, $150,000."

Another important letter is that of the four surviving guarantors and the representative of the deceased one. It bears date the 1st June, 1917, and in it the proposition is made that the guarantors' liability be fixed at $150,000, upon condition that the writers should pay $50,000 within 10 days and $50,000 within 6 months and $50,000 within 12 months thereafter; but the respondent's general manager on the 5th June, 1917, wrote declining to accede to the proposition, and saying that the respondent's directors "had decided that it will not be possible to consider any reduction of the liability under that guarantee. The bank has never had any doubt as to the goodness of the guarantee. We consider that you are all quite able to pay your share, and why the bank should share your individual loss with this company, it is not easy to understand."

As far as the evidence shews, nothing beyond the making of the payments I shall mention occurred until or shortly before the appellant Mather, on the 20th May, 1918, launched his action.

It was stated by counsel that the guarantors all along disputed their liability on the basis contended for by the respondent, or perhaps that as soon as they had paid what, according to their

ONT.
S. C.
MATHER
v.
BANK OF
OTTAWA.
Meredith, C.J.O.

contention, they owed, they took the position the appellants now take, and that in the meantime they said nothing because they did not desire, while owing the respondent a large amount, to antagonise it.

I find nothing in the evidence to support this statement of counsel, but much to indicate that the guarantors all along recognised that they owed the respondent the whole $150,000.

Only $100,000 of the company's bonds were sold. They realised $90,000, which the respondent received and gave credit for to the company on its direct liability. I have been unable to find the date when this money was received, but it was, no doubt, some time in the year 1912.

Although the position which the appellants now take is that the $90,000 should have been applied in reduction of the $150,000 for which the guarantors were liable, I find no hint of their having taken that position until the time when the appellant Mather's action was begun; but, as I have pointed out, their conduct throughout indicated that they all along recognised that they were liable to the respondent for the whole $150,000, and not for the balance only which remained after crediting the $90,000.

The guarantors have paid to the respondent a sum in excess of the amount which, according to the appellants' contention, was owing on the guarantee. The excess is not large, but the fact that payments in excess of what, according to their contention, they owed, is a circumstance indicating, I think, that the position now taken is the result of an afterthought.

I have been unable to find from the evidence when these payments were made, but I conclude from the statement, exhibit 21, that the last of them was made on the 6th April, 1918.

I turn now to the consideration of the terms of the bond. In my view, it is not, as Mr. Anglin contended, a guarantee of $150,000 of the indebtedness of the company, but a guarantee of the whole of the indebtedness, the amount which the guarantors were to be called on to pay being limited to $150,000.

If the provision that the subscribers to the bond guarantee "the repayment of the said advances, discounts, loans, payments, overdrafts, and other indebtedness, to the amount of $150,000, together with all interest, costs, charges, and expenses incidental thereto," is read without reference to the remainder of the instru-

ment, it may be that Mr. Anglin's contention that the bond is to be construed as applicable only to $150,000 of the company's indebtedness to the respondent is well-founded; but, when the remainder of the bond is read, it is, I think, not so, for it is provided that "the guarantors shall be liable for the ultimate balance remaining unpaid after all moneys which may have been received from other sources shall have been applied in reduction of the indebtedness which shall be owing from the Ontario and Manitoba Flour Mills Limited to the said bank;" which indicates plainly, I think, that the suretyship was to be in respect of the whole debt of the company, with a limitation of the liability of the guarantors to $150,000.

However, if it be assumed that the guarantee is applicable only to $150,000 of the indebtedness, it by no means follows that the payment of that sum by the company on account of its indebtedness, it still remaining indebted in more than that sum, discharges the guarantors. There is nothing in the cases cited by Mr. Anglin which supports such a view. *Ellis* v. *Emmanuel* (1876), 1 Ex. D. 157, is the leading case on the subject, but there is nothing in it or in the cases referred to by Blackburn, J., who delivered the judgment, to support the view that in the case of such a guarantee, where it is a continuing one, the surety's liability is discharged *pro tanto* by payments made by the principal debtor on account of his indebtedness.

The importance to a surety of his guarantee being treated as applicable to a part only of the principal debtor's indebtedness is that, if he pays that portion, he has in respect of it all the rights of a creditor, and therefore, if the principal debtor becomes bankrupt, is entitled to the dividends on so much of the indebtedness provable against the bankrupt's estate, and, if the creditor holds other securities for his debt, to the benefit of a proportionate part of them.

It is not, as I read the cases, payment by the principal debtor but payment by the surety that gives him these rights; and, as I understand the law, so long as any indebtedness exists, the surety is liable to make good any part of it not exceeding the amount which he has guaranteed. It would, I think, be a strange result that where a surety gives a continuing guarantee for a stated amount of the principal's indebtedness, he is entitled to say,

ONT.

S. C.

MATHER v. BANK OF OTTAWA.

Meredith, C.J.O.

whenever the principal pays an equal amount on account of his indebtedness, leaving however as much still owing, the surety is discharged, or that all payments made by the debtor on account of his indebtedness on a running account discharge *pro tanto* the surety; and that is not, in my opinion, the law.

In the view I take as to the construction of the bond, the letters of Fraser and Burn, if they mean what the appellants contend they do, were not admissible in evidence, because they would vary the terms of the bond; but, if those letters mean what, as I have said, I think they mean, the question as to their admissibility is immaterial, because the only respect in which they differ from the terms of the bond is that it does and they do not make the guarantee extend to the trade-paper, but that is of no importance in view of the fact I have already mentioned, that no claim is made in respect of the trade-paper, and none, it was stated upon the argument, exists.

Upon the whole, I am of opinion that the judgment of my brother Latchford should be affirmed and the appeal dismissed with costs.

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

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

Hodgins, J.A.

HODGINS, J.A.:—In my view, in the absence of any evidence upon the point, the proper inference is that the bond, while no doubt executed in general accordance with the arrangement outlined in Mr. Burn's letter, represented, together with the pledge of the bonds, the terms on which the parties had finally elected to deal.

It may have been that negotiations intervened, or that the bond was drawn so as to make the appellants liable upon the same terms as those upon which they were responsible for the $60,000 already advanced.

Upon these points there is no evidence, and I think the onus was upon the appellants to establish either mistake or inadvertence, if such existed, in connection with the form of the guarantee which they finally executed.

The proposal of the 26th October, 1911, that the contemplated bond was to be surrendered when the proceeds of the bonds for $150,000 were deposited with the respondent, involved not only the appellants' release from this $60,000, but also the surrender of the proposed guarantee. This might involve parting with that

guarantee without payment of the whole $150,000. In Mr. Burn's letter, the proceeds of the bonds, which might well be less than $150,000, were to be "applied in retiring the direct debt of the company," thus providing for the retention of the guarantee to secure the balance. This balance might, of course, include the original $60,000, or some part of it.

In other words, the negotiations were in that position that until the bond was signed it might be said that there had been no final agreement come to.

In view of the situation thus created, and in the absence of evidence which would make matters clear, I think the subsequent action of the parties in recognising the guarantee bond as the measure of their responsibility, and providing specially that the new agreements should not extend the liability of the guarantors to any further or greater extent than existed under the collateral guarantee in question, may well be regarded as decisive.

I think the appeal fails and should be dismissed.

Ferguson, J.A.

FERGUSON, J.A.:—In my opinion, the appellant Mather failed at the trial of this action to obtain any admission of the allegations made in para. 5 of the statement of claim, which reads:—

"Upon receipt of the said letter on the 1st day of November, A.D. 1911, and in consideration thereof, the plaintiff and his fellow-directors executed the said bond and delivered the same to the defendant bank, which thereafter made advances to the said Ontario and Manitoba Flour Mills Limited, in pursuance of the agreement therein set out, and the bonds of the company were duly deposited with the defendant bank as provided by the said agreement."

No evidence was offered in support of this paragraph, and the statement of counsel in reference to this aspect of the case is found at pp. 2 and 3 of the notes of the proceedings at the trial, and reads as follows:—

"Mr. Henderson: The question is as to the extent of the individual personal liability of those parties on that guarantee, which is in form very wide, guaranteeing all the indebtedness of the company to the bank, past, present, and future, but which they say was affected by the fact that there was at the time it was given a contemporaneous agreement with the bank, that, upon the happening of a certain event, that guarantee would be

ONT.
S. C.
MATHER
v.
BANK OF
OTTAWA.
Ferguson, J.A.

delivered up for cancellation. Your Lordship will appreciate the distinction—that we are not trying to cut down the effect of the document as such, but that there was another agreement contemporaneous with that agreement.

"His Lordship: In writing?

"Mr. Henderson: Yes, my Lord: that is why I say I do not think any oral evidence can be of any effect. May I be taken to have stated the facts accurately so far? . . .

"Mr. Hellmuth: I do not concede to my learned friend at all that there is any contemporaneous agreement that governs the bond. There were negotiations which led up to the bond.

"Mr. Henderson: That will be the question of law between us.

"Mr. Hellmuth: I am not conceding that the negotiations shewed anything different in the effect of the bond, but I do take the position that if there is a guarantee bond forming a contract between the bank and those parties, the negotiations, whether verbal or written, which led up to it cannot be given in evidence if they contradict expressly or impliedly the terms of the later instrument that was entered into. There was no contemporaneous agreement, as far as I know . . . There were prior negotiations.

"Mr. Henderson: That will be a question of law between us."

Counsel for the appellant Mather argued that we should infer from the correspondence that the guarantee bond, dated and executed 15 days after the letter, was executed and delivered in consideration of the letter: that, in my opinion, is not the necessary or proper inference or presumption: the presumption, and the proper inference, is, that the bond as executed expressed the true consideration therefor, also the mind of the parties at the time it was executed; the onus was on the plaintiff to displace that presumption by evidence or admission, and, in failing to submit such evidence or obtain such admission, he, I think, failed to make out his claim—that the letter of the 1st November stated an agreement contemporaneous with the bond which might and should be read along with the bond in order to ascertain the rights of the parties.

Counsel for the appellants Orme *et al.* contended that the bond itself limited the undertaking of the guarantors to a guarantee that the milling company would repay $150,000 of any advances

ONT.

S. C.

MATHER v. BANK OF OTTAWA.

Ferguson, J.A.

the bank should from time to time see fit to make to the company; the wording of the first paragraph, containing the direct undertaking of the guarantors, is capable of such a meaning, but to give such a meaning and effect to the whole document would, I think, necessitate our reading out or ignoring more than one of the subsequent provisions of the document.

After a careful consideration of the document, I am of opinion that effect can only be given to some of its terms and provisions by holding that, read as a whole, it amounts to an agreement by the appellants to make good to the bank the ultimate balance of the whole indebtedness of the milling company; the guarantors' liability being limited to the payment of $150,000, interest thereon, costs and expenses.

In the view I have taken, it is not necessary to express any opinion as to the meaning of Mr. Burn's letter of the 1st November.

I would dismiss the appeal with costs.

Appeal dismissed.

Re GRANT.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. March 19, 1920.

INSURANCE (§ IV B—171)—POLICY IN FAVOUR OF WIFE—DEATH OF WIFE BEFORE MATURITY OF CONTRACT—BENEFICIARIES—ESTATE OF INSURED—LIFE INSURANCE BENEFICIARIES ACT (ALTA.).

An insurance policy in favour of a wife who dies before the maturity of the contract in the absence of any declaration provided for by sec. 9 (9) of the Life Insurance Beneficiaries Act (6 Geo. V., Alta., ch. 25), becomes under clause (c) of sub-sec. 9 of the Act one for the benefit of the child or children of the assured and forms no part of the estate of the assured. If the policy is payable to the wife if living and if not then to the insured's executors, administrators or assigns, such insurance goes to the executors of the will of the assured and forms part of his estate.

Statement.

MOTION to determine whether money payable under two life insurance policies form part of the estate of the insured.

D. W. Mackay, for executors.

J. F. Lymburn, for Provincial Treasurer.

Walsh, J.

WALSH, J.:—This is a motion to determine whether the money payable under two policies of insurance on the life of the deceased is or is not to be taken into account in deciding the question of the liability of his estate for succession duty. The Canada Life policy for $5,000 is upon its face made payable to his wife Helen Marion Grant. The Confederation Life policy for $10,000 is upon

ALTA.

S. C.

RE GRANT.

Walsh, J.

its face made payable "to his wife Helen Marion Grant if living; if not then to the insured's executors, administrators or assigns." His wife pre-deceased him and he did not marry again. He never during her lifetime or afterwards made any other declaration with respect to this insurance money, and these policies stood at the time of his death as they had always done. He left but one child him surviving, a boy of nine, and no child of any deceased child.

Sub-sec. 9 of sec. 9 of the Life Insurance Beneficiaries Act, 6 Geo. V. 1916 (Alta.), ch. 25, enacts that if a sole beneficiary dies before the maturity of the contract the assured may by declaration provide that the policy shall be for the benefit of himself or of his estate or of any other person or persons whether or not such person or persons belong to the class of preferred beneficiaries. In the absence however of any such declaration a policy in favour of a wife who dies before the maturity of the contract becomes under clause (c) of sub-sec. 9 one for the benefit of the child or children of the assured, and that is this case. The money payable under the Canada Life policy is upon the facts and by virtue of the statutory revisions to which I have just alluded the property of the son of the assured and as a preferred beneficiary. It therefore forms no part of the estate of the assured and it is only on the property of the deceased that succession duty is payable.

The contention for the Provincial Treasurer however is that this money is property of the deceased within the meaning of the Succession Duties Act, 4 Geo. V. 1914 (Alta. 2nd Sess.), ch. 5, because he had upon the death of his wife the right under the above-mentioned sub-section to declare that it should be for the benefit of himself or his estate or of any other person or persons whether or not belonging to the class of preferred creditors and that this subjects it to duty under sec. 6 (f) of the Succession Duties Act which makes the Act apply to any property of which a person was at the time of his death competent to dispose. The argument is that by force of the above provisions of the Insurance Act this insurance policy became, upon the death of his wife, the property of the assured to so full an extent that he could have done what he liked with it to the entire exclusion of his son and that his son only becomes entitled to it because of his failure to otherwise provide by declaration.

If there was not in the Act any provision expressly covering the case of money payable under a policy of insurance upon the life of the deceased I would be inclined to think that under the very broad definition given by sec. 6 (g) to the phrase "competent to dispose of property" this policy would be property passing on his death and therefore liable to the duty.

Clause (g) of this sub-sec. 6 (amendment 8 Geo. V. 1918, ch. 34, sec. 5), however expressly covers the case of money received or receivable under a policy of insurance affected by the deceased on his life and defines what class of life insurance policy it is that is subject to the tax. Under this clause it is only a policy which was wholly kept up by him for an existing or future donee other than the husband, wife, child, grand-child or mother of the assured that is so subject. I think that it is to this clause (g) rather than to clause (f) that one must look to determine whether or not in any given case money payable under a life insurance policy is liable for duty. When the Legislature provided that a certain class of policy should be so liable it thereby excluded from liability every other class of life insurance policy even if but for such provision some other clause of the Act might be broad enough to include such other class. This policy was originally kept up by the deceased for his wife and afterwards, by operation of law, for his son and so it was not kept up for some one other than his wife and his child and is therefore not dutiable.

The Confederation Life policy however is different. Though his wife was the original beneficiary under it, upon her death it was to be paid to the executors, administrators or assigns of the assured. It was quite competent to the assured to thus direct. He could have done it after her death under the above-quoted sub-sec. 9 of sec. 9 and I see no reason why he could not do it in advance of and conditional upon her death. I do not see how the son can possibly claim this money as a preferred beneficiary. It must go I should say to the executors of the will of the assured and form part of his estate. It therefore was not wholly kept up by him for the benefit of one of the class to which exemption is given by sec. 6 (g) of the Succession Duties Act, and is therefore dutiable.

In my judgment the money payable under the Confederation Life policy is, and that payable under the Canada Life policy is

ALTA.
S. C.
RE GRANT.
Walsh, J.

not, to be taken into account in determining whether or not this estate is liable for succession duty. It was stated on the argument that unless both policies were held to be dutiable the estate would not be large enough to make it liable for duty at all and I therefore think that the Provincial Treasurer should pay the costs of this application as he has failed in his attempt to collect duty from the estate.

Mr. Lymburn informs me since writing the above that the estate is liable for the duty under my finding as to the Confederation Life policy. That being so I direct that there shall be no costs of this application to either party.

Judgment accordingly.

B. C.
C. A.

DRAKE v. CARTER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 19, 1920.

PLEADINGS (§ I N—270)—ORDER ALLOWING AMENDMENT OF STATEMENT OF CLAIM—CORRECTION OF ERROR ONLY—NO NEW CAUSE OF ACTION PLEADED—APPEAL.

When an order is granted allowing the amendment of a statement of claim for the purpose of correcting an error only, and no new cause of action is pleaded by the amendment, an appeal against the order cannot succeed.

[*Mercer* v. *The B.C. Electric R. Co., Ltd.* (1912), 8 D.L.R. 144, 17 B.C.R. 465, followed.]

Statement.

APPEAL by defendant from the order of Murphy, J., of October 10, 1919. Affirmed.

J. A. MacInnes, for appellant.

Sir Charles H. Tupper, K.C., for respondent.

Macdonald, C.J.A.

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

The amended claim is substantially the same as that originally made, no new cause of action is pleaded by the amendment. It is the old cause re-stated in proper form which the original statement of claim failed to give it. The case is analogous with *Mercer* v. *B.C. Electric R. Co., Ltd.* (1912), 8 D.L.R. 144, 17 B.C.R. 465, in which an amendment of like nature was allowed by this Court.

Martin, J.A.

MARTIN, J.A., would dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I think the trial Judge was right in making the order appealed from. It is not, as I view it, a case of setting up a new cause of action at all, but the correcting of an obvious error in the statement of claim.

B. C.

C. A.

DRAKE v. CARTER.

McPHILLIPS, J.A.:—I would dismiss the appeal. It is clear and there could be no misunderstanding of the character in which the defendant is sued in the action, *i.e.*, as assignee for the benefit of the creditors of Joshua Y. Strong.

McPhillips, J.A.

The order for the amendment was rightly made and is not the setting up of a new case.

Eberts, J.A.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

ALTA.

S. C.

NORSTRANT v. DRUMHELLER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. March 19, 1920.

TRIAL (§ VI—320)—ACTION AGAINST MUNICIPALITY AND A CORPORATION—INTERIM INJUNCTION GRANTED—SPEEDY TRIAL ORDERED—FAILURE TO SERVE CORPORATION WITHIN THE TIME ORDERED—FAILURE TO ATTEND TRIAL—OBJECTION—TRIAL—APPEAL—NEW TRIAL ORDERED—SERVICE ON NECESSARY PARTY.

Where one of the defendants to an action, who had an essential interest in the disposition of the same, failed to attend the trial because of failure to serve the notice in time and the Judge directed the trial to proceed subject to the plaintiff's objection, the appellate Court directed a new trial to be brought on without delay, and directed that the defendant be served with necessary documents at once.

Statement.

APPEAL by plaintiff from the trial judgment dismissing an action in which it was alleged that the defendant municipality proposed to erect a stable near the plaintiff's residence and that it would constitute a nuisance and asking damages and an injunction. New trial ordered.

F. C. Moyer, for appellant; *C. T. Jones*, K.C., for respondents.

Harvey, C.J.

HARVEY, C.J., concurs with Stuart, J.

Stuart, J.

STUART, J.:—In this appeal I agree that the appellant is not entitled on the facts now shewn to an injunction on the ground of nuisance and on this point the appeal should be dismissed.

I also agree with Beck, J., and Ives, J., that the purchase of the lots was apparently irregular and *ultra vires* of the council and for the reasons they give.

With regard to the contract for the building I have very grave doubt as to its validity and am inclined with some modifications to the views expressed by Ives, J.

Owing to the absence, however, of the parties necessary to be present on account of their essential interest in the matters I agree that the proper judgment is to allow the appeal and to order a new trial but without reviving the interim injunction which does

ALTA.

S. C.

NORSTRANT v. DRUM-HELLER.

Stuart, J.

not seem in any case to have stopped the completion of the stable or the payment for it. It will still be open to the plaintiff to apply if he is so advised for an interim injunction on new material.

I think I may say that it is of course understood by the Court that the views expressed are subject to further consideration in case added parties, if any, should present arguments on their own behalf and also that the result is merely to leave the plaintiff the option of adding the contractor and serving The Canadian Northern Town Properties Ltd. or of not doing so just as he pleases.

In case of delay on the part of the plaintiff in further proceeding the defendant should be at liberty to apply to a Judge in Chambers for such order as may be just to enforce final disposition of the action.

And I would venture to express the pious hope that the whole matter may be adjusted and settled without the acrimony and expense of further litigation.

With regard to the costs of the appeal I think each party should bear his own.

The appellant has failed entirely in regard to the nuisance while the respondent town so far as its own defence to its own course of action is concerned has also failed.

The costs of the action and of the first trial should be left to the Judge taking the second trial.

As to the counterclaim I concur with what Beck, J., has said.

Beck, J.

BECK, J.:—This is an appeal by the plaintiff from the judgment at trial of Hyndman, J.

The action is a class action brought by the plaintiff on behalf of himself and all other ratepayers of the Town of Drumheller.

The action was commenced on September 9, 1919, against the town only alleging that the defendant municipality proposed to erect a stable near the plaintiff's residence and that it would constitute a nuisance and asking damages and an injunction.

Then on September 29, 1919, an interim injunction order was made. The plaintiff amended his statement of claim adding The Canadian Northern Town Properties Company, Limited, as a defendant and alleging as additional matter that by contract dated December 31, 1917, the company had agreed to sell to the municipality 3 certain lots within the municipality for the price of $1,450: payable in 3 annual instalments, payable the first on

the date of the agreement, the second on December 31, 1918, the third on December 31, 1919; that the town had made these payments and had obtained a certificate of title for the lots; that no by-law had been passed by the council or approved by the ratepayers of the town for the raising of the purchase money; that it was upon these lots that the municipality proposed to erect the stable; that no by-law had been passed authorizing the erection of the stable nor any contract therefor made by the council. The prayer for relief asked (1) a declaration that the agreement of December 31, 1917, between the defendants, the municipality, and the company was illegal; (2) rescission of the agreement and re-transfer of the lots and repayment of the purchase price; (3) damages; (4) injunction.

The injunction already made was continued until the trial, but it was ordered that the plaintiff should serve the defendant company within 10 days and that the case should go to trial promptly that the defendant municipality might move to set the action down for trial. Owing to the death of the registered attorney of the defendant company—a "foreign" company—and a number of other accidents and circumstances, the plaintiff was unable to serve the company within the 10 days limited. The defendant municipality got the case put upon the list of cases for trial, whether by a special order or not does not appear, though I fancy without special order.

The action came on for trial before Hyndman, J. Counsel for the plaintiff explained to the Judge the difficulties he had encountered and the fact that the company had not yet been served and pointed out that if the trial were then forced on another hearing with the company as an effective party would be necessary. Counsel for the municipality urged that the case proceed. The Judge directed that the case should proceed. It did proceed and the Judge held that the plaintiff could not succeed, at all events as the action was then constituted, with respect to the purchase of the lots (in which I think he was right, the company not being before the Court) nor on the ground of the ineffectiveness of the contract for the construction of the stable (in which, quite aside from the previous question, I think he was also right) nor on the ground that the use of the stable for the purpose proposed would be a nuisance because the facts failed to establish it (in which, also, I think he was right).

ALTA.

S. C.

NORSTRANT v. DRUMHELLER.

Beck, J.

I think the trial Judge's judgment should stand insofar as he found that no prospective nuisance had been established—without prejudice, of course, to the right of the plaintiff to raise the question in the future of a nuisance arising from the actual use of the building.

As I have intimated I think the Judge's decision with regard to the contract for the erection of the stable was right, apart from the question of its place of construction.

It is pointed out in Meredith and Wilkinson's Municipal Manual, page 244, that only in the two Provinces of Ontario (Municipal Act, sec. 249) and Manitoba (Municipal Act, sec. 327), it is provided by statute that the powers of a municipal corporation shall be exercised by by-law.

The (Alberta) Towns Act, 2-3 Geo. V. 1911-12, ch. 2, with a number of amendments, provides by sec. 163 that a town may pass by-laws for a variety of purposes enumerated, most of which contemplate that the town is to deal with the particular matter in a legislative capacity. "May" in such a connection doubtless means the conferring of a power which if exercised must be exercised by by-law.

Sec. 178 provides that a town *may*, subject to certain subsequent provisions, pass by-laws *for contracting debts* by borrowing money *or otherwise*, etc.

Sec. 179 provides that by-laws for contracting debts or borrowing money, *which do not provide for the payment of the debts, contract or money borrowed within the financial year*, shall before the final passing thereof receive the assent of two-thirds of the burgesses voting thereon.

The case of *Bernardin* v. *North Dufferin* (1891), 19 Can. S.C.R. 581, was a Manitoba case. It depended upon the Manitoba Municipal Act of 1884, in which apparently the provision that the powers of the municipality should be exercised by by-law did not appear. That case decided that "may" was permissive only and did not prohibit a municipality from exercising their jurisdiction otherwise.

In Meredith and Wilkinson's Municipal Manual it is stated—correctly in my opinion—page 6:—

> At common law it was necessary that the contracts of a corporation aggregate should be executed under its common seal, but from the very earliest times certain exceptions to this rule were established and in trivial matters of daily occurrence and in matters of urgent necessity the seal was

not essential. These exceptions have been gradually extended, and it is now settled that a seal is not necessary in the following cases:—

. . . . .

(2). In the case of municipal corporations contracts with regard to matters of everyday occurrence or matters of convenience amounting almost to necessity.

(3). Contracts by corporations (including municipal corporations) where the consideration for them has been executed by the party seeking to enforce them . . . and the work is beneficial and incidental or ancillary to the purpose for which the corporation exists.

Numerous cases are cited for these propositions and in my opinion the body of Canadian authority is so strongly developed and fixed as to make it now inexpedient to attempt to unsettle it by reference to English authority, if indeed there are any, which would seem to lay down a more stringent rule in favour of municipalities. I think the trial Judge was right in applying these principles to the facts of the case relating to the erection of a stable as he did in his oral reasons for judgment as follows:—

I think, the Town of Drumheller being a community, according to the evidence of the secretary-treasurer, of about 2,050 people within the corporate limits with a considerable suburban population as well, that the erection of a stable 16 x 20 feet in area which I think this one is, costing $615 is not a very serious matter. Of course Drumheller is different from Calgary or Edmonton where such an item would be considered very trifling. I do not say it is altogether trifling in Drumheller, but it is not of sufficient importance to require the submission of a by-law to the ratepayers and it is an amount which might very well be paid out of current revenue and that was the arrangement, which I understand was intended. But Mr. Moyer objects that even though this were to be paid out of current revenue that this council should have taken the precaution to pass a by-law formally in council. That was not done, that is clear: nevertheless the matter of a stable was discussed and in council a resolution was put through that a stable for these horses be constructed. There is nothing mentioned in the minutes as to cost or the letting of the contract or anything of that kind. The public works committee were authorized to take this matter in hand. The question of their authority is not very clear. At any rate what they did do, rightly or wrongly, was to enter into an agreement with a contractor to put up this stable for the contract price of $615. There is nothing further with regard to this on the records of the council except that they authorized payment of the sum of $100 to the contractor on account of the erection of the stable. It seems to me then that that is a sufficient ratification of the contract, made at the instance of the public works committee, to render the town liable. In other words if the contract was incomplete before, the resolution to pay him $100 on account would confirm what was done. It is not absolutely necessary in every case that strict formalities should be observed. Therefore it seems to me that the fact of the town having 4 horses, which had to be cared for; boarding them at a livery stable; evidently needing a stable of their own very badly; and other stables being

ALTA.

S. C.

NORSTRANT v. DRUM-HELLER.

Beck, J.

scarce and difficult to obtain created a situation requiring attention and possibly urgent attention and that there ought to be considerable latitude allowed under such circumstances and that the strict formalities should not be insisted upon or required.

This conclusion might at first sight appear to justify the judgment in favour of the defendant on the counterclaim for damages for being prevented by the injunction from using the stable, but this is not so. The counterclaim was not justified by the practice of the Court. The defendant's remedy is by an inquiry to ascertain the damages which the plaintiff ought to pay upon his undertaking given upon the issue of the injunction, the damages being fixed rather on equitable principles. *Albertson* v. *Secord* (1912), 1 D.L.R. 804, 4 Alta. L.R. 90. The counterclaim should be struck out and the inquiry as to damages if eventually directed should be directed only after the determination of all other questions in the action. It may possibly then be found that in view of all the circumstances the defendant ought not to recover damages, though the injunction may not have been justified on the ground upon which it was issued.

I think, however, that the plaintiff, on behalf of himself and the other ratepayers, has a right to have the question of the validity of the purchase of the lots passed upon by the Court and that this can be done only if the vendor company is a party to the action and I would give him leave also further to amend by adding the individual members of the council who were parties to the transaction attacked if he should be advised to add them also. If the plaintiff should ultimately succeed in setting aside the transaction with reference to the lots and it were not hereafter approved by a vote of the ratepayers, the erection of the stable upon those particular lots would have proved to have been improper and though as I think without prejudice to the contractor. I think it is unfortunate that this action was brought to trial before all the questions raised between the parties were ready for adjudication.

It seems to me that the plaintiff greatly exaggerated the importance of an anticipatory injunction and would have been better advised to have abandoned it wholly if he could not have obtained terms—rather than go to trial with the action constituted as it was.

As to investigating the validity of the transaction relating to the lots, the provisions already quoted of the Towns Act shew that it was beyond the powers of the council, without a by-law submitted to and approved of by the ratepayers. Had the transaction been incomplete it is clear enough that ratepayers might have obtained an injunction to prevent its being completed. See McQuillin, Municipal Corporations, vol. V., ch. 52, page 5311, *tit*: "Citizens and taxpayers suits."

The fact that a contract beyond the competence of a corporation has been completed by conveyance and payment of the price, in my opinion, does not prevent the application of the same principle. The provision of the Land Titles Act as to the conclusiveness of a certificate of title was never, to my mind, intended to touch such a question as is here involved.

The members of a municipal council are trustees for the ratepayers, and are personally responsible to them as for a breach of trust if they are guilty of fraud or exceed their powers in relation to property or funds of the municipality. Instances of such actions are *Paterson* v. *Bowes* (1853), 4 Grant 170; *sub nom. Bowes* v. *City of Toronto* (1856), 6 Grant 1; (1858), 11 Moo. P.C.C. 463; *Attorney-General* v. *Belfast* (1855), 4 Ir. Ch. R. 119. In our own Court the case of *Livingstone* v. *Edmonton Industrial Assn.* (1915), 25 D.L.R. 313, 9 Alta. L.R. 343, shews that the Attorney-General is not a necessary party but that an action by one or more ratepayers on behalf of themselves and all other ratepayers will lie.

In *Attorney-General* v. *Belfast* (*supra*) it was held and declared that certain members of the corporation council must exonerate the rates and other property of the corporation from certain unauthorized loans, without prejudice to any question which they might raise, on the Master's report, as to their right to be recouped out of such property or funds, if any, as the Court might think justly applicable to that purpose.

Ordinarily I should say an action on behalf of all the ratepayers to set aside a transaction on the ground that it was *ultra vires* would name as defendants the individual members of the council of the municipality and the municipality and whereas in this case there appeared to be a third party interested such third party and if the action were successful the individual councillors would, by

ALTA.

S. C.

NORSTRANT v. DRUMHELLER.

Beck, J.

the judgment of the Court, be protected by application of the doctrine of subrogation so far as it appeared to be just and equitable.

In the Irish case no attempt was made to affect the position of the third parties to the transactions attacked, who consequently were not made parties to the action.

In the present case the interests of a third party, namely, the vendor company, are sought to be affected and, therefore, they were properly and necessarily made parties. On the other hand, the plaintiff so far, at least, has not sought a personal remedy against the individual councillors but contents himself with the protection which he hopes will be afforded by repayment of the purchase price to the municipality and the reconveyance of the lots to the company, and consequently has not made any individual councillors parties. In my opinion he is entitled so to frame his action. I think he should now be allowed to serve the defendant company and proceed to a trial with the view to a judgment to the effect asked for in that respect. I would give him leave so to do. As to the disposition of the costs of the trial already had, I think that will be best left to be dealt with by the Judge before whom the next trial of the action shall take place.

As to the costs of the appeal I would make no order.

Ives, J.

IVES, J.:—The plaintiff brings this action on behalf of all ratepayers of the Town of Drumheller as well as his own. The Canadian Northern Town Properties Company Limited is joined as a party defendant but was not served with the statement of claim and was not before the trial Court.

The plaintiff says that he is a ratepayer of the defendant municipality, that by a written agreement between the defendants dated December 31, 1917, the town agreed to buy from its co-defendant certain lands in the municipality for $1,450 payable in 3 annual instalments, the last of which became due and was paid in 1919 whereupon the lands were conveyed, that no by-law was passed by the town's council or voted upon by the ratepayers to authorize the purchase or the payment of the money. The evidence clearly establishes the truth of these allegations.

In 1918 the plaintiff erected an expensive dwelling for his own use in the town. Soon afterward a horse stable was erected for the municipality on the said purchased lands immediately in rear

of plaintiff's dwelling. The erection of this horse stable was under a contract with the "Works" committee of the town council, the contract price being $615. The plaintiff alleges that the stable is erected without authority and claims (1) a declaration that the agreement for purchase of lands of December 31, 1917, is illegal; (2) rescission of that agreement, a reconveyance of the lands to the company and a return of the purchase money; (3) damages for depreciation of plaintiff's property; (4) an injunction restraining the municipality from proceeding with the erection or user of the stable; (5) costs.

The defendant municipality is subject to the provisions of the Town Act, 2-3 Geo. V. 1911-12 (Alta.) ch. 2. Under Part II. of that Act entitled "Municipal Government" it is provided by sec. 13 that: "The powers of the said corporation shall be exercised by the council of the town which shall consist of a mayor and six councillors."

And sec. 21 provides that: "A majority of the whole council shall be necessary to form a quorum and no act nor other proceeding of any council shall be deemed valid or binding on any party which is not adopted at a regular or a special meeting of the council at which a quorum is present."

Under "Part IV." of the Act, sub-head "Powers and Duties of the Council," it is provided by sec. 163 that: "The council of every town may pass by-laws not inconsistent with any statute etc. . . . for—(sub-sec. 18) the erection of halls, lockups, weigh houses, markets and such buildings as may be beneficial to the municipality and the expropriation of lands therefor."

Sec. 173 defines the manner in which town by-laws shall be passed by the council.

Then under the sub-head "Money By-laws," sec. 179 provides that: "By-laws for contracting debts or borrowing money which do not provide for the payment of the debts contracted or money borrowed within the financial year shall before the final passing thereof receive the assent of two-thirds of the burgesses voting thereon in the manner provided hereinafter."

It would seem to me that the sections of the Act which I have quoted disclose an intention on the part of the Legislature to protect the interests of the ratepayers where expenditure of any of their money is concerned by first providing that the muni-

ALTA.
S. C.
NORSTRANT v. DRUM-HELLER.
Ives, J.

cipality shall act only by its council. Then by defining the powers and duties of that council and finally by giving the burgesses a direct say when the proposed expenditure or debt cannot be met out of current revenue.

I think the contention based upon the use of the permissive word "may" in sec. 163 loses its force when one realizes that without that word no authority is given in the Act to do the numerous daily acts necessary in municipal administration and contemplated in the section and in my opinion the word is not used in a permissive but an authoritative sense. It may seem a hardship that trivial matters should be subject to a rigid adherence to the forms prescribed by the Legislature but these forms are deemed necessary in the interests of the due administration of the trust reposed in the mayor and 6 councillors who are but the electors' trustees and to obviate arbitrary conduct or acts without due consideration, nor do I see a serious inconvenience in requiring all things of a town to be first considered in council and then authorized by council before being carried into performance.

There is no provision in the Act for a "Works" committee or for any delegation of its powers by a council.

The fact that the "Works" committee in the present case reported to council the necessity of a horse stable and a minute that the council decided to take steps for the construction of one is not authority for letting a contract by the council, or any one on its behalf, without the prescribed formality of a by-law passed in the prescribed way.

As to the validity of the land purchase agreement, surely the facts condemn it. But I think no judgment can be given against the company until that defendant is given an opportunity of being heard. In my opinion there should be a new trial. The defendant company should be served; the councillors who paid the purchase instalments should be added as defendants, if the plaintiff be so advised; the contractor who built the stable should be added as a defendant if the question of payment to him is raised. Meantime the council should be restrained from making any further payments on account of the barn. There should be no costs of this appeal.

I concur with Beck, J., in his disposition of the counterclaim for the reasons he has given.

McLAUGHLIN v. GENTLES.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. December 19, 1919.

PRINCIPAL AND AGENT (II B—17)—AUTHORITY OF AGENT—ACTION AGAINST UNDISCLOSED PRINCIPALS—GOODS SOLD ON AGENT'S CREDIT—NO KNOWLEDGE OF AGENCY ON PART OF PLAINTIFF—LIMITATION OF AGENT'S AUTHORITY—GENERAL AGENCY.

Where there is a general agent of undisclosed principals with a special restriction or limitation of his authority, one who contracts with him as a principal can only resort to the real principals subject to the limitation which has been placed on the agent's authority, because such person did not deal with him as his agent, nor had there been any holding out of him as an agent, and no contracting upon the faith of the authority. [*Miles* v. *McIlwraith* (1883), 8 App. Cas. 120, applied and followed.]

Statement.

APPEAL by the defendants other than the defendant Chisholm from the judgment of LENNOX, J., at the trial, in an action brought to recover the price of goods sold and delivered by the plaintiff to the defendant Chisholm upon his order. The plaintiff alleged that the defendant Chisholm was the agent of the other defendants, and that they were liable for the price of the goods.

The trial Judge gave judgment for the plaintiff for $939.77 against all the defendants, and directed the appellants to pay Chisholm's costs of defence. Reversed.

H. J. Scott, K.C., for appellant Drayton.

T. R. Ferguson, for appellants Gentles, Burton, and Millar.

A. J. Russell Snow, K.C., for respondent.

T. J. Agar, for defendant Chisholm.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—Appeal by the defendants other than Chisholm from a judgment of Mr. Justice Lennox, dated the 18th June, 1919, under which he held all the defendants, including Chisholm, liable to the plaintiff for the sum of $939.77. The judgment also directed the defendants other than Chisholm to pay his costs of defence.

As to what the learned trial Judge's views of the facts were we have no information, as no reasons were given by him, and it is impossible to determine what view he took of the questions involved. This necessitates an independent consideration of the evidence in order to see what results follow from it.

It appears that the respondent knew nothing of the fact that Chisholm was a member of a syndicate or was acting for others, but it is suggested that he ought to have gathered something

ONT.

S. C.

MCLAUGHLIN v. GENTLES.

Hodgins, J.A.

of the kind from a remark made by the defendant Chisholm a few days after his account had been opened. I will refer to the effect of this later. His own version is given in a letter written to the appellant Millar on the 19th September, 1918, in which he states that he did not know that any person was interested with Chisholm when the goods were sold and delivered. He has now, however, elected to sue the syndicate, which of course includes Chisholm.

Upon the question necessary to be considered before dealing with the law of agent and undisclosed principal, of the fact of agency, its scope and its limitations, there is a very clear and distinct divergence between the appellants and Chisholm. He says that there was not, in any instructions he got, any indication as to the time the work was to be continued, the amount of the expenditure, the amount of goods to be bought, their quality, or the number of men to be hired; that it was his intention to "make a mine" of it, and that if the four members of the syndicate contributed at the rate of $200 a month while operations were going on, he was willing to contribute his services at the same rate, and was in that way on an even basis; but, if more than $2,000 in all should have to be expended, the other members of the syndicate would provide the excess. He also says that he would not have gone up if limited to the expenditure of $2,000 nor to a time-limit of two and one half months, and that he had no instructions from the appellant Millar that all he was to do was to get out the ore.

This position is strongly contested by the appellants Millar, Burton, and Gentles, who insist that there was a limit of time and expenditure; that this was recognised by Chisholm in his correspondence; that the instructions as to ore were specified and were recognised in the correspondence; and that the situation at the time of Chisholm's engagement was that they had an option with the right to prove the mine by getting out ore and having it smelted. It followed, they say, in the natural course of business, that that was what they wished to do, and that any other action would have been absurd.

The position of the appellants on this point appears to be a reasonable one. Unfortunately the final agreement which is set up by them was not signed by anybody, and its binding effect depends upon oral testimony.

Chisholm stated in his examination that this agreement was prepared after he went up north, and that he never agreed to the clause therein which would limit his authority. The three appellants already named, on the other hand, all say that the agreement was dictated as evidencing the final agreement of all parties; and, while the appellant Millar will not definitely say that Chisholm was present, both the other appellants are positive that he was there and assented.

A curious circumstance and one which has not been satisfactorily explained is that Chisholm, on applying to set aside the noting of the pleadings as against him, stated in his affidavit that the agreements governing the syndicate were three in number, and gives the date of one of them as the 15th August, 1916. This, he admits, refers to the unsigned agreement, and he testifies that he knew about it before this action was begun and that it was produced at the trial of another action at Englehart, which he says took place over a year ago. At that place he was present for the purpose of defending an action in which he was being sued for the price of goods supplied to him while operating on this property. It is worth noting that the agreement is dated the 15th August, 1916, whereas the date given by the defendant Chisholm for his departure north is the 21st August, 1916. If both these dates are correct, he is mistaken as to the time of the preparation of the document.

The conclusion I would draw from the whole evidence, both oral and in writing, particularly the internal evidence supplied by the letters of Chisholm, coupled with the date when Sir Henry Drayton's assent to come in was received in Toronto, is that this document was dictated in the presence of all parties as expressing the final terms of their agreement, and that it was intended that it should be signed upon Drayton signifying his wish to participate, and that it was left unsigned when he did assent, because the parties had then scattered.

The first $1,000 was deposited in the bank on the 15th August, 1916; $500 on the 16th and $500 on the 17th August, the latter no doubt being from Sir Henry Drayton, as his letter to Millar enclosing his cheque is dated at St. Andrews, N.B., on the 14th August, 1916.

The effect of this conclusion is that the idea which appears to have coloured all Chisholm's actions, namely, that he was

ONT.

S. C.

MCLAUGHLIN v. GENTLES.

Hodgins, J.A.

untrammelled as to time, expenditure, or the character of the work, and that his job was to mine and not merely to get out ore for a smelter test, was erroneous.

The third paragraph of the recitals in the agreement of the 15th August, 1916, runs as follows:—

"And whereas the parties hereto have each agreed to supply five hundred dollars to explore, test, dig and remove ore from the said properties, the five hundred dollars to be contributed by Chisholm in salary at two hundred dollars per month, commencing with the 21st instant."

The operative clauses read:—

1. "The parties hereto are equally interested in and entitled to the benefits of a contract between A. E. Scanlon and C. Millar dated 2nd August, 1916, for a working option upon the said properties.

2. "The said Burton, Gentles, Millar, and Drayton shall each contribute five hundred dollars, and the said Chisholm shall contribute two and one half months' service, commencing with the 21st inst., in obtaining ore therefrom.

3. "The moneys to be paid by the parties, other than Chisholm, shall be deposited in the bank to the credit of C. Millar in trust, and he shall disburse the same in mining ore therefrom.

4. "The said Chisholm shall account to the said Millar for all moneys received from him or from the said property and its minerals, to be disbursed in mining the said claims.

5. "No partnership or agency exists between the parties hereto, and none of them is authorised to pledge the credit of another or the others of them.

6. "In case it is thought advisable not to mine the said property for two and one half months, then the said Chisholm shall be credited with the time he is engaged thereon at the rate of two hundred dollars per month."

It is to be observed that in the earlier signed agreement of the 16th June, 1916, it was provided that Chisholm's share of the $200 cash advance was to be paid "from the first shipment of ore," and that it was pursuant to this that the option was obtained on the 2nd August, 1916.

No one can read the letters without being convinced that the getting out of sufficient ore to put through the smelter test was

to precede regular mining operations, and that these were only to be decided upon if that test proved a success. What is chiefly relied on as indicating a contrary intention, namely, the getting out of timber and the damming of the stream, might have been quite as consistent with getting out ore as with settled mining operations. The appellant Millar, when he, Gentles, and Burton visited the property on the 5th October, 1916, seems to have decided that what was being done was on too extensive a scale.

Chisholm says that he shewed them the ore, and that Millar told him not to come down till he took a car-load of ore down, and this mention of ore is corroborated by Millar's letter of the 10th October, 1916, and Chisholm's letter of the 15th October, 1916.

Chisholm also says he had men cutting timber, and told Millar that they were logs for a building, and that he would have to start building some buildings to house the men, as it would soon be coming on cold weather. Gentles says he asked why he (Chisholm) was not getting out ore, and Chisholm said he was just going to begin. Burton says that Chisholm's reply was that he ought to be able to get some out before the money was all used up—about a car-load.

Chisholm's letter of the 15th October, 1916, says: "I note your advice about getting out some ore before all our appropriated money is expended. I shall do my very best to do so and carry on the absolutely necessary work with as little dead work as possible." He adds that what he has "expended in August and September amounts to $707.27. This, deducted from $2,000, leaves a balance of $1,292.73." This was in reply to Millar's letter of the 10th October, 1916, in which there appears this hint, "Remember we start with only a bank-roll of $2,000, and when that is exhausted we are to confer." That "was my reason for urging you to hog the vein, because if the money is all spent without producing beneficial results you are sure to find a disinclination to proceed further." On the 19th October, 1916, Millar replies to the letter of the 15th October, already quoted, and says: "Before it" (the bank-roll) "is all used up we shall have to meet to decide on the future. I hope you will be able to ship a car of ore before then."

The explanation given in the witness-box by Chisholm as to this reminder is not convincing. He says: "I waited for instruc-

ONT.

S. C.

McLAUGHLIN v. GENTLES.

Hodgins, J.A.

tions; I followed on my original agreement; a man would not start on a property unless there was an understanding to go ahead with it to make the very best he possibly could of it." He says that, unless it referred to the bank-account as it stood, he does not know what was the limit Millar referred to in his later letter of the 7th November, 1916, in which the expression is used, "I have no authority and you have no authority to exceed that limit." He adds "I did not understand there was any limit," but he did not write and say so. When that letter is looked at, its terms are so clear that no one can mistake them; it says that if he overruns the limit no one will be liable for the expense but himself.

Altogether I cannot acquit Chisholm of a design to hold on to his position as long as he could and to do things in his own way irrespective of the wishes or rights of his co-adventurers. Whether this was done to keep himself employed or under the domination of an idea that the ground he had secured after so much negotiation was a real mine and must be developed, and that his success would come in time to turn the objectors into converts, I cannot say. The result is that he exceeded his authority and incurred greater indebtedness than he was authorised to do.

That the idea I have mentioned was persistent is evident from his attitude after the visit made by Gentles and Glass about the 1st November, when, according to Gentles (who told Chisholm he came up to represent Mr. Millar and Mr. Burton), he was told to go no further.

This was put to Chisholm during his cross-examination in this way:—

"Q. When he gave you those instructions did he not say, 'I am representing these parties, and I give you these instructions not to go any further till you come down and we will see about it?' A. He would be one of the parties; it was not a letter of written instructions to close down.

"Q. Did not he tell you that he came there representing the others and gave you instructions not to go any further? A. Came in there to see and make an examination with his engineer.

"Q. And told you to go no further? A. I could not afford to close the place and leave everything alone there. I reported to Millar as soon as I was called on."

As, however, the supplies furnished by the respondent were of a character which would be necessary whether the work was exploration or mining, it is necessary to see whether the moneys provided were expended before the respondent's debt was incurred.

I find, on examining the cheques, bank-book, and exhibits, that the only items in the whole account which are not shewn to have been incurred previous to the 31st October, 1916, are two in number; these are represented by the following cheques:—

Nov. 27. Chisholm, petty cash..... $100.00
Nov. 27. J. B. McLaughlin (respondent herein) 4.15

There is nothing to indicate the date of this latter item, except the fact that in exhibit 13, which is the pay-roll for the month of October, there is attached, in Chisholm's handwriting, a list of unpaid bills, the first of these being this item, the others being incurred in September, 1916; so that probably this small amount was incurred in the same month. The amount paid in January, 1917, $524.60, to the Northern Canada Supply Company, was criticised during the argument, but I find that that account was all incurred before the 26th October, 1916, when that company drew on Millar for the account. They had, as early as the 18th October, notified Millar that they were looking to him; and he had, on or about the 19th October, agreed to accept a draft for it.

The result is that the whole of the $2,000 has been expended for goods supplied previously to the opening of the account with the respondent; and, if the appellants are now made liable, it must be upon the sole ground mentioned, namely, that the respondent is not bound by the limitation placed by the principal upon the agent.

If Chisholm was a general agent for the appellants, it is clear that under the authority of *Miles* v. *McIlwraith*, (1883), 8 App. Cas. 120, there would be no liability. That case decides that where there are general agents of an undisclosed principal with a special restriction or limitation of their authority, one who contracts with them as principals can only resort to the real principal subject to the limitation which has been placed upon the agents' authority, because he had not dealt with them as his agents, nor had there been any holding of them out or crediting as such, and so contracting upon the faith of the authority. Is not the situation here that of a general agency within the meaning of the above case?

ONT.

S. C.

MCLAUGHLIN v. GENTLES.

Hodgins, J.A.

In Story on Agency, 9th ed., sec. 17, it is said that "a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business, or employment."

In Wright's Principal and Agent, 2nd ed., p. 87, a general agent is defined in this way: "He is usually a person to whom the principal has entrusted the management of a particular business, such as an estate, or the manager of a business. Such general agent will, as between himself and the principal, have authority to do whatever a person in the position which he occupies usually does, except so far as he may have been restricted by the direction of the principal."

A particular agent is one who is given authority to deliver a particular message or buy a particular thing on one occasion or do some special thing, and has no implied authority *aliunde* from his position or the nature of his business. An agent who is a particular agent, not only as between himself and his principal, but also as between the principal and the third party, is one who has nothing in the nature of his ordinary business which will lead the third party to suppose he has more authority than the principal has actually given him.

It must be admitted, however, that the cases are not uniform, and that principals have been held liable where the agency was a general agency.

In the case in hand it does not seem to matter much whether the position was as outlined by the appellants or that sworn to by Chisholm. In either case, whether his authority was limited or not, it was to go upon the property in question to engage in operations which were in the nature of mining or exploration and to order such things as were reasonably necessary for that purpose. The limitation did not restrict his authority so far as third persons were concerned, except that it was to cease when a certain amount had been expended; up to that limit he was the agent of the appellants to do such acts as were necessary for the purpose for which he went upon the ground; and, so far as the goods in question are concerned, they would, apart from the limitation, have been equally necessary whether he was to take out such ore as was readily available on or near the surface of the vein, or was to go down deeper or operate more largely with the view of mining the property, as if it was owned by his principals and himself.

The cases to which I have referred as involving the question in some difficulty are the following:—

In *Edmunds* v. *Bushell* (1865), L.R. 1 Q.B. 97, the defendant accepted bills in the name of Bushell & Co. contrary to his authority, which bills were given to persons with whom Bushell had dealings in the way of business. Mellor, J., says (p. 100): "It would be very dangerous to hold that a person who allows an agent to act as principal in carrying on a business, and invests him with an apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation."

That case was followed by *Watteau* v. *Fenwick*, [1893] 1 Q.B. 346. There the defendants, a firm of brewers, who were the owners of a beer-house, appointed a manager of the business. The license was always taken out in his name, which also appeared over the door. The manager was forbidden to purchase certain articles required in the business, as these were to be supplied to him by the defendants. The manager, in contravention of his instructions, ordered such articles from the plaintiff for use in the business, and the plaintiff supplied them and gave credit to the manager only. Subsequently he discovered that the defendants were the real owners of the business and sued them for the value of the goods. The Court, consisting of Lord Coleridge and Wills, J., held the defendants liable. Mr. Justice Wills, at p. 348, says:—

"There seems to be less of direct authority on the subject than one would expect. But I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal."

ONT.

S. C.

McLAUGHLIN v. GENTLES.

Hodgins, J.A.

He then deals with the question of dormant partnership, stating that it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner, and asserts that the law of partnership, on such a question, is nothing but a branch of the general law of principal and agent, and is conclusive on the point now under discussion. He then refers to *Edmunds* v. *Bushell* (*ante*) and to the argument there made that, where there is no holding out, then, in order to make the principal liable, an agency in fact must be shewn. He remarks that he cannot find that any doubt has ever been expressed that that case is correct, and that he thinks it right, and that very mischievous consequences would often result if that principle were not upheld.

Shortly after that case was decided, *Johnston* v. *Reading* (1893), 9 Times L.R. 200, was decided by the same Court, consisting of Lord Coleridge and Cave, J. Lord Coleridge in giving judgment said that the grounds of the decision in *Watteau* v. *Fenwick* were that the articles ordered by the manager of the business were such that the business could not possibly be carried on without them, and he was therefore obliged to order them. The point involved in this case was different, and was whether travellers of mercantile firms, although agreeing to pay their own expenses, could bind their principals to any extent for vehicles on credit. The Court considered that there was no general custom or usage proved that mercantile firms paid their travellers' expenses and allowed them to make contracts on the credit of their employers for vehicles to carry them; there being no general custom, the employers were not liable.

In 1910, the case of *Kinahan & Co. Limited* v. *Parry*, [1911] 1 K.B. 459, was decided on appeal from the decision of a Divisional Court consisting of Pickford, J., and Coleridge, J. The action was brought to recover the price of whisky supplied at a hotel of which the defendants were the owners. The defendants had appointed a manager, in whose name the license was taken out, and whose name appeared over the door as the licensee. Contrary to express instructions which had been given by the defendants to the manager, he ordered the whisky in question from the plaintiffs, who gave credit to the manager only, and the whisky

was delivered at the hotel. The Divisional Court, upon the authority of *Watteau* v. *Fenwick*, entered judgment for the plaintiffs. The Court of Appeal set that aside, holding that there was no evidence that the manager was in fact the agent of the defendants in the particular transaction, or that the whisky was supplied for the use of the hotel and not to the manager personally, and that therefore no question as to the application of the law of principal and agent could arise in the case. Judgment was therefore entered for the defendants.

In this Province the principal case considered by the Court of Appeal is *Becherer* v. *Asher* (1896), 23 A.R., (Ont.) 202. The headnote is as follows:—

"Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name but for their benefit, to sell their goods at invoice prices, they are not liable for the price of goods of the same kind purchased by the agent for himself from other persons without the knowledge or authority of his employers."

Three of the learned Judges considered that *Watteau* v. *Fenwick* was not applicable, or expressed doubts about it, while Burton, J.A., considered it well decided. The majority of the Court, however, came to the conclusion that under the circumstances there was no authority to pay at all and no general agency, as Becket in that case was merely established in Toronto for the purpose of selling the defendants' goods, which were to be consigned to him; and, while the plaintiffs in that case were doubtless deceived by Becket as to the ownership of the stock and so trusted him, they failed to make out the liability of the defendants.

In the Solicitors' Journal (1893), vol. 37, p. 280, the *Watteau* case is criticised as being inconsistent with the case of *Miles* v. *McIlwraith* (*ante*). This criticism is adopted by the editor of the Harvard Law Review (1893), vol. 8, p. 50. The Law Quarterly Review as well, vol. 9, p. 111, does not feel clear that the *Watteau* case was rightly decided, and Sir Frederick Pollock's criticism, both here and in his work on Partnership (8th ed., p. 30), is that the analogy of a dormant partner is fallacious: he asks: "Is a dormant partner liable merely because he is an undisclosed principal? Is it not rather because he is, by the partnership contract,

ONT.
S. C.
McLAUGHLIN
v.
GENTLES.
Hodgins, J.A.

liable to the same extent as the known partners?" As to *Edmunds* v. *Bushell* he indicates doubts also, as does the Solicitors' Journal (*ante*).

In Halsbury's Laws of England, vol. 22, p. 25, the following note appears:—

"It was said in *Watteau* v. *Fenwick* (a case of agency), that an undisclosed principal was liable for the acts of his agent, although the latter was neither held out as such, nor expressly authorised, but the *dictum* must be regarded as of doubtful authority."

In Wright's Principal and Agent, 2nd ed., p. 110, the case of *Daun* v. *Simmins* (1879), 41 L.T.R. 783, is cited as deciding that it is not a question of law but of evidence as to what the authority of the agent was, and that where it was known that the house was a tied house the owners of it were not liable for goods supplied from an outside source.

That case, decided by the Court of Appeal, was not cited in *Watteau* v. *Fenwick*.

The last reference to the principal case appears to be *Lloyds Bank* v. *Swiss Bankverein* (1912), 17 Commercial Cases 280, and (1913) 18 Commercial Cases 79. Hamilton, J., in that case (vol. 17, pp. 292, 293), says:—

"The case of *Watteau* v. *Fenwick* was cited. It is a case which has been questioned by opinions that are entitled to respect, and is a case not on partnership at all, but on the ordinary rules of principal and agent, and I think it may well be distinguished from the present case, in any view of the matter, on the ground that the Court there had evidence, or assumed that there was evidence, or took judicial notice, that the ordinary course of dealing of the manager of a public-house was very much more extensive and precise in fact than the evidence as to the joint account I have in this case. As that finding of fact was the basis of the decision in *Watteau* v. *Fenwick*, it seems to me to be distinguishable."

In view of the doubt expressed as to the case which is relied on as rendering the appellants liable because of the bare fact of agency, I think it is open to this Court to follow *Miles* v. *McIlwraith*, untrammelled by the decisions I have mentioned. It seems to be straining the doctrine of ostensible agency or of holding out, to apply it in a case where the fact of agency and the holding out were unknown to the person dealing with the so-called

agent at the time, and to permit that person, when he discovered that his purchaser was only an agent, to recover against the principal, on the theory that he is estopped from denying that he authorised the purchase. It appears to me that the fact that there was a limitation of authority is as least as important as the fact that the purchaser was an agent. The vendor did not know either of these facts, and so did not draw any conclusion involving the principal when he sold and delivered the goods. Should he be permitted, when he elects to look to the principal, to do so upon any other terms than in accordance with the actual authority given at that time? It is entirely different where there is a holding out as agent and the fact of agency is known, but where neither is an element in the bargain nor the reason why credit was given, and so not an additional security known to the vendor at the time, no equity should be raised in favour of the vendor as against the principal so as to make the latter liable.

There is not in this case any ground for the application of such cases as *Thomson* v. *Davenport* (1829), 9 B. & C. 78; *Heald* v. *Kenworthy* (1855), 10 Ex. 739, 745; *Armstrong* v. *Stokes* (1872), L.R. 7 Q.B. 598; and *Irvine* v. *Watson* (1879-80), 5 Q.B.D. 102, 414: where it is held that in cases of agency the principal cannot defeat the creditor's claim by prepayment. Here the only hint obtained by the respondent was on the 8th November, 1916, after one half of his goods had been supplied. It came in such form as to make no impression upon him. He made no inquiry, and in September, 1918, asserts in writing that he did not know, at the time when the goods were sold and delivered (i.e., completed the 13th December, 1916), that Chisholm was anybody's agent. The defendants other than Chisholm never heard of the respondent, nor did he make any claim on them. The decisive fact, however, is that the amount had all been paid out and appropriated to accounts earlier in date than the respondent's and properly so. No right against the appellants exists unless it can be based upon the fact of agency irrespective of limitation of authority or the course of dealing. To allow the respondent to recover against the appellants is to ignore the limitations of his agency, the exhaustion of the fund provided, and the revocation of his authority, all of which happened in fact before the respondent supplied any of his goods.

ONT.

S. C.

McLAUGHLIN v. GENTLES.

Hodgins, J.A.

That part of the respondent's claim which consists of an assigned claim presents no different features. It is an account dated the 8th November, 1916, and no evidence was given respecting it.

The appeal should be allowed and the judgment set aside and the action dismissed with costs to the appellants. The respondent should have judgment against Chisholm for his claim and costs, as in his affidavit of merits Chisholm denies liability for any part of the respondent's claim. *Appeal allowed.*

N. S.

S. C.

FISHER v. KINNEY.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., and Ritchie, E.J. April 5, 1920.

LIBEL AND SLANDER (§ II—E)—ACTION FOR LIBEL—LETTER BY DEFENDANT TO PLAINTIFF'S HUSBAND—PRIVILEGED COMMUNICATION—MALICE.

Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest or some duty in connection with the matter, the occasion is a privileged one. On the plaintiff lies the onus of proving malice, and if the evidence adduced is equally consistent with either the existence or non-existence of malice, there is nothing to rebut the presumption in favouring the defendant from the privileged occasion.

[*Hunt* v. *Great Northern Ry.*, 60 L.J.Q.B. 500, [1891] 2 Q.B. 189; *Earle* v. *Kingscote*, [1900] 2 Ch. 585, referred to.]

Statement.

APPEAL from the trial judgment in an action brought by plaintiff, a married woman, for damages for falsely and maliciously writing and publishing of plaintiff words imputing that plaintiff had feloniously converted to her own use a cheque drawn by defendant and had obtained the money for which the cheque was drawn by means of false pretences. Reversed.

V. J. Paton, K.C., for appellant; *W. L. Hall*, K.C., for respondent.

Harris, C.J.

HARRIS, C.J.:—It appears that the defendant gave one Mrs. Emma MacDonald a cheque for $25 dated June 5, 1919, for wages of herself and her daughter Jennie MacDonald. Mrs. MacDonald indorsed the cheque and enclosed it in an envelope addressed to the Bank of Nova Scotia at Liverpool, upon which bank the cheque was drawn. She gave the envelope containing the cheque to her son to be mailed and he lost it. The bank was notified of the loss and asked not to pay the cheque. Ten days later defendant, believing that the cheque had not been cashed, gave

Mrs. MacDonald another cheque for the amount. In the meantime, as the defendant subsequently learned, the first cheque had been cashed at the Liverpool agency of the Royal Bank of Canada, two days after it was lost, and came through the latter bank to the Bank of Nova Scotia, and was charged up to the defendant's account. The defendant did not learn of this until the last of July when he sent his pass book to the bank to be balanced.

Meantime, the news having gone abroad of the loss of the cheque, certain parties informed the defendant that the plaintiff, who was the wife of one Vincent Fisher, had been seen on the road on the day the cheque was lost, going in the same direction as the MacDonald boy and immediately after him, and they asserted that it was their belief that the plaintiff had picked up the cheque. The officer of the Royal Bank of Canada who cashed the cheque reported that it was cashed by some woman dressed in black clothes and after making inquiries the defendant became convinced that the plaintiff had found the envelope containing the cheque and had either cashed it herself or got someone else to cash it for her.

Vincent Fisher had been casually employed by the defendant on his ranch and when he sent in his account for wages the defendant wrote him in reply the following letter:

Mr. Vince Fisher, Sept. 10-18.

Dear Sir:

Replying to your request to pay your balance of wages, I would say outside of errors in your acct. which you have failed to credit me with meals furnished you and have charged for more time than you worked, particulary on the last day, I have a counterclaim against you for $25.00 due me from your wife's account being the amount of Mrs. MacDonald's lost cheque in the felonious conversion of which and the cashing of same by falsely impersonating Mrs. MacDonald at the bank I have reason to believe and do believe your wife took part.

This of course would leave you in debt to me which balance I hereby demand you pay forthwith to me.

Yours truly,
W. A. Kinney.

P.S. Mrs. MacDonald has transferred all her rights to me in the cheque in question.

The plaintiff thereupon brought action against defendant claiming that the statements in this letter to her husband were libellous and she also claimed damages for slander for statements

N. S.
S. C.
FISHER
v.
KINNEY.
Harris, C.J.

alleged to have been made by the defendant to Mrs. Emma MacDonald and in the presence of her daughter Jennie MacDonald.

On the trial, evidence was given of conversations between defendant and Mrs. MacDonald alone and with her in presence of her daughter but apparently nothing was said about either one of these matters by the trial Judge in his charge to the jury. There is no doubt that these statements were privileged as both Mrs. MacDonald and Jennie MacDonald were interested in the matter and that I suppose accounts for the course which the trial took. The only thing submitted to the jury was the libel contained in the letter. At the close of the plaintiff's case there is a note by the reporter:

> Plaintiff rests on his main case reserving the right to shew malice if the occasion is held to be privileged. Mr. Paton moves for judgment. The Court: I refuse to dismiss the action. That is the only ruling I will give at this stage. Mr. Paton: I ask for a ruling that the evidence shews the occasion was privileged. The Court: That would be of no use at this stage. The only ruling I make is that I will not dismiss the action. I am not satisfied from the evidence that the letter was written on a privileged occasion. If I were obliged to rule I would say it was not. Mr. Paton: Your lordship rules that he had no interest? The Court: I don't think so.

The defendant gave evidence on his own behalf and was cross-examined by counsel for plaintiff at considerable length with a view to shewing malice on his part against plaintiff.

At the close of the defendant's case there is this note by the reporter:

> Defendant rests. Mr. Paton asks the Court to rule that the occasion was privileged. The Court: I do not think it was privileged. I rule that it is not.

Mr. Paton then called the plaintiff and another witness in rebuttal to shew the whereabouts of the plaintiff on June 7, the day the cheque was cashed.

The trial Judge having ruled that the occasion was not privileged did not consider the question as to whether there was any evidence of malice nor did he instruct the jury as to malice, and under his direction they gave a verdict in favour of the plaintiff for $400.

There is an application to set aside the verdict and for judgment for the defendant dismissing the action.

The first question is as to whether or not the occasion was privileged and I am clearly of opinion that it was.

There is no question but that the husband of the plaintiff was liable at common law for her torts committed after marriage, and there is nothing in the Married Women's Property Act to affect this liability. *Seroka* v. *Kattenburg* (1886), 17 Q.B.D. 177; *Earle* v. *Kingscote*, [1900] 2 Ch. 585.

The law seems to be well settled that where the defendant has an interest in the subject matter of the communication and the person to whom the communication is made has a corresponding interest or some duty in connection with the matter, the occasion is a privileged one.

As Lord Esher, M.R., put it in *Hunt* v. *Great Northern R. Co.*, 60 L.J.Q.B. 498, at 499-500, [1891] 2 Q.B. 189:—

> A privileged occasion arises when a communication is made by one person to another of such a nature that the person making it has an interest in making it and the person to whom it is made has a corresponding interest in having it made to him.

In *Toogood* v. *Spyring* (1834), 3 L.J. Ex. 347, at 351, 1 C.M. & R. 181, what Parke, B., said has often been quoted with approval. It is:

> The law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

In *Somerville* v. *Hawkins* (1851), 10 C.B. 583 at 589, 138 E.R. 231, Maule, J., in speaking of a privileged occasion said:

> It comprehends all cases of communications made *bonâ fide* in performance of a duty or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge—a supposition always to be made when the question is whether a communication be privileged or not—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences both to the servants and to the defendant himself.

In the case at bar the defendant wrote his letter in the assertion of a claim against the plaintiff's husband for the tort in question. Assuming that he believed the charge (as Maule, J., puts it—an assumption always to be made in considering whether the communication is privileged or not) he made the communication

N. S.
S. C.
FISHER
v.
KINNEY.
Harris, C.J.

exactly according to his belief of the facts and I do not see how it can be regarded in any other light than as a privileged occasion. If he believed that plaintiff had picked up the cheque and got it cashed, then he believed she was guilty of the crime with which he charged her in the letter.

The counsel for the plaintiff contended that the language used was unnecessary, and therefore the defendant could not claim that the words were privileged. The defendant had said nothing but the plain facts as he *bonâ fide* believed them to be and it is difficult to see how such a contention can be made.

If in writing the plaintiff's husband about the matter in question he had gone into matters wholly irrelevant or entirely unconnected with the matter in question as in *Huntley* v. *Ward* (1859), 6 C.B. (N.S.), 514, 141 E.R. 557, it would be evidence of malice to be submitted to the jury, but there is nothing in this letter which was not relevant to the claim the defendant was making.

The contention was put forward that the communication was not privileged although the occasion may have been, but it obviously is not a case of that character. I quote the rule as laid down by Odgers on Libel and Slander, 5th ed., page 304:—

> Not every communication made on a privileged occasion is privileged. The defendant may, in answer to an inquiry, launch out into matters which have no bearing on the question; or in writing to a person who has a joint interest with himself in one undertaking, he may wander off into other matters with which his correspondent is not concerned. The presence of such irrelevant matter does not of course affect the Judge's ruling that the *occasion* was privileged; as a rule, it will be merely evidence of malice to take the case out of the privilege. But there appear to be some cases, where the communication is so wholly irrelevant and improper, that the Judge, while ruling that the occasion was one which would have afforded protection to a proper letter, may yet declare that no privilege at all can attach to the letter which the defendant in fact wrote on that occasion. Again, if the communication sued on contain two or more distinct and severable charges, the Judge may rule such portion of it as contains relevant charges privileged, and the other portions unprivileged. So if, in replying to a question about A., irrelevant matter is dragged in defamatory to B., it is submitted, that in an action by B., it would be no defence that the communication was privileged as against A. But in other cases, if the matter impugned as irrelevant can possibly have any bearing on the question, or throw any light on the matter, or be of any assistance to the person to whom it is sent, the Judge should not rule that there is no privilege, but submit the whole communication to the jury on the issue of malice, if there be evidence to go to them on that issue.

If I am right in thinking that the case was one of qualified privilege it follows that there has been a mistrial, because if

the occasion was privileged it was the duty of the trial Judge to have decided whether there was evidence of malice to go to the jury, and if he came to the conclusion that there was then he should have put that question to them with proper instruction.

> The *onus* of proving malice lies on the plaintiff . . . (and the rule is that) if the evidence adduced is equally consistent with either the existence or non-existence of malice the Judge should stop the case; for there is nothing to rebut the presumption which has arisen in favour of the defendant from the privileged occasion . . . That the words are strong is no evidence of malice if on defendant's view of the facts strong words were justified. *Spill* v. *Maule*, L.R. 4 Ex. 232, 20 L.T. 675.
>
> Odgers on Libel and Slander, 5th ed., pages 344-346.

It is, I think, impossible to say that there is any intrinsic evidence of malice and the only extrinsic evidence suggested was the plea of justification in respect to which no evidence was offered at the trial. The authorities are clear that this is not evidence of malice. (See *Matheson* v. *Brown* (1915), 24 D.L.R. 844, 49 N.S.R. 198, *per* Graham, C.J.; *Wilson* v. *Robinson* (1845), 7 Q.B. 68; *Jenoure* v. *Delmege*, [1891] A.C. 73.)

In my opinion therefore the trial Judge should have decided that the occasion was privileged and that there was no evidence of malice to go to the jury and should have dismissed the action.

The counsel for the plaintiff contended that at most there should only be a new trial and his argument was that if the trial Judge had decided that the occasion was privileged he would then have had an opportunity of giving evidence of malice.

If we turn to the report of the trial we find that at the close of his case the plaintiff's counsel did reserve the right to shew malice if the occasion was held to be privileged, but it also appears that he cross-examined the defendant at length to shew malice on his part. One cannot imagine a libel suit in which the plaintiff in making out a case does not endeavour to shew actual malice if he can, for the purpose of increasing the damages. After the close of the defendant's case the plaintiff had an opportunity of calling evidence in rebuttal, and the Judge would, I suppose, have allowed the plaintiff to then give evidence on the question of malice if he had asked for the privilege. I say this because of the note about the matter at the end of the plaintiff's evidence. But the plaintiff's counsel took his chance. He relied upon the ruling in his favour that the occasion was not privileged and I

N. S.

S. C.

FISHER v. KINNEY.

Harris, C.J.

do not think that he can now ask for another chance to prove what he should have proved as a part of his case on the first trial.

Ordinarily, the Judge does not rule upon the question as to whether or not an occasion is privileged until all the evidence has been taken and I have never heard of a case being reopened and evidence admitted of malice after such a ruling. Odgers on Libel and Slander, at page 229, thus refers to the matter:

> If the occasion is not privileged, and no other defence is raised, the jury must find a verdict for the plaintiff. If the occasion is absolutely privileged, judgment will at once be given for the defendant. If, however, the Judge decides that the occasion is one of qualified privilege only, the plaintiff must then, if he can, satisfy the Judge that there is evidence of malice on the part of the defendant to go to the jury. If the plaintiff has given no such evidence, it is the duty of the Judge to direct a verdict for the defendant. If he has given any evidence of malice sufficient to go to the jury, then it is a question for the jury whether the defendant was or was not actuated by malicious motives in writing or speaking the defamatory words.

While the burden of proving that the occasion was privileged is on the defendant, usually the evidence with regard to the whole matter is brought out from the plaintiff or his witnesses. It may very well be that the defendant calls no witnesses but relies on the facts brought out from plaintiff's witnesses to shew that the occasion was privileged. Can the plaintiff in such a case start over again to prove malice. I do not suggest that a trial Judge may not in a proper case allow further evidence to be taken at any stage, but of course the defendant must have the opportunity of calling evidence to shew want of malice after the plaintiff has closed his case. I have never understood the practice to be as now suggested and I think it should not be so decided. In any event, the rule must be that plaintiff must make out her case at some stage and here she has not given any evidence of malice. The two charges of slander, if proved, were privileged and depend upon the same considerations.

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

Longley, J.

LONGLEY, J., I concur.

Drysdale, J.

DRYSDALE, J.:—I think in this case qualified privilege was established by defendant but it has to be borne in mind that qualified privilege is destroyed if actual malice is established as against defendant in writing the libel complained of. The question of malice is for the jury. In my opinion the jury should have

been instructed that qualified privilege was disclosed, that if defendant were actuated by malice in making the statements complained of privilege was destroyed. Malice was not submitted and I do not think the case can be properly disposed of until it is so submitted. Counsel argued that there was no evidence of malice to submit. I cannot agree in this but as there must be a new trial I think I should not discuss the evidence on this point. Suffice it to say that in my view malice must be submitted and that I think in order to a proper determination of the case a new trial is necessary. I would allow the appeal and direct a new trial.

N. S.
S. C.
FISHER v. KINNEY.
Drysdale, J.

RITCHIE, E.J.:—I agree. *Appeal allowed.*

Ritchie, E. J.

THE SHIP "IMO" v. GENERAL TRANSATLANTIC Co.

IMP.
P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin, Lord Atkinson, The Lord Justice Clerk. March 22, 1920.

SHIPPING (§ I A—3)—COLLISION IN HALIFAX HARBOUR—DAMAGES—LIABILITY OF SHIP-OWNERS.

When the navigators of ships in a harbour allow them to proceed within 400 feet of each other on practically opposite courses, so incurring the risk of collision, and practically bringing about such collision in place of reversing their engines and going astern, which, as a matter of good seamanship they could and should have done, before the ships came so close together, both ships are to blame for the reciprocal neglect.

APPEAL from the Supreme Court of Canada, 59 Can. S.C.R. 644, reversing in part 47 D.L.R. 462. Affirmed. Statement.

The judgment of the Board was delivered by

LORD ATKINSON:—La Compagnie Générale Transatlantique, a French Company, are the owners of a ship named the "Mont Blanc." The Southern Pacific Whaling Company, Ltd., are the owners of a ship named the "Imo." Lord Atkinson.

On December 6, 1917, at about 8.45 in the morning, these two vessels collided in the harbour of Halifax, Nova Scotia. The "Imo" was outward bound in ballast, the "Mont Blanc" inward bound, heavily laden with high explosives. By the collision the "Mont Blanc" was set on fire. Her cargo ultimately exploded with the most disastrous results. Many persons, including the captain, chief officer, and the highly-skilled pilot of the "Imo," were killed, a portion of the City of Halifax wrecked, and the ship herself blown to pieces. The "Imo" was a steel single-screw steamship belonging to the port of Christiania in Norway, 5,041 tons gross and 3,161 tons net register, fitted with

IMP.
P. C.
THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.
Lord Atkinson.

triple-expansion engines of 424 horse-power nominal. She was 430 ft. long, 45 ft. beam, her draught 22.2 inches, and her speed 11 to 12 knots. She was bound for New York, was employed in carrying food to Belgium, and is in the proceedings occasionally styled the Belgian ship or Belgian Relief ship. The "Mont Blanc" was also a single-screw steamship, registered at St. Nazaire, of 3,121 tons gross and 2,252 net register. She was 330 ft. long and 40 ft. beam; her draught on the day of the collision was 20.5 inches aft and 19.5 inches forward, and her full speed was about 7½ to 8 knots. The "Imo" was therefore the larger, more powerful and faster vessel of the two, and being in ballast was much lighter than the "Mont Blanc," which was heavily laden. At the time of the collision the weather at the part of the harbour where it took place was clear, though slightly hazy somewhat higher up, and those on board both ships admit that there was no wind or very slight wind, and no tide of any force.

The land on the north-east side of the harbour is called Dartmouth; on its opposite or south-western side the shore is styled the Halifax side. Along this latter shore are erected piers numbered, proceeding upwards from 2 to 9 inclusive, a sugar refinery, a dockyard, a dry dock and other buildings. At pier No. 9, which is something over 1 mile from pier No. 2, the Halifax shore bends considerably to the westward. The opposite shore is rather irregular in outline.

Just opposite No. 9 a cove called Tuft's Cove indents it, and some distance above this cove the land juts out towards the Halifax shore, forming a kind of blunt hill called Turple Head. Above this hill the harbour opens out into a considerable expanse of water, forming what is called the Bedford Basin. In this basin in December, 1917, several ships had, under Admiralty regulations, assembled for the purpose of being convoyed to their respective destinations. The "Imo" was one of those ships. She was on and before December 6, the day of the collision, anchored in the western part of the basin.

The "Mont Blanc," whose ultimate destination was some French port, was on the morning when the collision took place seeking to make her way to this basin for the same purpose, namely, to get convoy. The reach of the harbour from pier No. 2 upwards to the basin, though admittedly a narrow channel within

IMP.
P. C.
THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.
Lord Atkinson.

the meaning of the 25th of the Regulations for Preventing Collisions at Sea, is in fact of considerable width. At its narrow part it is called the Narrows, but even in this reach at the place where the collision occurred it is 500 to 600 yards wide. This being the breadth of the Narrows, the stretch of water between mid-channel and each of the bounding shores would be 250 yards, *i.e.*, 750 feet, so that each incoming and outgoing ship would, in the absence of obstructions, have ample room to steam to her destination exclusively through her own water. Again, as the "Imo's" length was 133 yards and that of the "Mont Blanc" 110, the former ship might have 100 yards of her length in the "Mont Blanc's" water and at the same time 33 yards of her length in her own, and the "Mont Blanc" might on the other hand have 20 yards of her length in her own water and 90 yards of it in the "Imo's" water. The mid-channel being an imaginary line, these facts may perhaps account to a great degree for the conflict in the evidence of the witnesses, some of whom observed the movements of the ships from different points on the Halifax shore, as to the precise position of the place of collision, namely, whether it was in mid-channel or some distance on the Halifax side of this imaginary line.

The action out of which the present appeal and cross-appeal have arisen was brought by the owners of the "Mont Blanc" to recover $2,000,000 in respect of the damage done to their ship by the collision, and the defendants, the owners of the "Imo," counterclaimed to recover the like sum for damage done to their ship.

An enquiry into the circumstances attending the collision was held in the Wreck Commissioner's Court at Halifax before Drysdale, J., a Justice of the Supreme Court of Nova Scotia, assisted by two nautical assessors. The action, already referred to, was subsequently tried before the same Judge, when only one witness, whose evidence he considered of little value, was examined orally. It was then agreed between the parties litigants that the evidence taken before the Wreck Commissioner's Court should, with that of the one witness examined orally, be taken as the evidence given in the action upon the issues therein raised. That may have been, on the whole, a prudent, it certainly was an economical, course. It has, however, these disadvantages.

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

Much, if indeed not the greater part, of the evidence is irrelevant to those issues; and in addition, no precise issues having been knit in the proceedings before the Court of the Wreck Commissioner, the evidence which would be relevant to the important points in controversy in the action has not been elicited so fully, or with the same precision and directness as it, doubtless, would have been had it been given orally on the trial of the action. In the result Drysdale, J., held that the "Mont Blanc" was alone to blame, 47 D.L.R. 462, 19 Can. Ex. 48. The owners of the "Mont Blanc" appealed direct to the Supreme Court of Canada, 59 Can. S.C.R. 644, against this decision as in this, an Admiralty case, they were entitled to do. The Chief Justice and Idington, J., were of opinion that the "Mont Blanc" was alone to blame; Brodeur, J., and Mignault, J., were of opinion that the "Imo" was alone to blame, and Anglin, J., that both ships were to blame. In this division of judicial opinion an order was made allowing the appeal, reversing the judgment of Drysdale, J., finding that both ships were to blame, directing that the damages should be assessed accordingly; and further ordering that the respondents, the owners of the "Imo," should pay to the appellants, the owners of the "Mont Blanc," the costs incurred by these latter in the Supreme Court of Canada, but that no costs incurred in the Exchequer Court of Canada should be paid to either party.

From that judgment an appeal to this Board has been taken by the owners of the "Imo," and a cross-appeal by the owners of the "Mont Blanc." Having regard to these facts it is but right that the evidence given on both sides should be examined by this Board critically and at length. The case of the owners of the "Mont Blanc," the plaintiffs in the action, as set forth in their printed case, is comparatively clear and simple. They have the advantage of having alive and available as witnesses to sustain it the members of the ship's crew, charged with the duty of navigating their ship, in addition to the skilled pilot who was taken on board. According to this case the "Mont Blanc" came to anchor on the evening of December 5, 1917, much lower down the harbour than the Narrows, got under way at 7.30 next morning, and proceeded up the harbour, passing the "Highflyer" at about 100 metres distant on the Dartmouth side, and of course

in her own water, and heading up the harbour for Turple Head. Those on board her allege that they first observed the "Imo" at the upper end of the Narrows; that she appeared to them to be just leaving the Bedford Basin; to be nearer to the Halifax than to the Dartmouth side; to be heading across the course of their ship; to be bearing 2 to 2½ points on the latter's port bow, and having the starboard side of the "Mont Blanc" open to her. They further allege that on seeing the "Imo" in this position they put the helm of their ship a little to port in order to approach nearer to the Dartmouth side, sounded one short blast upon her whistle, and caused her engines, which had been at half speed ahead, to be put to slow speed ahead. To this signal they alleged that the "Imo" replied by sounding on her whistle two short blasts, and as that signal would indicate, changed her course a little towards the Dartmouth shore; that thereupon in a few seconds the "Mont Blanc" again sounded one short blast, ported her helm a little more to bring her also closer to the Dartmouth shore, and stopped her engines. Whereupon the "Imo" again replied to this signal by sounding two short blasts on her whistle. Owing to these manœuvres it is alleged that the two vessels approached to within 150 metres of each other, the "Imo" still shewing to the "Mont Blanc" her starboard side and heading to cross the latter's course, so that a collision then became imminent; that thereupon the "Mont Blanc" took the only course open to her to avoid this collision, namely this: she put her helm hard a starboard, and went to port, that being heavily laden she maintained some little speed, answered her helm and went to port, bringing the two ships on parallel courses, starboard side to starboard side; that the "Mont Blanc" kept her engines stopped; and that the two ships might have passed each other safely, but that the "Imo" then sounded three blasts on her whistle, ported her helm, put her engines full speed astern, which, her propeller being a right-handed one, swung her head round more to starboard. The "Mont Blanc" then for the first time put her engines full speed astern, but in 20 to 30 seconds the stem of the "Imo" struck the "Mont Blanc" at a right angle about the first hold, and cut into her a considerable distance. The spot where the collision occurred was about mid-channel, or if not, a little to the Halifax side thereof and a little to the seaward of pier No. 6.

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

It is practically not disputed that the distance of the "High-flyer," as she lay at anchor, from Turple Head was 1½ miles, and that the place of collision, whether in the mid-channel or a little to the Halifax side of it, was midway between these objects, ¾ mile from each. It is alleged on behalf of the "Mont Blanc" that at the time of the collision pier No. 9 was open to her, bearing about one point on her port bow; that she was heading to a point between that pier and pier No. 8; that her head was by the force of the collision diverted to port from 1½ to 1¾ points; that just before the collision the two ships were only about 150 metres apart; that the "Imo" was then crossing the "Mont Blanc's" course, in the direction of the Dartmouth shore, though the ships were never quite end to end; that she did not at this stage reverse her engines and go full speed astern, because such a manœuvre would have precipitated a collision, but took the only course open to her under the circumstances to avoid this result. As she did not reverse her engines and go full speed astern, the burden of proving that the omission to do so was good seamanship would seem to rest upon her. See *City of Berlin*, [1908] P. 110. That case unlike that of the *Khedive* (1880), 5 App. Cas. 876, was not decided on any imperative rule touching the reversing of engines, but on an article similarly worded to article 29 of the Regulations of 1910, merely providing that nothing in the rules should exonerate any vessel or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals or to keep a proper look-out, or of the neglect of any precaution which might be required by the ordinary practice of seamen or by the special circumstances of the case. There a steamship going down the river Elbe, and seeing 3 lights of a steam tug a little on her port bow, ported to give the tug more room, thereby bringing herself over to her proper starboard side of the channel, but the tug starboarded and got onto the starboard bow of the steamship, whereupon the latter slightly starboarded and steadied, bringing the lights of the vessels green to green at one-half to three-quarters of a mile distant, and about a point and a half upon her starboard bow. The tug then ported back again and while crossing the bows of the steamer was sunk in a collision. The tug was found by Bargrave Deane, J., to be solely to blame. The Court of Appeal, consisting of Lord Alver-

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

stone, C.J., and Buckley and Kennedy, L.JJ., reversed this decision and held that the steamship was also to blame, on the ground that when those in charge of her saw that, though they had starboarded and steadied, the light of the tug did not broaden, but for an appreciable time was getting finer on their starboard bow, they ought to have realised that there was risk of collision within the meaning of the Regulations, and as a matter of good seamanship have at once stopped and reversed their engines.

These are the main lines of the "Mont Blanc's" case. Her preliminary acts are consistent with it. It is necessary now to turn to the very voluminous evidence to see if this case is substantially sustained. Her pilot, Francis Mackey, who was charged with her proper navigation, is a local pilot admittedly fully qualified and skilled. He proves that he passed the "Highflyer" at about 100 ft. distant from her on the Dartmouth side; that he then ported his helm and straightened his course to follow up on his own proper side of the channel, being then approximately about 320 to 330 ft. distant from the Dartmouth shore; that after proceeding some distance, his course being about N.W. or N. by W. and heading to some land west of Tuft's Cove, he for the first time saw over the land the mast of the "Imo," then about one mile or a little more distant. When he subsequently saw her hull and was able to make out what she was, she was about three-quarters of a mile or a little more distant, steaming on a course right down the channel, heading S.E. or probably ½ S. or S.E. ¼ S., which course of S.E. ¼ S. would, if continued, intersect the course of his own ship. The "Imo's" speed appeared to him to be above the speed fixed by the Admiralty Regulations, namely, five knots per hour. He, the pilot, to use his own words, immediately "established his proper side and his right to the channel by blowing promptly and distinctly on his whistle one short blast." There was no confusion, he says. He did not give any order to the captain or helmsman just at that time. A few seconds later he received in reply from the "Imo" a signal of two short blasts. To relieve himself of all doubt he then blew another signal of one short blast, and then changed his course a little to starboard in order to let the "Imo" see his port bow. To this second one short blast signal which

IMP.
P. C.
THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.
Lord Atkinson.

he gave, he again received in reply from her a signal of two short blasts, and then directed his ship's head to port in order to give the "Imo" plenty of room to pass (*i.e.*, starboard side to starboard side); that he succeeded in bringing the ships on parallel courses; that they would have passed safely had they kept those courses; that the "Imo" did not do that, but suddenly gave a three-blast signal and reversed her engines, her head being twisted to starboard; that he gave the order to go astern, but did not think there was time to carry it out; that the "Imo" came on at a pretty good speed, struck the "Mont Blanc" at right angles abreast of No. 1 hatch just abaft the forecastle head, cut her down 9 or 10 ft. he thought, to the water's edge, and that before the "Mont Blanc" received this blow she was heading up the Narrows with pier No. 9 on her port bow. The blow caused her head to slew around so as to point to pier No. 6. The reversing of the "Imo" with a right-hand propeller caused her head to swing to starboard, and her speed was, in his estimation, rather too fast. The witness gives his excuse for not reversing his engines and going full speed astern instead of putting his helm hard to starboard and going to port. He said under the rules of the road, knowing them as he did and following them particularly: "I consider it was right for me to exercise my judgment, that the clause in the rules says act, port, or starboard, or stop her. In the exercise of that judgment I directed her head to port in order to get the two ships parallel, leaving plenty of room for the "Imo" to pass safely," starboard side to starboard side if she continued her course. The reversing by the "Imo" of her engines, he insisted, rendered his manœuvre abortive. He, however, gave no reason or excuse for not having reversed his engines earlier, long before the two vessels had approached so near each other as 400 feet, less than the length of one of them, and little more than the length of the other.

This witness was cross-examined at great length, but nothing of importance was elicited, save that he said that between his ship and the "Imo" when he first saw her there were no ships save a small barge loaded with stones at pier No. 8. Aime Le Medic, the master of the "Mont Blanc," tells practically the same story. He states that when they passed the "Highflyer," they were 150 metres from the Dartmouth shore. That when

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

the "Imo" was first seen she appeared to be leaving the basin. Her starboard side was then visible to those on the "Mont Blanc." She seemed to be cutting across the latter's course, and was bearing about 2 to 2½ points on the latter's port bow. He then proves that the signals as described by Mackey were given in the order Mackey mentioned. He further says that seeing the "Imo" on the port side his ship was put a little to the right, but that they could not go much to the right, they were so near the land. He says the "Imo" was going to port while he was going to starboard; that the "Imo" continued on her course as when she was first sighted, keeping a little more to the left, that is to port; that when he got the second signal of two blasts from the "Imo," the ships were only 150 metres apart, and that a collision was inevitable if the two ships continued their courses; that it was not possible at this time for the "Mont Blanc" to have gone further to starboard; that if she did so there would inevitably have been a collision; that when he saw the collision was unavoidable if the ships continued their courses, there was only one manœuvre to be made, namely, to go to port; that he gave orders to the helmsman to bear all to the left, and he gave two short blasts of his whistle; that though his ship had little speed on she obeyed her helm at once; that the ships were then on parallel courses, starboard to starboard, and were about 50 metres apart laterally; that when the "Imo" reversed (giving three blasts), going full speed astern, she being very light and having speed, came to starboard; that judging by the force of the collision the "Imo" must have had at the time great speed on.

This witness was also cross-examined at great length, but nothing material was elicited. Jean Baptist Glotin, the first officer of the "Mont Blanc," was next examined. He proved that the "Mont Blanc" was registered at St. Nazaire, that her burden is 2,252 tons net, that her speed was 7½ knots, that there were on board 4 officers in addition to the captain, that she carried a chief and 4 other engineers. He stated that he was not on the bridge when the first one short blast signal was given by his ship, that when he heard it he looked to see what they were blowing for and saw the "Imo" about half a mile away or more, bearing about 25 degrees on his own ship's port bow, and heading in such a way as would cut his ship's course. He concurs with the pilot as to the number, character and sequence of the blasts

IMP.
P. C.
THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.
Lord Atkinson.

given, and said that after the first two short blasts were given by the "Imo" she changed her course. His evidence is in substantial agreement with that of the pilot and master on all the material points. He gives the particulars of the damage done to his ship by the collision. The "Imo," he says, collided with his ship at No. 1 hold at an angle of 90 degrees, penetrated with force into her almost to the side of the hatch combings, and cut into her 9 ft. in length almost down to the water's edge.

The distances given by these 3 witnesses are matters of very great importance if their evidence be accurate. They all agree in stating that when the signal of two short blasts was given by the "Imo" for the second time the two vessels were only 400 to 500 feet apart. The pilot and captain fix the distance of the "Imo" from the "Mont Blanc" when the first one blast was given at three-quarters of a mile. This witness, the first officer, states that he looked up when he heard the first single blast and saw that the "Imo" was distant about half a mile or more, bearing 25 degrees on his port bow. All agree that she was heading on a course which, if continued, would cross the course of the "Mont Blanc." The ships therefore must have been proceeding at a rate, which while the two single and two double blasts were being given, had reduced the distance between them from about three-quarters of a mile to 400 or 500 feet. Even at the maximum Admiralty rate of 5 knots each of these ships would steam three-quarters of a mile in about 9 minutes, if both were proceeding at that rate in about 4½ minutes. A very serious question arises here, namely, whether, having regard to the size of these ships, their speeds, courses and respective bearings of the one to the other, sound and prudent seamanship did not, if this evidence be accurate, imperatively require that each ship should have reversed her engines and gone full speed astern long before they were allowed to approach so close to each other as 500 feet. The two ships were together nearly 800 feet long. It certainly appears to their Lordships that it was a most hazardous position for such big ships to be allowed to get into; that it necessarily involved risk of collision; and that both captains were to blame for not having prevented their respective ships from getting into it. So that besides the question which, if either, of the two ships is blameable for the manœuvres

they resorted to in order to escape from the perilous position in which they found themselves almost in the agony of the collision there is the other and anterior question whether they are not both blameable for the earlier and reciprocal omissions which created that position.

Joseph Leveque, the "Mont Blanc's" third officer, does not in his evidence cover so wide a field as the pilot and master, but with all the points with which he deals he is in substantial agreement with them. Alphonse Serre, the wheelman on board the "Mont Blanc," states that he was not steering by compass, but as he was ordered by points on the shore. He corroborated the pilot and captain as to the number, character and sequence of the blasts given by the two ships, and says that after the second of the two short blasts given by the "Imo" he put his ship's head hard to port. As he was in the wheel-house he says he could not give any evidence as to distances. Antoine Le Gat, the chief engineer, said that the highest speed they could get out of the "Mont Blanc" even in fine weather was 7½ knots. He could not recollect the earlier orders which he got, but that the last orders he got just before the collision were first half-speed, then slow, then stop, and then full speed astern; that about 3 minutes elapsed between the order for half-speed and the collision; that the order for slow was not marked on his boards as they had not time to mark it.

So much for the evidence given by those on board the "Mont Blanc." Of the independent witnesses examined, several, on points other than the whistling, corroborate, in substance, the officers and crew of this ship. They differ from them on the question of the nature, number and sequence of the signals. On the question of the whistling, the evidence is, on the whole case, so conflicting that it is impossible to found upon it any precise and confident conclusion. This difficulty does not exist to the same extent as to the movements of the ships themselves, of which these signals, at best, ought merely to be the heralds. The evidence as to these movements is, on the whole, comparatively clear by whatever whistles they rightly or wrongly may have been announced. John Makiny, the commander of the "Nereid," which lay at the No. 4 dockyard pier, and who states he saw the collision, gives most important evidence in favour of

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

the "Mont Blanc." The trial Judge rejects it as untruthful, and as he saw and heard the witness it is best to put it aside.

Whitehead, the commander of a drifter, says he saw the two ships steaming through the Narrows, one, the "Mont Blanc," steaming up on the east or Dartmouth side, and the other, the "Imo," steaming down on the same side. He could not say which was nearer to the Dartmouth shore; they seemed to him from where he stood to be approaching each other almost end on, and, when he first observed them, to be only 600 to 700 yards apart. He said they were not more than 100 yards apart when the "Mont Blanc" blew a two-blast whistle and went to port, going very slowly but answering her helm; that the "Imo" when this signal was sounded was going much faster than the "Mont Blanc." Nothing was elicited to discredit this witness. He is in a responsible position. Two of the Judges of the Supreme Court rely strongly on his testimony. If his evidence be true it shews, as does that of the chief officer of the "Mont Blanc," that both these vessels had been guilty of fatally neglecting to reverse their engines and go full speed astern, before they allowed their respective ships to approach so near each other as 400 ft.; involving as it obviously did the risk of collision.

Charles Mayers, the third officer of the "Middleham Castle," a ship which, when the collision occurred, lay outside the Halifax graving dock, said he was on the deck of his steamer when he saw both these ships, the "Mont Blanc" passing about midway between the "Highflyer" and the Dartmouth shore. When the two were first seen by him they were both on the Dartmouth side of the channel, they were about 500 yards apart, the "Mont Blanc" heading up the harbour, the "Imo" heading down. He corroborates the pilot and captain of the "Mont Blanc" as to the number, character and sequence of the signals given by the two ships. It was urged that this witness was unworthy of credit, as he had been under some fantastic delusion about his being driven through the air for a great distance by the force of the explosion. Well, it is not unnatural that the shock given by such an appalling disaster should cause one of the victims to be under a delusion as to its effect upon himself; but though one may not have the same confidence in his evidence as if he was free from this delusion, yet his testimony ought not to be put aside as entirely untrustworthy.

Bert Henry, an employee of Messrs. Burns and Kellaher, deposed that he saw the two ships about two minutes before the collision; both were near the Dartmouth shore; they were going in practically opposite directions, the "Mont Blanc" heading up towards the basin, the "Imo" directly down the harbour. The "Mont Blanc" turned a little to the Halifax side, then they came together with a great thump, the bow of the "Mont Blanc" was turned more to the Halifax side by the blow, she was after that pretty straight across the channel. Nothing material was elicited on the cross-examination of this witness.

The statements made by the officers of the "Highflyer" are, on the whole, in their Lordship's view, more consistent with the case of the "Mont Blanc" than with that of the" Imo," though in some particulars they differ slightly from both. There is no evidence as to the circumstances under which these statements were obtained. The parties have by their agreements made them admissible as evidence, which legally they would not be, but, without making the slightest reflection upon the honour, accuracy or truthfulness of these gentlemen, their Lordships feel that they cannot rely upon those statements with the confidence with which they would naturally rely upon them had they been made on oath in the witness-box and were subject to cross-examination.

So much for the case of the "Mont Blanc." The case of the "Imo" is in several respects in conflict with it. Under art. 25 of the Rules for Preventing Collisions at Sea, it was the bounden duty of the "Imo" to keep on the Halifax side of the mid-channel as she passed down from the basin to the sea if it was safe and practicable for her to do so. Once it is shewn to have been safe and practicable for her to do so, the article becomes a rule of imperative obligation.

Accordingly, her case opens with an excuse or justification for steaming from the basin down to and past pier No. 9 on the Dartmouth side of mid-channel. It is alleged on behalf of her owners that by reason of the configuration of the channel she was, on leaving the basin, obliged to approach the Dartmouth shore, and that having yielding to that necessity, she was prevented from getting back into her own water, first by the obstinate refusal of an American tramp to leave the water on the Halifax side of mid-channel in which she then was, and second by the manœuvres of the tug "Stella Maris."

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

The American tramp had advanced so far into the basin that really nothing turns upon the alleged obstinacy of her navigators. It is otherwise with the tug. In the "Imo's" printed case it is alleged that just after being compelled to pass the American tramp starboard to starboard, those on board of the "Imo" saw the "Stella Maris," which according to the words of the case "appeared in front of her." The tug, it is alleged, was at that time heading to cross from the drydock on the Halifax side to the Dartmouth side, and was then about midway in the channel; that when those on board the tug saw the "Imo" approaching they turned her back to the Halifax side, and thus she lay across the channel. It is not alleged that the "Imo" gave any signal of any kind to the tug, but strange to say, it is alleged that while she was abreast of the tug and off pier No. 9, she gave one blast signal to the "Mont Blanc," though that ship must have been more than three-quarters of a mile away from her at the time, since from pier No. 9 to the place of the collision marked on the chart has been measured to be three-quarters of a mile, and of course the "Mont Blanc" could not at this time have reached the place of collision. But if she in fact gave that signal it only could have meant that she desired to alter her course to starboard and thought it possible to do so. It is not alleged that there was any crowding of her own waters to prevent her from entering them. It is alleged that the "Imo" then, as soon as she was given the one short blast signal, gave three blasts and reversed her engines, her head swung to starboard so that the witnesses on board steamers moored at the dockyard could see her port side. It is stated in the "Imo's" case that at this time the "Mont Blanc" was one-half to three-quarters of a mile distant. For the reasons already given the distance between them must have been more. According to this case the "Mont Blanc" was working out to mid-channel, angling across to the Halifax side and cutting across the course of the "Imo." Why the "Mont Blanc" should have done anything so irrational, unless indeed the "Imo" was heading so as to pass between her and the Dartmouth shore, is not suggested. But that is not all. If the "Imo's" head swung round to starboard in the way described, so that the people at the dockyard saw her port side, no reason is given why she did not steam ahead, get well into her own water, and steam down

through that water towards the sea. The "Mont Blanc" was half or three-quarters of a mile distant. Half the breadth of the Narrows is only 250 yards. Even if the "Imo" while reversing was only 50 yards from the Dartmouth shore, she would have only 200 yards, plus her own length, 143 yards, 343 yards in all, to steam to get bodily into her own water. It is absurd to suppose that the "Mont Blanc" could have steamed up nearly 4 times that distance and come near her before she was well away in her own water. It appears to their Lordships to be difficult to suppose that the latter ship's movements could have imposed any difficulty in the way of the "Imo" reaching her own waters, if those navigating her had desired to make her do so. The movement would have been apparently both safe and practicable at this precise time. There is not a suggestion in the "Imo's" preliminary acts that there was anything to prevent her, after she had passed the "Stella Maris," from getting into her own water and steaming down through it in her course to the sea. On the contrary, the statement, contained in the answer to question 12, is that before she gave those three blasts and reversed her engines she was keeping as far as practicable on that side of the channel which lay on her starboard side; that the "Imo's" speed was reduced to 1 mile an hour; that the engines were never put ahead again before the collision, a statement which (considering the nature of the blow) seems incredible; and that the "Mont Blanc" was while all this occurred from one-half to three-quarters of a mile distant. In the "Imo's" case it is said that before the collision the "Mont Blanc" had worked out pretty well to mid-channel, but that the two ships were then in their respective waters and were heading on courses on which they should have passed in safety port to port, that the "Mont Blanc" then blew a cross signal of two blasts and swung to port on a starboard helm, throwing herself across the channel in front of the bows of the "Imo" and making a collision inevitable. These statements appear to their Lordships to be incredible. It would appear to be impossible that the "Imo," after having reduced her speed to 1 mile an hour, kept her engines steady while she traversed half a mile at least of the harbour, and again reversed her engines going full speed astern, could have struck the "Mont Blanc" at right angles with a force capable

IMP.
P. C.
THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.
Lord Atkinson.

of inflicting the injury actually sustained by the latter ship. Again it seems impossible to assign any reason for the "Mont Blanc" doing what she is alleged to have done, namely, going across into the "Imo's" water and throwing herself across the channel in front of that ship. It is not really disputed that the "Mont Blanc" passed the "Highflyer" well in her own water, well over towards the Dartmouth shore. It is scarcely conceivable that the "Mont Blanc" should leave her own water, which according to the statement was safe and unobstructed, to cross into the water of the "Imo" in the manner described as if she was struggling to bring about a collision. The "Mont Blanc's" action in getting out towards mid-stream would, however, be intelligible enough if the "Imo" having got close to the Dartmouth shore before entering the Narrows, those navigating her had determined to keep their course down the "Mont Blanc's" waters and to pass between that ship and the Dartmouth shore. This is just what is alleged on the part of the "Mont Blanc" the "Imo" attempted to do. It explains and reasonably accounts for the collision, which the "Imo's" case fails to do.

The evidence given on behalf of the "Imo" to support their case was as follows: Peter B. Jonnas, the mate of the "Imo," a Norwegian, states he did not see the "Mont Blanc" till he heard two blasts from his own ship. The two ships, he says, were about 400 metres apart and nearly straight ahead, the "Mont Blanc" being a little on the "Imo's" port bow and about the middle of the channel, steaming straight up. That is very much the position in which the ships were placed by Glotin, the chief officer of the "Mont Blanc." It was, in their Lordships' view, as has been already stated, a perilous position, involving imminent risk of collision. This witness gives a different account of the character and sequence of the whistles from that given by the witnesses of the "Mont Blanc." Birkland, the third officer of the "Imo," did not give any evidence of importance. John Johansen, the helmsman of the "Imo," states that the "Imo" passed the American tramp port to port; that his ship was in the middle of the channel when she came into the narrows; that, he then saw the "Stella Maris," with two scows abreast of one another, behind her; that he saw the "Mont Blanc" abreast the "Highflyer," heading up the channel. After passing the

tug the speed, he said, of his ship was about 2 miles per hour; that he then got an order steady or a little to port; that he paid no attention to the whistling. The only whistling he mentioned was a two-blast signal from the "Mont Blanc" when the ships were close together. At the moment of the collision the "Imo," he says, was pointing to the sugar refinery. The "Mont Blanc," he said, came up the channel a little on the Dartmouth side. The collision occurred a good deal on the Halifax side. This leading question was then put to him: "You were going down a little on the Halifax side of the channel?" And he answered, "Yes, sir." He had never mentioned this before the leading question was put to him. He gave no explanation of how a collision occurred if the "Mont Blanc" was on the Dartmouth side of the channel and the "Imo" on the Halifax side, nor does he make any mention of the alleged reversing of the "Imo's" engines the first time. He further says that when the pilot of the "Imo" blew three blasts he put his helm hard a-starboard and that it was at that, *i.e.*, hard a-starboard, when the collision occurred. He does not explain if this were so, and his ship was in her own water, how the collision could have occurred.

Lewis Skarre, the first engineer of the "Imo," 29 years of age, holding a Norwegian certificate as first engineer, says the "Imo" started from her anchorage at full speed ahead. The next order he got was (he does not say how soon) dead slow, half-speed, dead slow, half-speed, and several different orders. He never got the order full speed between that and the collision. The fourth engineer, he says, marked the orders in a scrap log. He got orders full speed astern twice; the first reverse was longer than the second. It was a little longer than 1 or 2 minutes. Then he got an order to stop, and then the second order for the reverse several minutes after. He could not fix the time between the order for the first reverse and the order for the second. He could not say whether it was 4 or 5 minutes or 3 or 4 minutes. When he reversed the last time he heard three short blasts. He did not hear any other blasts either from his own or any other ship. The last order to reverse was repeated twice. This witness failed to fix any times definitely and precisely. According to the case the engines were first reversed ahead of pier No. 9 three-quarters of a mile above the place of collision. None of the other engineers were examined.

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

That concludes the evidence of those on board the "Imo." It will be observed that there is not in it a mention of the "Imo" being in her own water save the single answer given by Birkland to the leading question put to him. Neither is there any indication given of the purpose for which the first reverse of the engines was ordered, or any explanation why the "Imo" did not then cross to her own water. A number of onlookers were next examined as witnesses on the "Imo's" behalf. George Dixon lives at Tuft's Cove, which he says is abreast of pier No. 9. He was on December 6 working in the open then right down on the shore. He first noticed the "Imo" coming down when she got near the north end of pier No. 9. He could not tell her speed. She was about the middle of the channel. After she passed him she seemed to turn to the Halifax side. She was heading down pretty straight, he says, as they could see all her port side; she followed the middle of the channel pretty well. He first saw the "Mont Blanc" when she was pretty near the Richmond Pier. He thought she was going to dock in No. 8. He heard no whistles. He says the "Imo" was about the centre of pier No. 9 when the "Mont Blanc" was coming across to the Richmond pier (No. 8); that the "Imo" then started to go across to the Halifax side, and they thought she intended to go round the bows of the "Mont Blanc." He saw her reversing, and after that he saw her heading, swing to the Halifax side, and looked to be heading to the Sugar Refinery. This is wholly inconsistent with the "Imo" case. She, according to the case, was reversing abreast of pier No. 9, and the "Mont Blanc" was from half to three-quarters of a mile down the channel. Dixon makes no mention of the American skipper or of the "Stella Maris," and in a subsequent part of his evidence he says he thinks he did not see the "Mont Blanc" before the "Imo" reversed, while the case of the "Imo" is that she gave one blast for the "Mont Blanc," then heading up in her own water before his ship gave three blasts and reversed.

Edward McCrossan, a seaman on board his ship the "Caracas," lying bow up stream along pier No. 8, says he only saw the two ships two minutes before the collision; he heard no signals. The "Mont Blanc" was lying straightway across the river, and the "Imo" heading down the river coming straight into her very

slowly. It was only a light touch the "Imo" gave her. He could see the propeller of the "Imo," and it was not moving till after she hit the "Mont Blanc." The case of the "Imo" and all the evidence up to this is that the "Imo's" engines were going full speed astern, after the "Mont Blanc" had put her helm hard a-starboard. If the "Imo" never reversed so as to avoid the collision she would be in gross default. Again, if this witness be right, the two ships must have been in collision 500 feet from his own ship, and adding the beam of his ship, not more than 540 ft. from pier No. 8, and if the channel be 500 yards broad there the collision must have taken place over 200 feet on the Halifax side of mid-channel. The case of the "Imo" is that she was not anything like that on the Halifax side of mid-channel. In addition this witness only saw these two ships in the agony of the collision, and knows nothing of their previous courses.

John Sullivan, who was in the employ of Messrs. Burns & Kellaher, on December 6, 1917, though not a seafaring man, was in charge of their motor-boat on that day, but was not at the wheel. He says he first saw the "Mont Blanc" that morning on the Dartmouth side of the centre of the channel, opposite the dry dock. His motor-boat was astern of her. He judged that the "Mont Blanc" was travelling about 4 to 5 knots. He saw the "Imo" about the same time. She was heading down past the Narrows on the Halifax side. If they passed on the courses they were going they would be about 100 ft. apart, with the "Mont Blanc" on the eastern side. The "Imo" came into the Halifax side a little more. He did not hear any whistle, not even just before the collision. He saw the French boat coming over the Narrows to the Halifax side. He was about 150 yards when they collided on the port side of the "Mont Blanc." After the collision the "Mont Blanc" moved towards the Halifax shore. He would put the place of collision more towards the Halifax side than the middle of the channel, something to the Halifax side. There was room enough, he thinks, for the "Mont Blanc" to go to starboard instead of to port, when there would have been no collision. He is not a navigator, does not know the rules of the road. He knows nothing about bearings, and is not a very good judge of distance. The first thing that strikes one about this evidence is that it would have been quite a purposeless and rash

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

act of the "Mont Blanc," when going up through her own waters, the "Imo" coming down through hers, their courses being 100 ft. apart laterally, to have deliberately turned to port and invaded the "Imo" water. The witness probably refers to what occurred in the agony of the collision. The "Imo," he says, was heading towards the Sugar Refinery, the French ship heading down towards the Narrows. In addition, this evidence is inconsistent with what Peter B. Jonnas, the third mate of the "Imo," says, namely, that after he heard the two blasts from the "Imo," the "Mont Blanc" was nearly straight ahead, steering straight up the channel and about its middle; the ships were then about 400 metres apart. Afterwards when he heard the three-blast from the "Imo" they were only 100 metres apart.

McLaine, the master of the "Douglas H. Thomas," says he just saw the "Mont Blanc" when she passed the "Highflyer." He then heard two blasts from the "Imo" when she was up in the Narrows coming out of the basin, and heading towards the Dartmouth shore; he saw her whole starboard side. At the moment of collision she was going 1 to 2 knots; from the time she blew the two blasts, up to the collision, she was not going more than that speed. He next heard one blast from the "Mont Blanc," she—the "Mont Blanc"—was then opposite the dock-yard, a little on the Dartmouth side of the mid-channel. The next signal from the "Imo" which he heard was 3 blasts. She went astern, took off her headway, her bow coming to star-board about 2 points. She was heading to the Dartmouth side when she gave the three-blast signal. The "Mont Blanc" was then heading pretty straight up the channel; the vessels were then one-half or three-quarters of a mile apart. At the moment of collision the "Mont Blanc" was heading towards the Halifax side and the "Imo" was coming pretty straight down, but her head was a little to the Halifax side too; she struck the "Mont Blanc" at less than a right angle. The nature of the damage done and the absence of all twisting of the "Imo's" stem would go to shew that this last opinion is inaccurate. In addition this witness, who professes to have observed the vessels at the time, says nothing about the "Imo's" steaming down her own water from the time she first reversed till just before the collision, 100 ft. on the Halifax side of the mid-channel. His evidence is quite in conflict with that of the witness Dixon.

John Joseph Rourke, the chief engineer of the "Douglas H. Thomas," says he first saw the "Imo" up towards the basin. The first signal he heard was 2 blasts from the "Imo." The "Mont Blanc" just as she was passing the "Highflyer," he says, was going 6 or 8 miles an hour. The "Imo" was coming down from the basin at something like 3 or 4 miles an hour. She was heading towards the Dartmouth shore. The vessels were at this time about 1 mile apart. The next signal he heard was one from the "Mont Blanc," one blast. The next signal was 3 blasts from the "Imo;" she had changed her course slightly to the Halifax side; she then reversed her engines, her bow swung to the Halifax side. She was reversing a long time. She came ahead to starboard. She was then half a mile from the "Mont Blanc." The "Imo" then blew a one-blast signal, and the "Mont Blanc" then a one-blast signal. The "Mont Blanc" did not then change her course; but afterwards gave a two-blast signal and went to port; they were then getting within 300 or 400 yards of each other. Prior to this going to port the vessels were coming fairly parallel as far as he could say. The "Mont Blanc" was keeping for the Dartmouth shore, the "Imo" headed for the Halifax shore. Their courses were not quite parallel, but both ships would pass one another. The reason, he suggests, for the "Mont Blanc" giving the one-blast signal he has described was that both ships were getting handy to each other and the "Mont Blanc" people were getting a little nervous. The "Mont Blanc," he says, was on the Dartmouth shore; the "Imo" was about mid-channel, somewhat inclined to the Halifax shore. The only reason he can suggest for the "Mont Blanc" giving a one-blast signal was that she wanted to get more room. That is a very significant answer. Why should she want to get more room and go away to starboard closer to the Dartmouth shore unless, as her witness says, the "Imo" was passing her till they came within 400 ft. of one another? This evidence leads to the conclusion, already mentioned, that both ships neglected to reverse their engines before they had approached at all so near each other as 400 feet.

Ralph E. Smith, a marine engineer in the employment of Messrs. Burns & Kellaher, says he has been 8 years at sea, that he first saw the "Mont Blanc" at the Ferry Wharf on the Dart-

IMP.

P. C.

THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.

Lord Atkinson.

mouth side going up towards the basin. He estimated her speed probably at 5 knots. He then went below on his own ship. Someone called him up saying there was going to be a collision, and when he came up the "Imo" was into the "Mont Blanc" and shoved her round just about crossways in the channel. He was 300 or 400 yards away from the ships. It appeared to him that the French ship had not any way on, but the "Imo" must have had some on because she shoved the other boat right round.

The evidence of the other onlookers does not carry the case further.

Walter Brannen, the mate of the "Stella Maris," states that he was at the northern end of the Sugar Refinery pier when he first saw the "Imo" up in the entrance to the basin, coming down. She was more on the Dartmouth side. He kept his vessel on the Halifax side. He was always more to that side. When the "Imo" was nearly down to them she blew one blast. He looked astern and saw the "Mont Blanc" coming up. She was on the Dartmouth side of the channel and they were about a third of a mile apart. It was not necessary for the "Imo" to give any signal to him. (This statement of the distance is clearly erroneous.) Soon after giving the one blast the "Imo," before she had got past the tug, gave 3 blasts. He noticed a whirl under her stern and thought she was going astern. He does not recollect that any vessel sounded any whistle after the "Imo" passed him. The "Imo" was 150 to 200 yards to the eastward of his tug when she passed him. Her speed was then 5 miles an hour. She had not passed him when she went astern. She straightened down the harbour after she passed him. He noticed that before the collision the "Mont Blanc" turned her head to port. Before that she was on the Dartmouth side. This witness must according to the "Imo's" case and to the measured distances have been three-quarters of a mile away from the place fixed by her as the place of collision, yet he is asked the question whether he could tell whether the 2 vessels would have gone clear if the "Mont Blanc" had not changed her course, and he takes upon himself to answer that if they kept their courses and their speeds about equal he thinks they would have collided, because when he first noticed the "Mont Blanc," she was heading across the harbour, coming up under the stern of the "Highflyer."

It is abundantly proved that the "Mont Blanc" passed the "Highflyer" well over towards the Dartmouth side of the channel. The witness is then asked: "When the 'Imo' blew her one-blast signal, did you think it was for you?" He replied: "I did at first, and then I noticed the position she was in and I thought she could not be blowing it for me." The reason he gives is that the "Imo" was practically close on them, and there was no need for her coming to starboard to clear them. What happened when the "Imo" passed the tug up abreast of pier No. 9, as the "Imo's" case fixes it, is of comparatively little importance. It gives little help as to the course of the "Imo" down the channel after she had passed this point.

Their Lordships have thus examined critically and at great length the evidence bearing upon the points in issue in the action. They have upon the whole come to the following conclusions:—

First, that the "Mont Blanc," from the time she passed the "Highflyer" till she starboarded her helm in the agony of the collision, never left her own water, though she may, no doubt, before she was actually struck, have forged ahead so as to cross the middle line of the channel.

Second, that as she steamed up through her own waters her speed was not immoderate.

Third, that the "Imo" in order to inflict the injury to the "Mont Blanc," which it is proved she did inflict must have struck that ship with more force and at a higher rate of speed than her witnesses admit.

Fourth, that the "Mont Blanc" must at the time of the collision have had little if any way on her, else the stem of the "Imo" would have been twisted to some extent, which it was not.

Fifth, that the inclination of their Lordships' opinion is that the "Imo" could, when she first reversed her engines, have crossed into and remained in her own water, as she was bound to do, but never did.

It is not necessary, however, absolutely to decide this last point, because on the case of both ships it is clear that their navigators allowed them to approach within 400 ft. of each other on practically opposite courses, thus incurring risk of collision,

IMP.
P. C.
THE SHIP "IMO" v. GENERAL TRANS-ATLANTIC CO.
Lord Atkinson.

and indeed practically bringing about the collision, instead of reversing their engines and going astern, as our assessors advise us, they, as a matter of good seamanship, could and should have done, long before the ships came so close together. This actually led to the collision. The manœuvre of the "Mont Blanc" in the agony of the collision may not have been the best manœuvre to adopt, and yet be in the circumstances excusable. But their Lordships are clearly of opinion that both ships are to blame for their reciprocal neglect above-mentioned to have reversed and gone astern earlier than they did.

They are therefore of opinion that the appeal and cross-appeal both fail, that the judgment appealed from should be affirmed, and they will humbly advise His Majesty accordingly.

There will be no order as to the costs of the appeal and cross appeal. *Appeal dismissed.*

IMP.
P. C.

REDERIAKATIEBOLAGET v. NEWCOMBE.

(The Proper Officer of the Crown.)

Judicial Committee of the Privy Council, Lord Sumner, Lord Parmoor, Lord Wrenbury, The Lord Justice Clerk and Sir Arthur Channell.
March 18, 1920.

SHIPPING (§ IV—20)—STOWAWAY—ENEMY COUNTRY—NEUTRAL SHIP—UNNEUTRAL SERVICE—CAPTAIN'S DECEPTIONS—CONFISCATION.

There must be sufficient evidence of an act which would constitute an unneutral service or a cause of condemnation under that or any analogous title in order to afford a ground for the confiscation of a neutral vessel, where deceptions on the part of the captain are not sufficient either in justice, or according to authority.

Statement.

APPEAL from the Exchequer Court of Canada, Nova Scotia Admiralty District (in Prize). Reversed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—Their Lordships are much indebted to counsel on both sides for the unusually complete and exhaustive survey of all possible authorities bearing on a most important question, but, for reasons which their Lordships will briefly state, they do not think it necessary to deal with this case in such a manner as would require that time should be taken for its further consideration.

The case is one in which there is no appeal by the captain against the confiscation of the rubber, which was his property. The Local Judge in Admiralty, Drysdale, J., has expressly said

IMP.
P. C.
REDERIAKA-TIEBOLAGET v. NEWCOMBE.
Lord Sumner.

that for carrying the contraband rubber alone he would not have confiscated the ship, and that, although the captain of the "Svithiod" lied in certain particulars, that alone would not cost his owners their ship; and accordingly the case, although it has involved some discussion as to both the prevarication and falsehood of the captain, and his conduct in having on board some contraband, really resolves itself, and always has resolved itself, into the question whether the captors made out, or laid the foundation for making out, a case of unneutral service.

Upon that the evidence briefly stands as follows: There was a German stowaway on board the vessel found at Halifax. Their Lordships will assume that, as the trial Judge found, this stowaway was taken on board in collusion with the captain of the vessel, although it may be pointed out that this is rather a matter of indirect inference from the probabilities of the case than dependent upon any fact positively deposed to. This person was the third mate of the "Blucher," which had taken refuge in Pernambuco at the beginning of the war to avoid the risks of capture at sea, and had remained there for the best part of 3 years. Hellman came on board and purported to be a stowaway, and purported to discover himself when the ship was a sufficient length of time out of Pernambuco, and was then treated by the captain of the "Svithiod" with some consideration, and so the vessel reached Halifax. The vessel was a Swedish vessel, bound with a full cargo of maize from Buenos Ayres to a port of discharge in Denmark. The trial Judge found that he was satisfied that the captain took the third officer intending to smuggle him to Germany. In their Lordships' opinion, that, however plausible as a matter of speculation, on this evidence is a matter of speculation only; because all that can be said is, on the one hand, that he was a German, and apparently that his relations were still alive in Germany, while, on the other hand, there is no evidence of any express intention on his part, or of anything done by him, to throw any light on his further proceedings after arriving in Denmark; and for what it may be worth there is the fact that he had left Pernambuco under such circumstances of dispute with the other officers on board his ship, the "Blucher," that the immediate cause of his discovery was in fact the sending of a letter by the first mate, which he must have known would fall

IMP.
P. C.
REDERIAKA-TIEBOLAGET v. NEWCOMBE.
Lord Sumner.

into the hands of the British officials, betraying Hellman's presence on board, because he had gone away in debt to him and others. Therefore, it would be quite impossible, in their Lordships' opinion, to say that it has been proved that he was even going to Germany. What this man was, except that he was a mariner and a qualified third officer, the evidence does not shew; and even assuming, as probably one may assume, because our eyes cannot be closed to circumstances of public notoriety connected with the war, that, if he reached Germany, some service in connection with the war would promptly have been found for him, the fact remains that he was at the time a seaman in an entirely private capacity seeking the opportunity of a voyage, by which he would at least escape from a further stay at Pernambuco, and proceeding at his own expense, or at the expense of the owners of this Swedish barque, it does not appear which, but without their cognisance at any rate. His case, therefore, cannot be placed in the same category at all as the cases where the officers of a belligerent state have engaged a vessel to perform a particular service, or have paid for the carriage of particular passengers, or where persons, already embodied in the service of the belligerent country, are being transported upon some purpose of state.

Their Lordships are impressed with the fact that the circumstances of this case appear to lie outside the scope of any authority to which their attention has been drawn. It is true that when he reached Halifax the captain of the "Svithiod" endeavoured to conceal the presence of the man on board by means of very transparent devices, because, as he knew almost as soon as he was interrogated, the officials were already aware of the man's presence, and anything he might say or do could hardly do more than save appearances for himself, and enable him to say that he had not given the man up. The conduct of the captain of the "Svithiod" does not appear to their Lordships particularly aggravated. At any rate, if there is no sufficient evidence of an act which would constitute an unneutral service or a cause of condemnation under that or any analogous title, the mere deceptions of the captain of the "Svithiod" in themselves would not, either in justice or according to authority, be a ground for confiscating the vessel.

IMP.
P. C.
REDERIAKA-TIEBOLAGET v. NEWCOMBE.
Lord Sumner.

Their Lordships are, of course, very fully impressed with the great importance of the whole topic of unneutral service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided. On some proper occasion it might be necessary to define with very great accuracy the way in which well-known principles should be applied under modern conditions; but it is precisely because their Lordships are so impressed with the importance of the subject, with the high obligations which rest upon neutrals to refrain from all unneutral service, and with the gravity of that breach of duty, if it should occur, that they think it unnecessary, and therefore inexpedient and undesirable, to endeavour to decide any question of law in a case where, in their view, the captors have failed to lay any foundation in fact which would justify the investigation of so important a subject.

Their Lordships will, therefore, humbly advise His Majesty that the appeal succeeds; that the decree of confiscation ought to be set aside, and that the confiscated vessel ought to be restored to her owners. The respondent will pay the costs of the appeal.

Appeal allowed.

MONTREAL TRAMWAYS Co. v. McALLISTER.

IMP.
P. C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster and Lord Dunedin. March 3, 1920.

NEGLIGENCE (§ II A—76)—INJURY TO BOY BY TRAMWAY—FINDING OF FACTS BY JURY—CONTRIBUTORY NEGLIGENCE—NOT SOLE CAUSE OF ACCIDENT—REDUCTION OF DAMAGES—LIABILITY OF DEFENDANT.

According to the laws of Quebec, the finding of contributory negligence on the part of the plaintiff does not afford a complete defence; the defendant in order to succeed must shew that the negligence of the plaintiff was the sole cause of the accident. The question of applying law to the facts is one for the jury, and if the jury be properly directed, and there is evidence on which to base their findings, these findings must stand.

[*Macleod* v. *Edinburgh Tramways Co.*, 1 Sess. Cases 1912-13, 624 distinguished; *C.P.R.* v. *Frechette*, 22 D.L.R. 356, [1915] A.C. 871, followed.]

Statement.

APPEAL by defendant from the judgment of the Court of King's Bench, Quebec (1916), 34 D.L.R. 565, 27 Que. K.B. 174, in an action by the guardian and father of an infant for damages for injuries to the said infant. Affirmed.

The judgment of the Board was delivered by

IMP.

P. C.

MONTREAL TRAMWAYS CO. v. MCALLISTER.

Lord Dunedin.

LORD DUNEDIN:—The respondent in this case, Peter McAllister, is the guardian and father of Francis McAllister, and sues the appellants, the Montreal Tramways Company, for damage for personal injury to Francis McAllister. The facts are simple enough. Francis McAllister is a schoolboy, and with other school companions he was, on November 7, 1913, going to the grounds of the Montreal Amateur Athletic Association, which are situated on the south side of the appellants' tramway lines. He was riding in a west-bound car, and there is a point at which it is indicated by a signpost that cars may be asked to stop opposite the entrance of the said grounds. The tramways have a double track and the west-going track is to the north of the east-going. The car in which McAllister was riding was signalled to stop and did stop at the above-mentioned stopping-place. Just as the car stopped, the boys left the car at the rear, on the north side, and going round the back of the car proceeded to go across the other track. As McAllister crossed the track he was struck by an east-going car and seriously injured.

The case was tried by a special jury, to whom the Judge put certain specific questions which had been fixed by the Court after argument. As it was a mixed jury, the questions were put both in French and English, but it is sufficient to give the English version:

1. On or about the 7th May, 1913, was Francis McAllister a passenger on board of a car owned and operated by the company defendant? 2. On that day was Francis McAllister struck by a car owned and operated by the company defendant? 3. Was such accident caused by the sole fault and negligence of the company defendant and if so, in what did such fault and negligence consist? 4. Was such accident caused by the sole fault and negligence of the said Francis McAllister and if so, in what did such fault and negligence consist? 5. Was said accident caused by the combined fault and negligence of the said Francis McAllister and of the company defendant and if so, in what did the fault and negligence of each consist? 6. Did said Francis McAllister suffer damages as a result of such accident and if so, at what amount do you fix such damages? 7. If you have replied in the affirmative to question No. 5, to what sum do you reduce the amount to which the said Francis McAllister is entitled on account of his having contributed to the accident in question?

To these questions the jury replied as follows:—

(1) Yes. (2) Yes. (3) No. (4) No. (5) Both parties were in fault, but the greater fault was on the part of the boy; and having asked the question the jury added the motorman did not

have his car under control and the boy was negligent. (6) $6,000. (7) $2,400.

All findings were stated to be unanimous.

Judgment was accordingly entered for $2,400.

The appellants appealed to the Court of King's Bench to recall the judgment on the ground of misdirection, and on the ground that the verdict was contrary to evidence. The Court of King's Bench consisting of five Judges unanimously dismissed the appeal and affirmed the judgment. Reasons were given by Cross, J.

Appeal has been taken to this Board, but the only ground argued was that the verdict was contrary to evidence.

The case was argued by the appellants' counsel with great candour and ability. He at once admitted, as he was bound to do, that unless he could shew that the sole cause of the accident was the boy's own rashness in crossing the other track without looking to see whether another car was coming, he could not succeed; if he could so shew then he was entitled to succeed.

Their Lordships do not think there is any controversy as to the law of the matter.

It has been clearly laid down in many cases, and quite recently by this Board in the case of the *Canadian Pacific Railway Co.* v. *Frêchette*, 22 D.L.R. 356, [1915] A.C. 871, 18 Can. Ry. Cas. 251, that if the negligence of the plaintiff is the sole cause of the accident it cannot be in the proper sense contributory, and the negligence of the defendant in such a case is in the words of Lord Cairns an "*incuria*," but not an "*incuria dans locum injuriæ*." When, however, it is sought to apply the law to the facts, the question is one for the jury, and if the jury has been properly directed and there is any evidence on which their findings can be based, these findings must stand.

Now, in the present case, not only do the above-recited questions very clearly put the point to which the attention of the jury was to be directed, but the Judge in his charge put the matter very clearly, and no objection is now taken to what he said. That being so, the sole question now comes to be, was there evidence on which the jury could find that there was negligence on the part of the appellants' servant which was partly the cause of the accident? Contributory negligence on the part of the boy

IMP.
P. C.
MONTREAL TRAMWAYS CO. v. MCALLISTER.
Lord Dunedin.

they have found, and reduced the damages accordingly. As to this the matter is admirably put by Cross, J., in the judgment under appeal. He first of all calls attention at page 568 (34 D.L.R.), to what was said on this point by the Judge in his charge, which was as follows:—

Mais quand on voit un char qui est prêt de s'arrêter, s'il n'était pas arrêté tout-à-fait, s'il était presque arrêté, alors le garde-moteur doit immédiatement aller à une allure telle qu'il puisse arrêter presque immédiatement son char, l'avoir sous contrôle, pour pas qu'il arrive d'accident à quelqu'un qui decendrait de l'autre char. Cela doit, n'est-ce pas, ce à quoi l'oblige la prudence.

And then continues:—

It was made clear to the jurors that they could take their own view of the facts. The case of cars meeting one another at ordinary speed at places other than stopping places was distinguished, and it was pointed out by the Judge that the motorman in such a case, having reason to believe that nobody would be trying to cross in front of him, would not need to slacken speed. The jury were asked to consider whether in the circumstances the motorman had slowed down promptly enough or not, and they were properly enough invited to consider the distance traversed by the car after the collision before it came to a stop, in its bearing upon the matter of speed.

The jury, in such circumstances, could adopt either view. Having found that the motorman did not have his car sufficiently under control, they would appear to have taken the view that the west-bound car had come so near the crossing that passengers who had hurriedly alighted from it—or other pedestrians for that matter—might happen to cross from behind it and so come upon the track of the east-bound car, p. 572 (34 D.L.R.).

If it was the view of the jury that that was the way the accident happened, there was clear ground to treat it as a case of contributing faults, fault on the part of McAllister in having ventured upon the track without having looked and listened, and fault on the part of the motorman in not having control of his car sufficient to stop it before it would strike the pedestrian. It might indeed be taken as a typical case of contributing faults, for the defendant cannot say that McAllister's fault was a sufficient cause of the whole damage, seeing that the motorman by stopping the car quickly enough would have avoided the damage.

This really disposes of the whole case. Their Lordships will only add a few words on a case which was much relied on in the argument before them, viz., *Macleod* v. *Edinburgh etc. Tramways Co.* (1913), Sess. Cas. 1912-13, page 624, where the facts bore in some respects a great resemblance to the facts in this case. A young woman in Edinburgh left a tramcar which had stopped, and crossed behind the car on to the other track, and as she did so was hit by a car going in the opposite direction. The jury found in favour of the pursuer, but the First Division of the Court of Session set aside the verdict, holding that there was clear contrib-

IMP.

P. C.

MONTREAL TRAMWAYS CO. v. MCALLISTER.

Lord Dunedin.

utory negligence on the part of the plaintiff, who had failed to look to see if there was anything coming before she stepped on to the track. They accordingly gave judgment in favour of the defendants. Now the actual judgment in the case cannot avail the appellants here, for the simple reason that all the judgment did was to affirm contributory negligence, which by the law of Scotland, like that of England, affords a complete defence, whereas here contributory negligence has been found, but by the law of Quebec does not afford a complete defence.

The case was relied on for the sake of certain remarks of the Lord President on the conduct of the woman, which would go to shew that in that case he thought (and the other Judges agreed with him) that the imprudence of the woman was the sole cause of the accident; but here there arises a distinction in the facts which, as regards this topic, makes all the difference. The accident there did not occur at any stopping-place, the stopping car was stopped by desire to let the woman down. Accordingly the approaching motorman had no warning until he actually saw the other car stop, and that he only did when he was close to the car. The whole point in the present case is that the motorman knew that he was approaching a place where the other car might stop, and in view of that he was bound to have his own car under control. The jury held he did not. That was a disputed question of fact, and it cannot be said that the jury were not entitled so to hold.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

UNITED CIGAR STORES, LIMITED v. MILLER.

CAN.

Ex. C.

In the Matter of the Petition of United Cigar Stores, Limited, of the City of Toronto, in the Province of Ontario, Manufacturers (Provincial), Petitioner; and United Cigar Stores Limited (Dominion), Added Petitioner (by Order of the Court); and George Mitchell Miller, Objecting Party, and United Cigar Stores of Winnipeg, added Objecting Party (by Order of the Court).

Exchequer Court of Canada, Cassels, J. March 8, 1920.

TRADE MARKS—REGISTRATION—TRADE NAME, PASSING OFF.

The petitioner sought to have the words "United Cigar Stores" registered as a trade mark, and to have the same words registered in the name of the objecting party expunged. These words constituted the trading name of the petitioner and most of the trade marks claimed by it were for particular brands of cigars. Moreover, by ch. 129, 3 Geo. V., 1913, Man., a company was incorporated by the name of "United Cigar Stores" and the statute provides, *inter alia*, "that the company may

CAN.

EX. C.

UNITED CIGAR STORES, LIMITED v. MILLER.

procure itself to be registered in any Province of the Dominion of Canada and exercise its powers in such Provinces." The petitioner claimed that the obtaining of the charter was a fraud on its rights.

Held, on the facts stated, that the petitioner was not entitled to have the words "United Cigar Stores" registered as a trade mark.

Quære. Would the mere fact of a company having a corporate name similar to petitioner be a bar to any action that might be brought against it for passing off its goods as the goods of petitioner?

PETITION asking to have a certain trade mark claimed by petitioner registered and a certain trade mark already registered expunged from the registry.

Wallace Nesbitt, K.C., for petitioner; *Russel Smart*, and *J. Lorn McDougall*, for objecting party.

Cassels, J.

CASSELS, J.:—The petition in this case asks that the entry in the Registry of Trade Marks, stated to be No. 45, folio 11011, for the words "United Cigar Stores" be expunged from the registry.

The petitioners also ask that the trade mark be registered in their name for "United Cigar Stores."

They also ask that a specific trade mark consisting of a shield whereon a red background there is displayed a representation of a Union Jack Flag and underneath in white letters upon the said red background the words "United Cigar Stores" be registered.

The case came on for trial before me—certain objections having been filed on behalf of one George Mitchell Miller.

After considerable evidence was adduced, Mr. Smart, who acted as counsel for the contestants, asked leave to add as co-contestants an additional defendant, the parties appearing as contestants not being the proper parties. No objection was raised on the part of the petitioners represented by Mr. Nesbitt, K.C., and as no harm could arise, the application of Mr. Smart to add these parties is allowed.

It later appears that the petitioners are not the proper parties to make the application. It would appear that the Ontario Company, the United Cigar Stores, Limited, have assigned all their rights including their right to the trade mark in question, to a company incorporated by the Dominion under a similar name, namely the United Cigar Stores, Limited. The contestants raise no objection to this company being added as co-petitioners, and as no harm can be occasioned to anyone, the advertisement being correct and in the name of the United Cigar Stores, Limited, I

see no reason why this Dominion company should not be added as co-petitioners.

The judgment should not issue until the additional contestants and the additional petitioners are duly added.

Mr. Smart, after considerable evidence was adduced, consented to the trade mark registered by his clients being expunged. I think he was well advised in the course he adopted, as it would be impossible to allow this trade mark to remain upon the registry, and an order to this effect will issue.

No objection has been raised to the registration of the specific trade mark by the petitioners, which I have previously referred to, and an order may go in the usual form allowing the petitioners to register the specific trade mark.

I cannot allow the petitioners to register as a trade mark the words "United Cigar Stores." There are a great many objections to such registration. It is really the trading name of the company, and the evidence would indicate that most of the trade marks which are claimed by the petitioners are for particular brands of cigars. An additional reason is that by a statute of Manitoba, assented to on February 15, 1913, a company is incorporated by the name of United Cigar Stores. (Ch. 129, 3 Geo. V., 1913.)

The 26th section of this statute provides:—

> The head office of the company shall be in the City of Winnipeg, in the Province of Manitoba, and the company may procure itself to be registered in any Province of the Dominion of Canada, and exercise its powers in such Provinces.

It is argued by Mr. Nesbitt that the obtaining of this charter is a fraud on the rights of his client.

As I pointed out, the Exchequer Court has no jurisdiction in passing-off cases, nor can I assume that there was an impropriety in the obtaining of this Act of the Manitoba Legislature. Any remedy to get rid of this charter will have to be taken in a different form of action. The mere fact of the company having a corporate name may not be a bar to any action that might be brought if this company were passing off their goods as the goods of the petitioners. On this question I refrain from giving any opinion, as the matter is not one before me. I refer counsel, however, to the case of the *Boston Rubber Shoe Co.* v. *The Boston Rubber Co. of Montreal* (1902), 32 Can. S.C.R. 315, and also to a late case

CAN.
EX. C.
CASSELS, J.

along the same lines, in the Court of Appeal in England, *Ewing* v. *Buttercup Margarine Co.*, [1917] 2 Ch. 1.

As the success of the application is about equally divided, there will be no costs to either party.

Judgment accordingly.

Annotation.

ANNOTATION.

By Russel S. Smart, B.A., M.E., of the Ottawa Bar.

CONCURRENT USE.

The rights as between two parties who use a trade mark concurrently have never been defined in Canada.

The Supreme Court of the United States in *United Drug Co.* v. *Theodore Rectanus Co.* (1918), 248 U.S. 90 at 97, said: "The asserted doctrine is based upon the fundamental error of supposing that a trade mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy. *Canal Co.* v. *Clark* (1871), 13 Wall. 311, 322, 20 L. Ed. 581; *McLean* v. *Fleming* (1877), 96 U.S. 245, 254, 24 L. Ed. 828. There is no such thing as property in a trade mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designnate the goods as the product of a particular trader and to protect his goodwill against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. *Hanover Milling Co.* v. *Metcalf* (1916), 240 U.S. 403, 412-414, 36 Sup. Ct. 357, 60 L. Ed. 713, 6 T.M. Rep. 149.

The owner of a trade mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. See *United States* v. *Bell Telephone Co.* (1896), 167 U.S. 224, 250, 17 Sup. Ct. 209, 42 L. Ed. 144; *Bement* v. *National Harrow Co.* (1901), 186 U.S. 70, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Paper Bag Patent Case* (1908), 210 U.S. 405, 424, 28 Sup. Ct. 748, 52 L. Ed. 1122.

In truth a trade mark confers no monopoly whatever in a proper sense, but is merely . . . a distinguishing mark or symbol—a protection of one's goodwill in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

It results that the adoption of a trade mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade. And the expression, sometimes met with, that a trade mark right is not limited in its enjoyment by territorial bounds, is true only in the sense that wherever the trade goes, attended by the use of the mark, the right of the trader to be protected against the sale by others of their wares in the place of his wares will be sustained.

Annotation.

Property in trade marks and the right to their exclusive use rest upon the laws of the several States, and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate the commerce with foreign nations and among several States and with the Indian tribes. Trade Mark Cases, 100 U.S. 82, 93, 25 L. Ed. 550. (Points out Act of Congress limited to Interstate Trade.) (*Massachusetts* v. *Louisville T.M.* "Rex," a registered trade mark.)

This was following the earlier cases of *Hanover Milling Co.* v. *Metcalfe* (1916), 240 U.S. 403, 36 Sup. Ct. Rep. 357 at 360, in which their opinion was expressed as follows:

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. *Canal Co.* v. *Clark*, 13 Wall. 311, 322; *McLean* v. *Fleming*, 96 U.S. 245, 251; *Amoskeag Manufacturing Co.* v. *Trainer* (1879), 101 U.S. 51, 53; *Menendez* v. *Holt* (1888), 128 U.S. 514, 520; *Lawrence M'fg. Co.* v. *Tennessee M'fg. Co.* (1891), 138 U.S. 537, 546, 11 Sup. Ct. Rep. 396.

This essential element is the same in trade mark cases as in cases of unfair competition unaccompanied with trade mark infringement. In fact, the common law of trade marks is but a part of the broader law of unfair competition. *Elgin Watch Co.* v. *Illinois Watch Case Co.* (1901), 179 U.S. 665, 674; *G. & C. Merriam Co.* v. *Saalfield*, 198 Fed. Rep. 369, 372; *Cohen* v. *Nagle* (1906), 190 Mass. 4, 8, 15, 2 L.R.A. (N.S.) 964; *S. A. & E. Ann. Cas.* 553, 555, 558" (Reprd. p. 415), and cases to the effect that the exclusive right to the use of a trade mark is founded on priority of appropriation, 36 Sup. Ct. Rep., at 361, "But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant; unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

The following earlier decisions in the United States shew the development of the law:

Infringement—Right to injunction—Use of mark in different localities.

(U.S. Circuit Court, N.Y.). Complainant and its predecessors in Baltimore, and defendant and its predecessors in New York City, each for more than 30 years produced and sold a rye whiskey under the name of "Baltimore Club." Complainant's business was chiefly local and did not extend to New York City until shortly before the commencement of this suit, when it placed its goods in the market there. Defendant's business was larger, and whatever reputation or value attached to the name in New York was due to its efforts and its goods. *Held*, that complainant, even if conceded priority of use in the limited area of its business, had no standing to enjoin defendant's use in New York since that would be to further the deception of the public there, which it is the primary object of equity in such cases to prevent. (See Trade Marks and Trade Names, Cent. Dig. §93; Dec. Dig. §84, 88.) *Thomas G. Carroll & Son Co.* v. *McIlvaine & Baldwin Inc.* (1909), 171 Fed. 125.

Annotation.

Use of mark in territory where plaintiff's goods unknown—Not restrained.

(U.S. Circuit Court of Appeals, 7th Cir.) Complainant, an Ohio Milling company, since 1872 has used the name "Tea Rose" as a common-law trade mark for one of its brands of flour, but has never sold such brand in the territory southeast of the Ohio river comprising the States of Georgia, Florida, Alabama, and Mississippi, although it has recently made some effort to establish a trade there in other brands Defendant, without knowledge of its prior use by complainant, since 1893 has used the name "Tea Rose" for one of its own brands of flour in which it has built up an extensive trade in the States named, where the name has come to mean defendants' flour and no other kind. *Held*, that complainant was not entitled to an injunction to restrain defend nt from using the name in such territory. *Hanover Star Milling Co.* v. *Allen & Wheeler Co.* (1913), 208 Fed. 513.

First to adopt enjoined from unfair competition in territory—First occupied by one last to adopt.

(U.S. Supreme Ct., 1916.) Where it appeared that the plaintiff had through a long period of years established a valuable trade in the Southeastern States, particularly Alabama, in connection with the use of an alleged trade mark "Tea Rose," so that its mill in Illinois became known as the "Tea Rose Mill," and the defendant, though also a user of the mark "Tea Rose" for a considerable period, had but recently invaded the territory in question and by unfair means had attempted to cut into the trade of the plaintiff by selling flour under this mark in Alabama. *Held*, that the plaintiff is entitled to an injunction against defendant irrespective of its claim to affirmative trade mark rights in that territory and notwithstanding the fact that The Allen & Wheeler Company, not involved in the suit, had used the same mark prior to either plaintiff or defendant in other territory, *Hanover Star Milling Co.* v. *Metcalfe*, 240 U.S. 403, 36 Sup. Ct. 357.

The same question has also arisen in England in the case of *Edge & Sons Ltd.* v. *Gallon & Sons* (1899), 16 R.P.C. 509; (1900), 17 R.P.C. 557. The facts in this case were as follows (17 R.P.C.): "In 1888 E. commenced to call his blue "Dolly," and it was ordered, invoiced and advertised thereafter as "Dolly." In 1894 a company was formed which took over the business of E. In 1898 the company commenced an action against G. & Son for supplying blue not being the plaintiffs' to persons ordering "Dolly Blue." The blue so supplied was blue manufactured by R. and bore R's trade mark, which consisted of a washing tub called in some parts a "Dolly" tub and in other parts a "Peggy" tub with a handle of a dolly or peggy stick projecting from it. R. had used this trade mark since 1871, and registered it under the Trade Marks Act in 1876. It was admitted that R's blue was called "Oval Blue" and was invoiced as "Oval"; but the defendants' case was that retail customers often asked for it as "Dolly Blue," both before 1888 and since, and that there had, in fact, been a concurrent use of the word "Dolly" to describe E's blue and R's blue. *Held*, at the trial, that the plaintiffs were entitled to an injunction. The defendants appealed to the Court of Appeal, who held that concurrent user of the term "Dolly" to denote Ripley's blue as well as the plaintiffs' was proved, and the judgment of the Judge at the trial was wrong. The appeal was allowed with costs above and below, and the plaintiffs' costs of the trial, which had been paid by the defendants, were ordered to be repaid to them, but without interest. The plaintiffs then appealed to

Annotation.

the House of Lords. *Held*, by the House of Lords, that the concurrent user was proved, and the judgments of the Court of Appeal were right.

Under the Canadian Trade Mark and Design Act, R.S.C. 1906, ch. 71, sec. 11, the applicant is required to be entitled to the exclusive use of the trade mark.

In *Partlo* v. *Todd* (1888), 17 Can. S.C.R. 196, Ritchie, C.J., said at 199: "And this sec. 8, which is relied on as giving an absolute exclusive use, must be read in connection with the other provisions of the statute and it is quite clear that this exclusive use is only to attach when there is a legal registration."

"It is not the registration that makes the party proprietor of a trade mark; he must be proprietor before he can register," at p. 200. "I think the term 'proprietor of a trade mark' means a person who has appropriated and acquired a right to the exclusive use of the mark," at p. 201 . . . (See *McAndrew* v. *Bassett* (1864), 4 DeG. J. & S. 380 at 384.)

In the same case in the Appeal Court (1887), 14 A.R. (Ont.) 444 at 451, Hagarty, C.J.O., said: "I think the object of the Act was not to create new rights but to facilitate the vindication of existing rights . . . (cites early statutes). All this legislation is based upon the further protection of existing rights. Next year 24 Vict., ch. 21, was passed, for the first time establishing a register. It declares it expedient to make provision for the better ascertaining and determining the right of manufacturers and others to enjoy the exclusive use of trade marks claimed by them."

A distinction must be drawn between a trade mark which is a mark on goods and a trade name used on a hotel, store or establishment. A trade mark as such must be applied to a vendible article. (*McAndrew* v. *Bassett* (1864), 4 DeG.J. & S. 380.)

The distinction between trade marks and trade names is pointed out by Sebastian, 5th ed., p. 17, as follows:

"In imitations of trade names, again, used as such and not as trade marks on goods, there is a difference from trade mark cases proper: there is a false representation, but it is a representation, not that certain goods are certain other goods, but that a certain establishment is a certain other establishment, the object being that the one establishment should obtain custom intended for the other. Such cases are not cases of trade mark, not being concerned with marks placed on vendible articles in the market (*McAndrew* v. *Bassett*, 4 De G.J. & S. 380) but still the Court has to proceed on much the same lines.

All such cases, whether of trade mark or trade name or other unfair use of another's reputation, are concerned with an injurious attack upon the goodwill of a rival business; customers are diverted from one trader to another, and orders intended for one find their way to another. *Trade marks are really a branch of the goodwill of the business with which they are connected, representing it in the market, while the trade name over the shop represents it to the passer-by.* It is by the devolution of the goodwill that that of the trade marks is regulated; (822 of the Trade Marks Act, 1905; Rules 76-81 of the Trade Marks Rules, 1906; see also 70 of the Patents Act, 1883; and 82 of the Trade Marks Act, 1875); they are in fact included in, and valued as part of, the goodwill (*Hall* v. *Barrows* (1863), 4 De G.J. & S. 150); severed from it they cannot exist. (*Thorneloe* v. *Hill*, [1894] 1 Ch. 569.)

Annotation.

This distinction has been adopted very widely in the United States as the following case will show:

TRADE MARK GENERAL—TRADE NAME LOCAL.

(N.Y. Supreme Court.) A trade mark designates an article of commerce and is affixed thereto. It is thus general or universal accompanying the article, while the trade name applies to a business and is as a rule local. A trade mark can be infringed anywhere but not so with a trade name, the owner of which has an exclusive right thereto in his locality only. *Ball* v. *Broadway Bazaar* (1907), 106 N.Y. Supp. 249; 121 App. Div. 546.

THEORY OF PROTECTION OF TRADE NAMES.

Trade names are protected on the theory that, while the primary and common user of a word or phrase may not be exclusively appropriated, there being a secondary meaning or construction which will belong to the person who has developed it. *Sartor* v. *Schaden* (1904), 125 Iowa 696; 101 N.W. 511.

TRADE NAME IS LOCAL—SAME NAME MAY BE USED IN DIFFERENT LOCALITIES.

(Iowa, 1904.) A trade mark covers the limits of the jurisdiction granting the same and is protected therein, a trade name is of necessity local, and is based on usage in a particular locality in which the user thereof is doing business; and as one person may own a trade mark in one country or jurisdiction and another own it in another, so one person may have a property right in a trade name in one locality and another person have a property right in the same word in another locality. *Sartor* v. *Schaden*, 125 Iowa 696; 101 N.W. 511.

BUSINESS SIGN NOT A TRADE MARK.

(Missouri App., 1911.) A business sign does not constitute a trade mark. *Covert et al.* v. *Bernat* (1911), 138 S.W. Repts. 103.

TRADE MARK, TRADE NAME—DISTINCTION BETWEEN.

(Sup. Ct. Kans., 1914). A" trade mark" relates chiefly to the thing sold, while a "trade name" involves also the individuality of the maker both for protection in trade and to avoid confusion in business. *Harryman* v. *Harryman* (1914), 144 Pac. 262.

The use of the name of a corporation as a trade mark was dealt with in the *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, of Montreal (1902), 32 Can. S.C.R. 315.

The plaintiff incorporated in Massachusetts in 1852; registered the trade mark in 1897. The defendant in 1899 sold rubber boots and shoes with the mark of "The Boston Rubber Co., of Montreal, Ltd.," and pleaded that the mark was in effect a corporate name and the use of it was not audulent. The trial by Audette held that the defendants were free to use their corporate name in the absence of fraud. The judgment was reversed by the Supreme Court which held that the word "Boston" had become an invented or fancied name. Sir Louis Davies said, at page 327:

"It seems to me, with great respect, very difficult on the evidence in this case to find that fraud and bad faith were absent; . . . The object . . . may not have been to deceive purchasers . . . but that such would have been the result, I entertain no reasonable doubt. If so, it would bring the case directly within the rule laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865), 11 H.L. Cas. 523 at 538."

Annotation.

And at page 333, "Nor am I able to see how he can, by obtaining for himself and his associates letters corporate under the statute, do under cover of the corporate name what he otherwise would be prevented from doing. The defendant company has the right to use its corporate name for all lawful and legitimate purposes. It has not the right to use it, however, by stamping it upon goods it has manufactured and offered for sale, if by so doing it causes the purchasing public to believe that the goods are those of the plaintiff company." Restrained use of words "Boston" or "Bostons" in connection with rubber boots and shoes by stamping circular advertising without clearly distinguishing from the shoes of the plaintiffs.

TKACZUK v. STEWART.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. April 6, 1920.

ASSIGNMENT (§ I—7)—SUIT FOR WAGES DUE TO HUSBAND AND WIFE—DEFENCE —AGREEMENT FOR PURCHASE OF LAND—ASSIGNMENT OF WAGES— INOPERATIVE—R.S.M. 1913, CH. 13, SEC. 3.

A married man living with his wife cannot by agreement or other assignment or order dispose of his wages or salary to be earned in the future, without the written consent of his wife endorsed on or attached to such agreement or assignment.

Statement.

APPEAL by plaintiffs, husband and wife, in an action for wages in which the County Judge entered a nonsuit. Reversed.

R. A. Bruce, for appellant; *A. E. Hoskin*, K.C., for respondent.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—The contract of employment, dated April 18, 1918, appears to be a contract made by the husband for himself and as agent for his wife, who subsequently adopted it. The two were to receive $85 per month, of which the wife was to get $30. The husband did not purport to deal with her share of the wages in an agreement for the purchase of certain lands made July 8, 1918, by him with the defendant. The wife says the defendant told her she was to get $30 a month, and that she told him she would have nothing to do with the agreement to which she was never a party.

Sec. 3 of R.S.M., 1913, ch. 13, provides:—

3. No assignment of, or order for, wages or salary to be earned in the future shall be valid when made by a married man living with his wife, unless the written consent of his wife to the making of such assignment or order is attached thereto or endorsed thereon.

The agreement for purchase provides that $500 is to be paid to the defendant on November, 1918, "out of the wages of the purchaser to be earned by him in the employ of the vendor during

MAN.
C. A.
TKACZUK
v.
STEWART.
Cameron, J.A.

the season of 1918, which amount the vendor is hereby authorised to deduct from said wages." The other payments are to be made out of the crop in the manner set forth.

I am of opinion that this provision as to application of wages is tantamount to an assignment of, or order for, the payment of wages to be earned in the future, so far as it deals with wages yet to be earned. The defendant appears in the transaction in two different capacities—as master and as vendor. As master he secures a transfer to himself as vendor from the husband of wages earned and to be earned by him, the husband.

It was contended that this provision in so far as it deals with wages to be earned must be held as voidable only and must stand until set aside in an action brought for that purpose. The object of the Legislature was to afford protection against improvidence on the part of wage-earners and the Courts ought to assist in carrying out that intention whenever the subject matter is brought to their attention by holding any assignment or order in violation of the statute as inoperative. Proceedings to recover wages are usually intended to be summary and as informal as possible and there was no intention on the part of the Legislature that an action must be brought to set aside an assignment of, or order for, wages before proceedings could be taken to recover them. See Labatt, Master and Servant, page 1855, note. In *Central of Georgia R. Co.* v. Dover (1907), 1 Ga. App. 240, 57 S.E.R. 1002, a statute declaring void a contract for the assignment of unearned wages for the purpose of securing a loan was held to render the contract there in question invalid. The Canadian statute, 9 Edw. VII., 1909, ch. 2, referred to in the note in Labatt, *supra*, is our Manitoba Act. I think this is the construction put in England on the Acts respecting seamen's wages. Merchants Shipping Act (Imp.), 57-58 Vict. 1894, ch. 60, sec. 155.

On the facts in this case, the assignment by the husband of his wages to be earned after the date of the agreement, being made without his wife's consent, was void and we must so treat it.

The County Court has jurisdiction under ch. 44, R.S.M., 1913, sec. 57 (*b*), in all actions for legal and equitable claims where the balance payable does not exceed $500 and

in any such action the Judge shall have all the powers and jurisdiction which a Judge of the Court of King's Bench would have in case the action had

been brough in that Court, including the taking of accounts and the cancellation of contracts on the ground of fraud or misrepresentation, whether at the suit of the plaintiff or when claimed by the defendant in his dispute note, to the end and intent that full relief, legal and equitable, may be given to either party in such action.

Now the agreement for purchase was properly proved. We are entitled to disregard that part of it dealing with the wages of the husband to be earned but the rest of the instrument including that portion of it affecting wages earned by the husband up to its date remains unaffected. It was contended that the agreement as a whole had been rescinded and that evidence to that effect ought to have been admitted at the trial. But there is here no question of fraud or misrepresentation affecting the agreement. It is not alleged by the plaintiffs in their pleadings that the contract was rescinded and indeed there is no provision for a reply in the County Court but it was so stated before us. It is clear that the County Court Judge had no jurisdiction to entertain an action or counterclaim to set aside the agreement on any other grounds than those of fraud or misrepresentation, which were not urged.

Under sec. 125 of the County Courts Act, R.S.M. 1913, ch. 44, the plaintiffs might have applied for a transfer of the action to the King's Bench, but no such application was made. What evidence could be offered to shew cancellation does not clearly appear. It is evident, however, from what was stated on the argument before us by plaintiffs' counsel that he was relying upon cancellation or abandonment of the agreement by the action of the parties and not upon fraud or misrepresentation, and in that view the trial Judge was justified in refusing to admit the evidence. If he had been asked to transfer the case to the King's Bench he had jurisdiction to do so. But, as I have stated, no such application was made to him by the plaintiffs and he proceeded to deal with the agreement so far as it was properly before him. That is, he took the agreement for purchase as proved and establishing a *primâ facie* claim for $500 due the defendant by the husband, which he (the husband) says he never paid. I think the County Court Judge was, however, in error in holding that agreement covered the amount due to the husband after the date of the agreement and the amount due to the wife.

My conclusion is that the plaintiffs are entitled to recover,

MAN.

C. A.

TKACZUK v. STEWART.

Cameron, J.A.

as to the husband, the amount earned by him subsequent to the agreement, and, as to the wife, the whole amount due her.

The judgment of nonsuit is set aside and a judgment for the plaintiffs entered in accordance with the foregoing.

The plaintiffs are to have their costs of this appeal and of the trial in the County Court.

The amount for which judgment should be entered:—

Due to the wife 5½ months.....	$165.00
Due to the husband, 2⅔ months.....	146.00
	$311.00
Deduct amount paid as in particulars.....	41.33
	$269.67

Judgment accordingly.

ONT.

S. C.

Re PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Riddell, Latchford, Middleton and Lennox, JJ. January 2, 1920.

HEALTH (§ III B—16)—COMPULSORY VACCINATION—DUTY OF CITY COUNCIL—VACCINATION ACT, R.S.O. 1914, CH. 219, SEC. 12—MANDAMUS—POWER OF COURT—STATUTORY DUTY OF COUNCIL—PROPER PERSON TO ASK FOR ORDER—STATUS OF PROVINCIAL BOARD OF HEALTH—PUBLIC HEALTH ACT, R.S.O. 1914, CH. 218.

Under sec. 12 of the Vaccination Act, a municipal council has no discretion but to order the vaccination or re-vaccination of persons resident there, when smallpox exists in the municipality. The Court has power to grant a mandamus that the council do its statutory duty, the Court, however, acts only on the application of a person entitled to ask the Court for such an order.

According to the Public Health Act, R.S.O. 1914, ch. 218, the Provincial Board of Health, while an entity, and entitled to be heard in Court, is not a corporation, and though given very extensive powers of investigation has no particular supervision over the conduct of municipal council in vaccination matters any more than in any other matters.

[*Rex* v. *Bishop of Sarum*, [1916] 1 K.B. 466, referred to; *Re City of Ottawa and Provincial Board of Health* (1914), 20 D.L.R. 531, 33 O.L.R. 1, approved; *Metallic Roofing Co.* v. *Local Union No. 30* (1903), 5 O.L.R. 424, distinguished.]]

Statement.

APPEAL by the Provincial Board of Health for Ontario from an order of Sutherland, J., dismissing an application for a mandamus directing the Council of the Municipality of the City of Toronto effectively to order the vaccination or re-vaccination of all persons resident in the municipality. Affirmed.

ONT.

S. C.

RE PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

The judgment appealed from was as follows:—

SUTHERLAND, J.:—An application at the instance of the Provincial Board of Health for Ontario for a peremptory order of mandamus directing the Council of the Municipality of the City of Toronto effectively to order the vaccination or re-vaccination of all persons resident in that municipality who have not been vaccinated within seven years, as provided by the Vaccination Act, R.S.O. 1914, ch. 219, and especially by sec. 12 thereof, and to issue a proclamation by the head of the municipality, to be published in posters and in at least one newspaper published within the municipality, warning the public that the said sec. 12 is in force. The section named provides as follows:—

"(1) In every municipality where smallpox exists, or in which the Provincial Local Board of Health has notified the council that in its opinion there is danger of its breaking out owing to the facilities of communication with the infected localities, the council of the municipality shall order the vaccination or re-vaccination of all persons resident in the municipality who have not been vaccinated within seven years, and that such vaccination or re-vaccination shall be carried out in so far as the same may be applicable in the same manner as the vaccination of children, except that a person of fourteen years of age or over, but under the age of twenty-one years, who is not in the custody or under the control of his father or mother or of any other person, and every person of twenty-one years or over, shall present himself for vaccination by the medical practitioner, or by some other legally qualified medical practitioner, and the medical practitioner shall adopt the same measures to secure the vaccination or re-vaccination of every such person as he is required to take with regard to children.

"(2) A proclamation issued by the head of the municipality, and published in posters and in at least one newspaper published within the municipality, or, if there is no such newspaper, in at least one newspaper published in the county or district in which such municipality is situate, warning the public that this section is in force shall be sufficient evidence to justify the conviction of any person who has failed to comply with the law within a period of seven days from the publication of the proclamation.

ONT.

S. C.

RE PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

"(3) Every member of a municipal council which neglects or refuses to make the order required by subsection 1 or to make proper provision for carrying the same into effect, shall incur a penalty not exceeding $25, unless he proves that he did everything in his power to secure the making of the order or the making of proper provision for carrying any such order into effect, and causes his protest against such refusal or neglect to be recorded in the proceedings of the council.

"(4) If the head of a municipality neglects or refuses to issue and publish the proclamation required by subsection 2 he shall incur a penalty not exceeding $25.

"(5) Every person who wilfully neglects or refuses to obey the order of the council shall incur a penalty not exceeding $25."

The fact that smallpox has existed in the municipality of Toronto for some time past, and to a considerable extent, is common knowledge, and was proved by the material filed on the application; indeed no attempt was made to controvert this. In so far as the applicant's material entered upon a discussion of the merits of vaccination as a precautionary and preventive measure in the interests of public health and security, and led those opposing the motion to file affidavits in which medical men not only questioned its utility but suggested that under some conditions it is even fraught with danger, I expressed the view on the argument that such discussion was beside the real and single question to be dealt with and determined upon the motion. The Legislature must, I think, be assumed to have come to the conclusion, before it enacted the clause in question, that where smallpox was found to exist in a municipality it was in the public interest that vaccination or re-vaccination should be ordered. That is the law, binding alike upon the council, the public, and the Court. If the facts are proved to exist and are brought to the notice of the council, it seems obligatory upon that body to act in the manner indicated in the section. The existence of smallpox having apparently, in the opinion of the Provincial Board of Health, been proved to exist, the chief officer for the Province of Ontario, by a written notice served on the Mayor of the City of Toronto on or about the 8th December, 1919, called his attention and that of the members of the council to the fact that the city had had for some time, and particularly since the 1st November last, an outbreak of the

disease; that there had been a large number of cases in the city; that the local situation had been well known to the members of the council; and that he was directed by the Board "to respectively notify you and the council to carry out the provisions of the Vaccination Act, as laid down in sec. 12 thereof, within 48 hours after receipt by you of this notice, in default of which the Board will proceed to take such steps as may be necessary to enforce the law."

The council having failed to comply with the notice, it was under these circumstances that the motion was launched.

Preliminary objection was taken by counsel for the members of the council that, while the applicant was, under the Public Health Act, R.S.O. 1914, ch. 218, sec. 3 (1), constituted a Provincial Board of Health for the Province of Ontario, and clothed therein with powers of investigation, inquiry, and inspection with reference to disease and public health in some general and indicated directions, inclusive of oversight of vaccination and serum, and with authority to make regulations deemed necessary to prevent and mitigate disease, it was not created a corporation thereby, and so had no status or authority to make the motion.

It was pointed out, amongst other things, that, by sec. 15 of the Act, every local board was created a corporation by the name of "The Local Board of Health" of the particular municipality for which it was formed, and that by sec. 83 (1) it was expressly declared that "no determination or order of the Provincial Board or of a local board for the removal or abatement of a nuisance shall be enforced except by order of a Judge of the Supreme Court where such removal or abatement involves the loss or destruction of property to the value of $2,000 or upwards," and (2) that "the order may be made upon the application of the Provincial Board or of the local board." It was accordingly argued that the maxim *expressio unius est exclusio alterius* should be applied in the construction of this statute. While it has been said that this maxim is not of universal application, it is a general rule of construction in so far as Acts of Parliament are concerned: *Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628, at p. 634; *Drinkwater* v. *Arthur* (1871), 10 New South Wales (Supreme Court) 193; *Whitehead* v. *Cape Henry Syndicate* (1906), 54 S.E. Repr. 306, at p. 308, 105 Va. 463.

ONT.

S. C.

RE PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

It was also argued that the only remedy, so far as recalcitrant members of the council were concerned, was to apply subsecs. 3 and 4 of sec. 12 of the Vaccination Act to them and make them individually liable for the money penalties therein imposed.

In the case of *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, it was held that there was no liability on the part of the commissioners for the park to the public using the highways therein by reason of the absence or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them; and also that the commissioners, under the provisions of the statutes in that behalf, in any circumstances, act in the discharge of their various duties as an "emanation from the Crown" or as agent of the Crown, which is not liable for acts of the subordinate servants of the commissioners.

Counsel for the applicant relied strongly on *Re City of Ottawa and Provincial Board of Health* (1914), 20 D.L.R. 531, 33 O.L.R. 1, in which the last mentioned case was considered and distinguished, and in which it was held that the Provincial Board of Health had acted upon the assumption "that it was justified in refusing to approve of the plans and specifications because it did not approve of the river scheme; and that the Board had gone beyond what was referred to it by the statute when it assumed to reject the river scheme approved by the ratepayers," and "that the Court had jurisdiction to make and should make a peremptory order of mandamus requiring the Board to consider the plans and specifications for the carrying out of the river scheme and to approve or disapprove the same without regard to its opinion of the source of supply," and, further, that "the Board, acting under the Public Health Act, 2 Geo. V. ch. 58, and under the special Act 4 Geo. V. ch. 84, is not to be regarded as a mere emanation from the Crown; it is a body created for the discharge of important administrative and quasi-judicial functions" (head-note).

It is one thing to say that it is a body created for the purposes mentioned, and that, if it fails to discharge or attempts to discharge in an improper way its duty, it is amenable to the jurisdiction of the Court, but quite another, as it seems to me, to say that in its own name it has a legal right to apply to the Court for the order asked for on this application. I am of opinion that it

has not that right, and that the order asked cannot be made, with only the present parties before the Court. As I intimated upon the argument, it may well be that such an order can be obtained at the instance of the Crown, and that it might be made upon the present application, were the Crown to consent to be added as an applicant. It is possible also that on an application by a ratepayer of the city such an order might be made, or that if one were to consent to become an applicant such order might be made upon this motion. In the latter case I would desire to hear further argument. *Application dismissed.*

H. M. Mowat, K.C., for the appellant board.

G. R. Geary, K.C., and *C. M. Colquhoun*, for the respondents.

RIDDELL, J.:—Smallpox exists in the city of Toronto; the learned Judge in Chambers refused a mandamus to compel the council of the municipality to order vaccination or re-vaccination of all persons in the city; the Board desired to appeal, and applied for a speedy hearing. It was found possible to form a Court under sec. 14 of the Ontario Judicature Act; and, in view of the importance and urgency of the matter, a Court was formed for the purpose, with the distinct statement to the applicant that we should not hear the motion unless it was desired also by the city corporation.

Riddell, J.

The case has been fully, carefully, and ably argued on both sides.

After a careful examination of the legislation and authorities, I cannot find that the appeal should succeed.

There are certain matters about which there is and can be no controversy or doubt.

Smallpox exists in Toronto; this fact alone makes it the duty of the council of the municipality to make an order under the Vaccination Act, R.S.O. 1914, ch. 219, sec. 12. The council of a municipality in many cases is given a discretion as to measures to be passed; and in such cases the Court—in recent practice at least—does not interfere if there is good faith. But in this case there is no such discretion given. Smallpox existing, it is the duty of the council to make the prescribed order. A member of the council has no more right under the law to bring into play his views of the propriety of vaccination than he has his views of prohibition or duties upon imports.

ONT.

S. C.

RE PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

Riddell, J.

Again, there can be no doubt of the power of the Court to grant a mandamus that the council do its statutory duty—and, while the Court has a discretion, the discretion does not as a rule go so far as to overlook breach of a plain imperative duty imposed by the Legislature.

In *Rex* v. *Bishop of Sarum*, [1916] 1 K.B. 466, the Bishop was compelled to admit as a churchwarden a person whom he judged from his known character, words, and conduct to be unfit for the office. The Court said (pp. 469, 470): "If the Bishop had a discretion to examine into character before admitting . . . a churchwarden, it can hardly be questioned that he made a reasonable use of that discretion"—but, holding that he had a merely ministerial duty to perform, granted a mandamus. See also *Rex* v. *Lords Commissioners of His Majesty's Treasury*, [1909] 2 K.B. 183, and cases cited in both cases. So here the council, if it had a discretion, would be beyond the reach of a mandamus; but, having a purely ministerial duty, it is subject to the order of the Court.

But the Court does not act *proprio motu*—nor has it so acted for many years: at one time the Chief Justice of the King's Bench was a sort of detective and crown prosecutor, but that time is long past. We act in giving a mandamus only upon the application of some person, natural or artificial, who is entitled to ask the Court for an order.

There are two distinct questions here involved, which were not always kept separate on the argument, and which may easily be confused:—

(1) As to the right, i.e., the legal power, of the applicant to apply to the Court at all; and

(2) As to the right of the applicant to the relief sought.

As to the first, I feel no difficulty. While the Provincial Board of Health is not made a corporation by the Act, it is made a legal entity, wholly distinct from its individual members: it has duties to perform as a Board, and in the performance of these duties it may require the assistance of the Court. For example, sec. 6 (*c*) of the Public Health Act making it the duty of the Board to prevent as far as possible the sale of impure or inert vaccine matter, can it be doubted that the Board could sue for an injunction against any one persisting in selling such vaccine matter, or against any one interfering with their distribution of sanitary literature under

sec. 6 (*f*)? And indeed the Board, as a Board, is given the power specifically to apply to the Court, in certain circumstances, by sec. 83 (2) of the Act, R.S.O. 1914, ch. 218.

I think that the Act throughout implies that the Board is a legal entity with rights as well as duties, and in that view it has a right to be heard in Court. I cannot think that it is a *tertium quid*, both a legal entity and not a legal entity. If there be anything in *Sellars* v. *Village of Dutton* (1904), 7 O.L.R. 646, inconsistent with this, it is not to be followed. *Metallic Roofing Co.* v. *Local Union No. 30*, 5 O.L.R. 424, was decided as it was because the appellants were held not to be a legal entity. *Re City of Ottawa and Provincial Board of Health*, 20 D.L.R. 531, 33 O.L.R. 1, is, in my opinion, well decided, and I can see no difference between *status* to subject to motion for a mandamus and *status* to entitle to come into Court and ask for a mandamus.

But, in the view I take of the second question, it is not necessary to give a decided opinion on this point.

Assuming the entity of the Board and its power of applying to the Court, I do not think it has a right to the order asked for.

By no stretch of charity can it be said that the Act is well drawn: but we must take it as it is drawn—we can neither enlarge nor diminish it. The Board has large powers of legislation given by sec. 8 of the Public Health Act; but that legislation, to be valid, must meet the approval of the Lieutenant-Governor in Council, i.e., of the Ministers of the Crown responsible to the Legislature elected by the people. There is no reason why, under sec. 8 (*a*), a regulation that all persons should be vaccinated, etc., should not be made if the Ministry of the day were in favour of it; but that is not here the question.

Under the law, a mandamus is not granted unless the applicant can "shew that he has a clear legal specific right to ask for the intervention of the Court:" *Regina* v. *Guardians of Lewisham Union*, [1897] 1 Q.B. 498—"The Court has never exercised a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus shall have a legal specific right to enforce the performance of those duties" (at p. 501, *per* Bruce, J.) No such right is given to the Board specifically, or, as I think, by implication.

ONT.

S. C.

RE PROVINCIAL BOARD OF HEALTH FOR ONTARIO AND CITY OF TORONTO.

Riddell, J.

Very extensive powers of investigation are given the Board by secs. 6 and 7, but there is nothing to indicate any duty or power of supervision over the conduct of municipal councils in vaccination matters any more than in other matters. No doubt the Board is deeply concerned in the health of the people of Toronto, but not in a different way from that of the people of Cobourg or of Ancaster. The council of the city is a separate and distinct body, with its own ambit of duty prescribed by statute, and I can see no more right in the Board to interfere in the conduct of the council than in the council to interfere in the conduct of the Board.

It has been suggested that the Local Board of Health should join in the application—as at present advised I do not consider that the case would be advanced by such an addition. I fail to see the legal specific right of this body to a mandamus. But, in view of the fact that an election has been held and a new council about to take office, I think it best not to allow the Local Board of Health to join in the present application, but leave that body to make a substantive application if so advised.

The applicant having acted in good faith and in the public interest, it is not a case for costs.

The attention of the Government should be drawn to the defects in the Act; for that purpose a copy of the judgment will be sent to the Attorney-General for the information of himself and his colleagues.

Note:—Since the above judgment was ready for delivery out, we have been advised that the Local Board does not wish to join.

Latchford, J.
Middleton, J.
Lennox, J.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

LENNOX, J.:—I heartily concur in the conclusion that the appeal should be dismissed, and that it is not a case for awarding costs. I refrain from going further, not because I have any reason to doubt the correctness of the judgment of my learned brother Riddell throughout, but because I have not examined into some of the questions dealt with, with the degree of care that would justify me in expressing a final opinion, and it is not essential that I should do so at this time.

Appeal dismissed.

McLINTOCK v. LOWES.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. April 20, 1920.

MORTGAGE (§ VI G—116)—SALE—CONDITIONS—OBJECTION—PAYMENT WITHIN SIXTY DAYS—PRACTICE.

In a mortgage sale (as distinguished from other judicial sales) the plaintiff mortgagee should not be forced to accept a condition for postponement beyond the usual sixty days of any part of the purchase money required to satisfy his claim in full.

Statement.

APPEAL to a Judge in Chambers as to whether one of the conditions of sale fixed by the Master in a mortgage action was proper or not. The matter being an important one of general practice was referred by the Judge to the Appellate Division.

Bernard, Bernard and *Goodall*, for appellant.

Lougheed, Bennett & Co., for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The mortgage covered only an undivided one-third interest in a certain subdivision in the suburbs of Calgary upon which it is said that there are no improvements. By condition 3 all parties to the action were to be at liberty to bid at the sale.

Condition 6 reads as follows:—

> The purchaser if other than the plaintiff is at the time of the sale to pay down a deposit of 10% on the amount of his purchase money to E. V. Robertson, the independent solicitor appointed by order of this Honourable Court dated the 19th day of November, 1919, to conduct the sale, 15% of the purchase money is to be paid into Court within sixty days without interest and the balance in two equal payments in one and two years with 8% interest when the purchaser shall be entitled to a transfer or vesting order and to be let into possession.

The plaintiff mortgagee objected to this provision for two years' time being given to the purchaser for final payment and now appeals against the Master's order allowing the condition.

The order *nisi* shews that the amount standing against the mortgaged property under the mortgage was on June 17, 1919, $41,199.77 for principal, interest and costs and the valuation put upon the whole property by the valuator's certificate is such that a one-third interest is far less than this amount.

It therefore follows, if these valuations can be depended upon, and there was no attempt made to dispute them, that it will certainly take the full purchase price and a good deal more to satisfy the mortgagee's claim. It follows again from this that the postponement of the payment of 75% of the purchase for 1 and 2

ALTA.

S. C.

McLINTOCK v. LOWES.

Stuart, J.

years means in effect that the mortgagee is asked to wait still longer for his money or for that part of it which can be realized from the property.

As a usual thing it is upon the order *nisi* that the mortgagee is asked to wait. Time is then given to the mortgagor with a final warning. It is then that the Court exercises its indulgence in his favor. Of course it is to be said that the condition in question is not for the purpose of giving more time to the mortgagor but for the purpose of making as good a sale as possible, that is, getting as good a price as possible. Nevertheless the effect is to make a postponement as against the mortgagee.

On the other hand, if the usual rule as to the amount of the reserved bid is observed it seems almost certain that, with the terms fixed as practically cash, there will be an abortive sale. With such properties all sales are now almost uniformly abortive as indeed are most forced sales of all city properties. If, as is almost certain, the mortgagee becomes the purchaser at the sale or gets the property by foreclosure after an abortive sale he will not be much farther ahead in realizing his debt and would undoubtedly have to handle it by sale on time just as is proposed in the condition.

But I do not see how even this contingency can be effectively raised against the mortgagee. At any rate he has a right to try to get actual cash and as much of it as he can.

Furthermore there is the very obviously consequent circumstance that the mortgagee, or the Court for him, would have a purchaser in hand who might fall down and a second set of proceedings would have to be begun against him. And in the meantime it seems probable that the plaintiff could not issue execution. I do not think the Court ought to place a mortgagee in that position against his will. Of course a Judge with his consent could arrange for a sale on time and I believe has occasionally done so.

Also there could be no objection to a condition that such portion of the purchase money as would not be required to pay the mortgagee in full might remain deferred because then it would be only the mortgagor's affair.

My opinion therefore is that in the ordinary case of a mortgage sale (as distinguished from other judicial sales), the Court should

ALTA.

S. C.

McLINTOCK v. LOWES.

Stuart, J.

not force a plaintiff mortgagee to accept a condition for the postponement beyond the usual sixty days of any part of the purchase money which is required to satisfy the plaintiff's claim in full.

I notice that it is the practice in some of the American States and also in England (see Seton, vol. 1, pages 335 and 201), to permit credit to be given upon judicial sales, apparently other than mortgage sales, but even then it is usual to demand a bond or other security for the deferred payments. But even this if adopted, would still leave the mortgagee with other contingent law suits on his hands.

I would not say however that there might not arise a case in which even against the plaintiff mortgagee's will a sale by instalments might be directed, such for instance as the case where the whole money has become due merely by virtue of an acceleration clause or the case of a mortgagee trustee for debenture holders against a railway company or other large going concern. Such a case would have to be dealt with when it comes up.

But on the facts of the present case the appeal should be allowed with costs and the Master directed to amend the sixth condition so as to provide for payment of the balance over the deposit within 60 days without interest.

Appeal allowed.

GODFREY v. COOPER.

HART v. COOPER.

WARBURTON v. COOPER.

ONT.

S. C.

Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Latchford and Middleton, JJ. January 2, 1920.

NEGLIGENCE (§ II C—95)—COLLISION OF AUTOMOBILES ON HIGHWAY—RIGHT OF WAY—CONTRIBUTORY NEGLIGENCE—EXCESSIVE SPEED—INJURY TO PASSENGERS IN "JITNEY"—UNLICENSED DRIVER—LIABILITY OF DEFENDANTS.

Parties driving in a "jitney" on the highway who are injured by the negligence of the driver of another car, are not prejudiced in their action for damages by reason of the fact that the driver of the jitney is unlicensed, and is guilty of contributory negligence.

[*Sercombe* v. *Township of Vaughan* (1919), 46 D.L.R. 131, 45 O.L.R. 142, distinguished; *The Bernina, Mills* v. *Armstrong* (1888), 13 App. Cas., followed.]

Statement.

APPEALS by the defendant in three actions in the County Court of the County of York from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiffs.

ONT.

S. C.

GODFREY v. COOPER.

The three plaintiffs were passengers in an automobile driven by one Flemming. Flemming was driving west along a highway, Dundas street, in the city of Toronto; the defendant was driving an automobile north on an intersecting highway, Hamilton street; Flemming had the right of way; the defendant ran into Flemming's car, striking it on the hub of one of its rear wheels. The plaintiffs were injured, and brought these actions to recover damages for their injuries.

The car driven by Flemming was owned by his wife. The three plaintiffs, the passengers, were being carried for hire. Flemming had no license.

The trial Judge found the defendant negligent in failing to give Flemming the right of way and in driving negligently without keeping a proper look-out for vehicles ahead and to the right. He found Flemming negligent in driving at an excessive and unlawful rate of speed when approaching and crossing Hamilton street.

Upon these findings, an action by Flemming and by his wife, the owner of the automobile driven by Flemming, was dismissed; but judgment was given for each of the three above-named plaintiffs, upon the ground that they were not so identified with Flemming as to be answerable for his contributory negligence.

O. H. King, for the appellant.

D. J. Coffey, for the plaintiffs, respondents.

Riddell, J.

RIDDELL, J.:—The facts in these cases as found by the learned County Court Judge I accept. The plaintiffs were riding in a "jitney," driven by one Flemming, when there was a collision between their "jitney" and another automobile driven by the defendant. Both the defendant and Flemming were negligent, and the negligence of each contributed to the accident. Flemming was not the owner of the jitney, and he had no license as required by our statute.

Under these circumstances, the learned County Court Judge dismissed the action of Flemming, and gave judgment for these three plaintiffs—the defendant appeals.

The findings of fact were not attacked before us—nor, as I think, can they be successfully attacked—but it was argued that the plaintiffs were in a conveyance which had no right on the highway at all, and therefore the defendant is excused.

I do not discuss the question as to the right of the "jitney" on the highway. I assume that it was wrongfully there—one question then is, what is the duty of one lawfully travelling upon the highway towards one unlawfully travelling on the same highway? The answer is, in my view, plain.

In the first place it has little or nothing in common with the duty of the owner of property toward those who come upon it; and such cases as *Sercombe* v. *Township of Vaughan*, 46 D.L.R. 131, 45 O.L.R. 142, do not assist. We have two persons, members of the public, using a highway intended for public use: is one of them to gauge his conduct toward the other by the fact that that other has or has not a license? Are his duties to that other to be tested by something of which the first might, and probably would, be ignorant?

In *Philadelphia Wilmington and Baltimore R.R. Co.* v. *Philadelphia and Havre de Grace Steam Towboat Co.* (1859), 23 Howard (Supreme Court U.S.) 209, the defendants placed and left a pile in the Susquehanna river, a common and public highway; the plaintiffs' steamboat, prosecuting her voyage on the river on Sunday, struck the pile and was damaged. The District Court gave judgment for the plaintiffs; the judgment was affirmed by the Circuit Court; and the defendants appealed to the Supreme Court of the United States. The defence was that the boat had no right on the river on Sunday at all, as this was forbidden by a Maryland statute. The Supreme Court said that, admitting that the master and crew were liable to prosecution and punishment, that did not relieve the defendants. "The law relating to the observance of Sunday defines a duty of a citizen to the State . . . For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty the loss of a ship, by the tortious conduct of another . . . " (p. 218).

The Court recognised the rule in Massachusetts (referred to on the argument) to the contrary, but said that it depended "on the peculiar legislation and customs of that State, more than on any general principles of justice or law."

In *Bucher* v. *Cheshire R.R. Co.* (1888), 125 U.S. 555, the same Court held that the decisions established a local rule of law within

ONT.
S. C.
GODFREY v. COOPER.
Riddell, J.

the Courts of Massachusetts, though this rule was disapproved by the Court itself.

The true rule is well expressed in *Mohney* v. *Cook* (1885), 26 Pa. St. 342, at pp. 349, 350: "The law requiring care in avoiding accidents, defines a duty to individuals only. It is most frequently applied to travel upon highways of land or water; though it applies to all cases in which persons are so near together that they are liable to injure each other by accident. It recognises the relation thus naturally arising, and declares the law of that relation to be mutual care. The rule that the party who sues must be without fault himself, has no other object than to prevent such fault, in circumstances of danger, as may contribute to the injury . . . It is relevant to inquire whether the plaintiff, with due care, might not have avoided the injury . . . It must be a failure of duty . . . to the party who caused the danger, so that it may be said that he brought the injury on himself."

In the Irish case *Petrie* v. *Owners of S.S. "Rostrevor,"* [1898] 2 I.R. 556, the plaintiff had without right planted oysters on the bed of the Newry river; the defendants' steamer had damaged the oyster beds; and the plaintiff brought an action based upon the alleged negligence of the defendants. The Court (Johnson, J.) gave judgment for the plaintiff, holding that he was *de facto* in possession of the *locus in quo* and that the defendants "ought . . . with ordinary skill and prudence" to have kept away from his oyster beds—the defendants appealed. In the Court of Appeal there was considerable discussion as to the duty of the defendants toward the plaintiff, who was undoubtedly a trespasser on the bed of the river. It was there held that the plaintiff was not in possession in any proper legal sense—that the defendant "was bound . . . not to be reckless or careless," but "fairly avoiding, as far as he could, any reckless, negligent, or careless action that might be detrimental or dangerous to the oysters:" *per* Lord Ashbourne, C., at p. 570. It was held, however, that the defendants had not acted in such a way as, "on the score of negligence, carelessness, or recklessness, to fix the ship with liability:" *ib.*, p. 570. Fitzgibbon, L.J., says (p. 574): "No action of trespass on the case for negligence could . . . be maintained by the present plaintiff, unless knowledge of the existence of his oysters, or such reasonable probability of their being in the place

as would make it the duty of the defendant to act as if he knew that they were there, could be shewn, i.e., unless damage to the oysters was the natural or probable consequence of running ashore;" and, while it is true that the Lord Justice says (p. 575) that the defendants owed no duty in point of law to the plaintiff, the reason is given immediatly before in the fact that the defendants did not know of the existence of the beds, "the plaintiff . . . had not given any visible sign that his oysters were there" (p. 574)—concluding the Lord Justice says: "The evidence . . fails . . . to support the action for negligence" (p. 582). Holmes, L.J., says (p. 585): "No doubt if the master knew of the oyster bed, he would not have been justified in injuring it through recklessness or carelessness." Of course the whole discussion was on the theory that the plaintiff had no right to have his oyster beds there: if he had such right he would have been in possession, and the defendants must keep off, knowledge or no knowledge.

There are a number of hints in the English Courts—I think it will be sufficient to cite one actual decision. In *Walton* v. *Vanguard Motorbus Co. Limited* (1908), 25 Times L.R. 14, there were lamps of the plaintiffs placed without legal warrant on the footpath. The defendants' servants negligently ran against them and damaged them. It was argued that, even if the defendants were negligent, "the plaintiffs were not entitled to recover because they had not any right to erect the standards in the footpath." The County Court Judge held the defence valid, and the plaintiffs appealed to a Divisional Court. Lord Alverstone, L.C.J., "as regarded the point that the plaintiffs were not entitled to recover because they had not shewn that they had any right to have the standard on the footpath . . . was of opinion that the defendants were not entitled to raise the point that the lamp-post was an object they were entitled to knock down without being held liable for negligence." In one of the cases there was evidence of negligence, and it was sent back for a new trial; in the other the County Court Judge had found that there was no negligence, and the appeal was dismissed.

This case does not seem ever to have been overruled or questioned.

As to the negligence of Flemming, it is too late in the day to advance that as a reason for disentitling his innocent passengers to recover.

ONT.

S. C.

GODFREY v. COOPER.

Middleton, J.

The *Bernina* case, *Mills* v. *Armstrong* (1888), 13 App. Cas. 1, is still good law, and it is unnecessary to cite our own cases.

I would dismiss the appeal with costs.

MIDDLETON, J.:—Appeal by the defendant in three actions arising out of an automobile accident, heard by Judge Denton in the County Court of the County of York.

The three plaintiffs were passengers in an automobile driven by one Flemming.

Flemming was driving west on Dundas street, the defendant was going north on Hamilton street, and so Flemming had the right of way. The defendant ran into Flemming's car, striking it on the hub of its rear wheel.

The trial Judge has found the defendant negligent in failing to give Flemming the right of way and in driving negligently without keeping a proper watch for traffic ahead and to the right. He has also found Flemming negligent in driving at an excessive and unlawful speed when approaching and crossing Hamilton street.

Upon these findings, an action by Flemming and by his wife, the owner of the car, was dismissed; but judgment was given for the passengers, upon the ground that they were not so identified with Flemming as to be answerable for his contributing negligence.

Upon this appeal the findings of the Judge as to negligence were not questioned by either party; the only question argued was the contention of the defendant, which the trial Judge thought afforded no defence to the action by the passengers, that, as the car driven by Flemming was owned by his wife, a license was necessary; and that, as Flemming had no license, the passengers in his car could not recover against the defendant for injuries sustained by his negligence—put in another way, the contention is that Flemming in driving the car for hire was unlawfully upon the highway, and the passengers, by participating in his illegal act, became unlawfully upon the highway, and the negligence of the defendant resulting in their injury affords them no right of action.

I disagree with every element of this contention. In my opinion, a mere failure to obtain a license does not deprive the driver of any right of action he would otherwise have against any person who injures him by negligence. Nor can a defendant rely upon any breach of the provisions of the statute, unless he can shew that the breach of the statute was a proximate cause of the

accident. Nor can any such defence avail against a passenger in the car. He is not so identified with the driver as to be disentitled to recover by the fault of the driver.

The question is very widely different from that which arises in an action against the municipality for damages by reason of the nonrepair of a highway. There there is no wrongful act resulting in injury, but a mere failure to perform a statutory duty; and, before the plaintiff can succeed, he must shew that the defendant owed a duty to him, and he fails in this when it appears that by reason of some fact he is not lawfully upon the highway. The obligation to repair a highway is an obligation to those lawfully upon the highway. An example of the application of this principle is found in *Sercombe* v. *Township of Vaughan*, 46 D.L.R. 131, 45 O.L.R. 142.

The doctrine relied upon by the defendant has the assent of the Courts of Massachusetts. The Courts there fully appreciated the distinction between "unlawful conduct which is a cause of an injury and that which is a mere condition of it," and recognise that in other jurisdictions the doctrine has been established "that if there is an unlawful element in an act, which in a broad sense may be said to make the act unlawful, this will not preclude recovery unless the unlawful element or quality of the act contributed to the injury, so that, if the act of a plaintiff may be considered apart from a certain unlawful quality that may enter into it, and if so considered there is nothing in it to preclude recovery the existence of the unlawful quality is of no consequence unless in some way it had a tendency to cause the injury." This doctrine, having the assent of almost every State of the Union, is repudiated in Massachusetts, where it is regarded as established that "the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering upon the crossing" (i.e., the railway crossing where the defendants' engine negligently wrecked the automobile) "the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision

ONT.
S. C.
GODFREY
v.
COOPER.
Middleton, J.

with the engine. He is within the words of the statute. He is in no better position to recover than a person would be who was violating the law by walking on the track of a railroad, and was struck by an engine when he had reached the crossing of a highway. Every minute of the time, and in every part of his movement, while walking upon the track in his approach to the crossing, he would be a violator of law and a trespasser. His unlawful act, in walking to that point and thus coming into collision with the engine, would directly contribute to his injury, and would preclude him from recovery:" *Chase* v. *New York Central and Hudson River R.R. Co.* (1911), 208 Mass. 137, 158.

This and numerous other decisions shew that in that State the automobile, if unregistered, and "all its occupants are trespassers upon the highway and have no rights against other travellers except to be protected from reckless or wanton injury:" *Dean* v. *Boston Elevated R.W. Co.* (1914), 217 Mass. 495, 498; and it logically follows that a person injured by an unregistered car "can recover damages in an action against the operating owner without proving that he was negligent in operating the car, his liability being that of a wrongdoer maintaining a nuisance on the highway:" *Koonovsky* v. *Quellette* (1917), 226 Mass. 474, 475 (head-note). It is to be observed that, even in the State of Massachusetts, the unregistered automobile is not *caput lupinum*, but has some rights. The effect of the lack of registration is supposed to flow from the provisions of the statute, which is said to place the unregistered vehicle and its occupants in the position of trespassers, with the same right which a trespasser upon land has against the owner of the land. This effect is attributed to the provision of the statute that no automobile shall be operated on the streets unless registered.

Our statute is not so worded. Its main provision is: "The owner of every motor vehicle driven on a highway" shall obtain a license: Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 3. "Every motor vehicle shall be equipped with an alarm bell, gong or horn:" sec. 6 (1). And offences against the Act are made punishable by fine and imprisonment: sec. 24. The section here invoked (sec. 4) is expressed in the negative form: "No person shall, for hire, pay or gain, drive a motor vehicle on a highway" unless licensed; but the whole scope of the Act indicates that it is intended to require

those operating vehicles upon the highway to observe its requirements, and failure to do so subjects the offender to certain penalties, but does not make him a trespasser in the sense that he is an "outlaw" within the meaning of the Massachusetts cases.

The statute is intended above all to regulate the user of the highway and to impose duties upon all those using motor vehicles upon the highway and to confer corresponding rights upon all others using the highway. Speed limits are given, but there is the provision: "Any person who drives a motor vehicle on a highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the highway and the amount of traffic which actually is at the time, or which might reasonably be expected to be on the highway, shall be guilty of an offence under this Act:" sec. 11 (2). It is for breach of this duty that Flemming was found by the learned trial Judge to be in fault.

The provisions as to right of way are intended to apply to all vehicles upon the highway, and not merely to those which have been duly registered, and which are in all respects in conformity with the requirements of the Act. When vehicles are in operation upon the highway, the Legislature never intended any investigation or discussion as to registration, but prompt and instant obedience to the rules laid down.

Further, I can find no English law to justify the proposition that the rule laid down as to the obligation of owners of land to trespassers can be applied to highway accidents.

In *Walton* v. *Vanguard Motorbus Co.*, 25 Times L.R. 14, the defendants' omnibus ran into a lamp standard placed by the plaintiff upon a footpath. The defendant maintained that the standard was not lawfully erected, and that the plaintiff was a trespasser. The Lord Chief Justice of England (Lord Alverstone) said: "The defendants were not entitled to raise the point that the lamp-post was an object they were entitled to knock down without being held liable for negligence."

When the foundation of the doctrine as to the right of a trespasser is looked at, it will be seen that it is rested upon the right of the owner to do as he pleases upon his own property, assuming that no one will violate his property-right, and that the limitation is that he must not wilfully injure one who he knows is trespassing.

ONT.
S. C.
GODFREY
v.
COOPER.
Middleton, J.

Grand Trunk R.W. Co. of Canada v. *Barnett*, [1911] A.C. 361, was dealt with on the footing that Barnett was a trespasser not only upon the Pere Marquette Railway train, but also upon the land of the Grand Trunk Railway Company, and so "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 deliberately placing unexpected dangers in his way" (p. 369). There is no duty owing by the owner of land to a trespasser save this limited duty. This standard cannot be applied to persons using the highway, for there is upon them the common law duty to care for others; and, in the case of motor vehicles, there is the duty to observe all the requirements of the statute. The existence of this duty shews how inapplicable the suggested principle is.

Finally, as already said, the passenger is not so identified with the driver of the vehicle as to be answerable for his fault: *Mills* v. *Armstrong, The Bernina*, 13 App. Cas. 1. This view has been acted upon by Anglin, J., in *Fafard* v. *City of Quebec* (1917), 39 D.L.R. 717, at p. 723, where he held that a passenger in a cab was not called upon to inquire into the fact of the cabman's license.

Latchford, J.

LATCHFORD, J., agreed with MIDDLETON, J.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (dissenting):—The rights of the parties to these actions seem to me to depend entirely upon the question: whether the driver of the car in which the plaintiffs were when injured had, under sec. 2 of ch. 48, 7 Geo. V. (O.)*, "the right of way," over the person in charge of the vehicle which was the cause of the injury.

If he had, there is no reason, that I can perceive, why the owner of the vehicle which caused the injury should not be liable for all the damages caused by the collision.

But, if he had not, neither he nor any of the plaintiffs has, in my judgment, any cause of action against the defendant.

If he had, he was right in proceeding as he did, including the increasing of the speed of his car.

*By sec. 2, the Highway Travel Act, R.S.O. 1914, ch. 206, sec. 3, was amended by adding sub-sec. (3): "Where a person travelling or being upon a highway in charge of a vehicle or on horseback, meets another vehicle or person on horseback at a cross-road or intersection, the vehicle or horseman to the right hand of the other vehicle or horseman shall have the right of way."

According to his own testimony, upon seeing the other car on his left hand side, and depending on his right of way, he went on without looking again at it: and in that he was right, for, being assured of his safety from it, under this statutory rule of the road, his proper course was to exercise his right of way as speedily as possible, taking care that in doing so he was not running into danger from, or to, the traffic ahead of him: and, having made sure of no danger ahead, the increasing of his speed was not only proper but commendable.

His testimony at the trial, and upon his examination for discovery before trial, makes it quite plain that he proceeded in this, under ordinary circumstances, proper and commendable manner: his own words are: "Well, I did not look at him after I first saw him: I looked straight right the other way to see where I was going: to see what I was doing: I don't know anything about his car: after I saw him, I just looked straight ahead." And, in answer to the question, "Did you increase your speed when you came to Hamilton street?" he said: "Well, I may have, to shoot past him, I could not say:" and, "Yes, I may have, I am not sure." There seems to me to be no doubt he did, nor any doubt that in doing so he did that which every good driver would have done in the like circumstances, and should have done, if he had the right of way.

And, if he had the right to be upon the highway at all, as he was, he obviously should have had it, for he was going westward and the other car northward: the enactment which is in these words: "Where a person travelling or being upon a highway in charge of a vehicle . . . meets another vehicle . . . at a cross-road or intersection, the vehicle . . . to the right hand of the other vehicle . . . shall have the right of way:" makes that very plain.

But, unfortunately for the plaintiffs, their driver was not lawfully upon the highway. He was driving a motor vehicle for hire upon a highway without being licensed to do so, in violation of the provisions of sec. 4 of the Motor Vehicles Act—as he frankly admitted in his testimony at the trial, thus: "Q. You were driving this car for hire as a 'jitney?' A. Yes, I had it for hire."

Being prohibited on one page of the statute-book from being upon the highway at all, as he was, it would be out of the question

ONT.

S. C.

GODFREY v. COOPER.

Meredith, C.J.C.P.

to contend that, upon another page of it, he is not only given a right to be there, as he was, but is also given a right of way over others lawfully there.

And, if he had not the right of way, then the accident is altogether the result of his mistake. In the belief that he had, he went on regardless of the rights of the other driver, and without taking any care to avoid a collision with him, not even looking again after first seeing the other car. Not having the right of way, he should not have increased the speed of his car, but rather should have decreased it. If he had not the statutory right of way, even if lawfully upon the highway, that would have been so. The other car should have had that right, because, proceeding as they were, the other car should have passed over safely first. At the rate of 20 miles an hour, one second, in time, would have made that sure, and much more than a second was lost to the other car by the application of its brakes and the acceleration of the speed of this car. And, even if that were not so, no one in his senses, driving a light car carrying four passengers, some of them young women, would have risked a collision with a heavy, rapid-running car, with only the driver of it in it: if the speed of this car had not been increased, nor that of the other vehicle, the other would have passed over safely first: if it had been diminished, safety was more than assured.

The learned County Court Judge seems to have been much impressed with the thought that each of these cars was being driven too fast, and found that each driver was guilty of negligence in this respect; though there is really no evidence that either exceeded the statutory limit of 20 miles an hour. I can find no evidence of negligence, of the one toward the other, in this respect: and, if there had been, that neither caused nor contributed to the collision.

It must be remembered that though to the pedestrian, in whose ranks most of us are, high speed is dangerous, yet in much traffic it is not only necessary, but is, with competent driving, a factor of safety. Incompetence, hesitation, disregard of the rules of the road, and the rights of others, and negligence, are the main causes of injury and inconvenience.

In this case, if the driver of the car in which the plaintiffs were had gone one-twentieth of a second faster his car would have escaped injury altogether. He complained of the other driver,

because, if he had turned only a foot and a half to the right his car would have passed behind the other, but he did not: his brakes were on so firmly that he could not; on so firmly in order to prevent his car from striking the other with destructive force; and, even if that had not been so, in imminent danger it is frequently impossible, in a moment of time, to know and to do that which might have been best.

The real, and indeed the sole, cause of the injury which the plaintiffs sustained, was the insistence, of the driver of the car in which they were, upon a right of way to which he was not entitled: and so the plaintiffs have no cause of action against the defendant.

I have dealt with this question first because it is the first raised by this appeal: the trial Judge based his judgment for the plaintiffs mainly upon the ground that the defendant proceeded in violation of the statutory right of way of the other car: if he were right in that, his judgment in favour of the plaintiffs was right: if he were wrong in it, the judgment is wrong: the appeal is based on the ground that the plaintiffs and the driver of their car were all unlawfully on the highway: and, being so, could have no such right of way; and so the judgment in appeal is wrong.

And, if that were not so, the action should be dismissed, in my opinion, upon the other, and broader, ground on which this appeal is based.

The driver of the car in which the plaintiffs were was driving in defiance of the statutory prohibition to which I have referred. He was unlawfully driving upon the highway. And that unlawful state of affairs was caused by the plaintiffs. They hired and paid, or were to pay, him for so driving. If they had not done so, he would have been lawfully upon the highway; would have had the right of way; and should have succeeded in his action for damages against the defendant. It was their presence in his car, as paying passengers, that alone made the journey unlawful.

It is no answer to assert that they did not know that the driver was not licensed, because, in the first place, it was their act alone that made his driving unlawful. When one employs and pays another to do an unlawful act it is not a good plea of justification to allege a want of knowledge of a want of qualification. In the next place, I find no evidence of ignorance of the plaintiffs that the driver was unlicensed, and, if there had been and such ignorance

ONT.
S. C.
GODFREY
v.
COOPER.
Meredith, C.J.C.P.

might excuse, it could not in this case excuse, because the plaintiffs did not take the trouble even to ask the man if he were licensed: if they had done so, he would have told them that he was not; but that would have made no difference; they would have taken their chances, and quite reasonably have done so, there being no other means by which they could be carried into town, whither they were bound on pleasure bent. The risk of such an accident was very remote. Hundreds of thousands of other persons took it successfully during the "strike" of the street railway company's traffic servants. And, lastly, they knew, it was common knowledge, that thousands of private conveyances were unlawfully engaged in the like traffic: the licensed drivers were insignificantly few: the car was a "small Ford:" there was nothing of any character to indicate that it was a licensed mode of conveyance: they paid almost what they chose, and so small an amount that a licensed conveyance was out of the question.

The plaintiffs then were, at their own instance and at their own cost, being unlawfully driven upon the highway: they were trespassers upon the rights of others lawfully upon it, in so far as they interfered with traffic rights: and, so, though those lawfully upon the highway could not disregard altogether the plaintiffs' presence there, their duty towards them was much less than if they had been lawfully there: they could not wilfully or recklessly disregard their presence there, and, so doing, injure them without liability; but they owed to them no higher duty: if they did, then these wrongdoers would be in as favourable a position as if they were rightdoers: and that cannot be. But there was nothing of that character in this case: until the driver of the car in which the plaintiffs were, increased his speed, the driver of the other car might have thought, not unreasonably, that he was to be permitted to pass over first: indeed, if he had gone on notwithstanding the increased speed of the other car, he must have passed over safely first: for, as I have said, one second in time would have been enough, and more than that was lost in the sharp application of the brakes of his car, which must have been effective, as the large car which had been travelling at probably 20 miles an hour pushed the small car over only 4 or 5 feet, turning it over on its side: but causing it so little injury that its driver was able, at once, to drive it into and through the centre of the city of Toronto to the wharf

and there take in a passenger—his wife—and drive again through that city to their home: see *Grand Trunk R.W. Co. of Canada* v. *Barnett*, [1911] A.C. 361.

The case of *Sercombe* v. *Township of Vaughan*, 45 O.L.R. 142, 46 D.L.R. 131, is also an authority for the views which I have expressed. The plaintiff failed in that action because he was unlawfully upon the highway: if unlawfully there as to those whose duty it was to repair it for the benefit of those lawfully upon it—those having the highest rights in it—he was more unlawfully there as to them—those lawfully using it. In short, every one making an improper use of a highway to the inconvenience of those lawfully upon it creates a public nuisance, and is liable to prosecution in so far as the public generally are concerned and answerable in damages to any person rightfully there who suffers any particular injury through such nuisance.

In that case, one of the learned Judges said that the plaintiff was a trespasser upon the highway, a trespasser to whom the defendants owed no duty except to refrain from setting traps for him and from maliciously or wilfully injuring him: if that be so as to those who are by law to repair the highways for the use and benefit of those who rightfully make use of them, it must assuredly apply with greater force to those for whom the work must be done, when they are lawfully upon the highway: see *Jones* v. *Canadian Pacific R.W. Co.* (1913), 30 O.L.R. 331, 13 D.L.R. 900, 16 Can. Ry. Cas. 305.

Cases of *The Bernina* type I should have thought very obviously so unlike such a case as this that they could hardly be relied upon by either party. The Bernina was lawfully upon the highway, having all the rights which navigation laws afforded such a vessel: the little Ford in this case was unlawfully upon the highway: the passenger upon the Bernina was not in the remotest manner connected with any unlawful or negligent act: the passengers in the little Ford were the cause of its being unlawfully upon the highway: they hired its driver to do, and paid for doing, that which the statute said should not be done: and so deprived the car of the right of way the attempt to exercise which was the cause of the accident.

The statutory prohibition was passed for the benefit of those lawfully upon the highway: for their safety, benefit, and conven-

ONT.
S. C.
GODFREY v. COOPER.

ience: a benefit which the Courts have no right to cut down, not to speak of putting the wrongdoer in the same position in all respects, as those having the highest rights in the highway, notwithstanding such prohibition, as the judgment in appeal does: see the *Jones* case, *supra*. *Appeal dismissed.*

B. C.
C. A.

STANDARD SILVER LEAD MINING Co. v. WORKMEN'S COMPENSATION BOARD.

CUNNINGHAM v. WORKMEN'S COMPENSATION BOARD.

ROSEBERRY v. WORKMEN'S COMPENSATION BOARD.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. April 6, 1920.

COSTS (§ I—11)—POSITION OF WORKMEN'S COMPENSATION BOARD (B.C.)—AGENT OR SERVANT OF THE CROWN—NOT LIABLE FOR COSTS—CROWN COSTS ACT, R.S.B.C. 1911, CH. 61.

The Workmen's Compensation Board (B.C.), a body corporate, can be the agent or servant of the Crown and as such cannot be made liable for costs according to the provisions of the Crown Costs Act, R.S.B.C. 1911, ch. 61.

[*Re Woods Estate* (1886), 31 Ch. D. 607, distinguished; *Rex* v. *Special Commissioner of Income Tax* (1919), 35 T.R. 684, referred to.]

Statement.

APPEALS by plaintiffs from an order of Macdonald, J., as to costs. Affirmed.

A. P. Luxton, K.C., for appellant; *S. S. Taylor*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This case, I think, is governed by our decision in *In re Land Registry Act & Scottish Temperance*, [1919] 2 W.W.R. 125.

In *Rex* v. *Special Commissioner of Income Tax* (1919), 35 T.R. 684, the King's Bench Division, consisting of the Lord Chief Justice, Darling, J., and Bray, J., express opinions which at least inferentially support the conclusion to which we came in the above-mentioned case. They were there considering the common law rule that the Crown neither pays nor accepts costs, and they pointed out that this rule only applies to the Crown in the proper and strict sense of the word, but not to the officers, servants or agents of the Crown. Our Crown Costs Act expands the common law rule by extending it to the officers, servants and agents of the Crown.

The only distinction of note between this case and *In re Land Registry Act & Scottish Temperance*, *supra*, is that the

Workmen's Compensation Board is a corporation. It is however created by statute to carry out public purposes and the members of the Board are the appointees of the Lieutenant-Governor-in-Council. A corporation may, I think, be agent for the Crown. The Board is therefore within the purview of the Act.

I would therefore dismiss the appeal, but there can be no costs.

GALLIHER, J.A.:—I think the appeal should be dismissed.

The Legislature has created the Board a body corporate with functions largely judicial for carrying out the purposes of the Act, 6 Geo. V. 1916 (B.C.), ch. 77.

In exercising these functions the restrictions (if we may call them such) placed upon the Board are to be found in secs. 48, 49 and 50 of the Act.

Sec. 48 provides that all moneys and securities collected and belonging to the Accident Fund shall be in the custody of the Minister of Finance and shall be accounted for as part of the Consolidated Revenue Fund of the Province.

No moneys collected or received on account of the fund shall be expended or paid out without first passing into the provincial treasury and being drawn therefrom.

The Board must submit to the Auditor General each month an estimate of the amount necessary to meet the current disbursements from the fund during the succeeding month and when this is approved by the Auditor General the amount is paid to the Board and has to be accounted for to the Auditor General.

The Auditor General has to approve of the investment by the Board of the surplus moneys.

These investments have to be made in the joint names of the Minister of Finance and the Board.

Sec. 49 provides that the accounts of the Board shall be audited by the Auditor General or an auditor appointed by the Lieutenant Governor-in-Council.

Sec. 50 provides for the making of an annual report by the Board to the Lieutenant-Governor and the laying of the report before the Legislature.

Shortly these provisions give to the Government supervision over the moneys collected by the Board for the Accident Fund also the custody of same, control of investment of surplus funds, and to a certain extent control as to payment out.

B. C.

C. A.

STANDARD SILVER LEAD MINING CO. v. WORKMEN'S COMPENSATION BOARD.

Galliher, J.A.

Then secs. 56 to 60 inclusive deal with the constitution of the Board, the appointment of its members, the duration of their term of office, their salaries, etc. (It is to be noted that these salaries are paid out of the Consolidated Revenue Fund.)

The whole question here is: Is the Board the Crown or the officer, servant or agent of and acting for the Crown within the meaning of the Crown Costs Act, R.S.B.C. 1911, ch. 61, so as to preclude the Court from giving costs for or against them?

Mr. Taylor, counsel for the respondents, relied solely on that Act.

In England the old rule that costs were not given for or against the Crown has been somewhat modified in late years. Our Act is wider than the English rule of law in that the words "officer," "servant," or "agent" are included.

Now although the Board cannot be said to be the Crown which was the view taken in *Re Wood's Estate* (1886), 31 Ch. D. 607 at 621—still if they can be said to be the "officer," "servant," or "agent" of the Crown they come within our Act.

That point was decided in our own Court in *In re Land Registry Act & Scottish Temperance, supra.*

We there held that the Registrar of Titles was an officer of the Crown and refused costs.

On that point I think there is no difference in principle between that case and the present. I see no reason why a body corporate cannot be the servant or agent of the Crown.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—The appeals in the three cases have relation only to the question of costs—Macdonald, J., being of the opinion that "the Board is an agent of the Crown" and that the Crown Costs Act, R.S.B.C. 1911, ch. 61, applies, sec. 2 thereof reading as follows:—

> 2. No Court or Judge shall have power to adjudge, order, or direct that the Crown, or any officer, servant, or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter or proceeding except under the provisions of a statute which expressly authorizes the Court or Judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown.

The Judge referred to, and evidently relied upon, a judgment of Clute, J., in *Murphy* v. *Toronto* (1917), 41 O.L.R. 156, at page 168—where that Judge said, when considering the Ontario Act, 4 Geo. V. 1914, ch. 25, very similar in its powers to the British

Columbia Act, 6 Geo. V. 1916, ch. 77, the Ontario Act is somewhat different though in its arrangement and I have not compared the Acts section by section, but the Acts cannot, in all respects, be said to be the same. Then, I do not see any provision, such as we have (added by "Workmen's Compensation Act Amendment Act, 1918," 8 Geo. V. 1918 (B.C.), ch. 102, sec. 5)—that compensation to workmen and dependents "shall apply to any employment by or under the Crown in right of the Province . . . [as] if the employer were a private person." Even apart from the amendment that we have and, with great respect to Clute, J., I cannot agree "that the Workmen's Compensation Board is in a sense a branch of the Government." It would certainly be anomalous that the Board should have the power to adjudicate as against the Crown—and at the same time be, as it has been held by Macdonald, J., within the terminology of sec. 2 of the "Crown Costs Act," *i.e.*, within "Crown or any officer, servant or agent of and acting for the Crown." The Workmen's Compensation Board has been created by statute, a body corporate (6 Geo. V. 1916, ch. 77, sec. 56)—it is true this same provision is in the Ontario Act, but I do not observe that Clute, J., took this point into consideration, but be that as it may, it is clear to me that the Workmen's Compensation Board is not the Crown nor the officer, servant or agent of the Crown. It would certainly be a very invidious position for the Board to be in when adjudicating as against the Crown—that in so doing it would be the Crown acting as Judge in its own cause. It is only necessary to state this proposition to have immediately repelled any idea that the Workmen's Compensation Board can be said to be in any manner representative of the Crown. To discharge its functions, with acceptation to the public, and within the purview of the statute it must be disassociated in every way from the Crown or the direction of the Crown and that is the plain intention of the Legislature. It is significant that in the recent case, *Workmen's Compensation Board* v. *Canadian Pacific Ry.* 48 D.L.R. 218, [1920] A.C. 184, 88 L.J.P.C. 169, their Lordships of the Privy Council, in advising His Majesty, that the judgment appealed from should be reversed and the action dismissed, also advised that the appellants, the Workmen's Compensation Board, should have their costs of the appeal

B. C.

C. A.

STANDARD SILVER LEAD MINING CO. v. WORKMEN'S COMPENSATION BOARD.

Galliher, J.A.

and in both the Courts below. It is true the point was not taken—but eminent counsel appeared in the appeal—and when the magnitude of the costs is considered, it would seem unthinkable that the point—if point there be—should have been overlooked. I venture to remark, extra-judicially, that should it be determined that the Workmen's Compensation Board is not subject to the payment of costs, the Legislature should, at the earliest moment, correct such an anomaly. It might well be that some employer or employee might be carried as far as the Privy Council only to find, if successful, that no costs could be imposed against the Workmen's Compensation Board. Certainly the statute would not be equitable in its application to employer or employees—that the Workmen's Compensation Board should not be liable for costs—that the Board, where successful, receives no costs does not satisfactorily meet the justice of the matter. It is therefore, with great respect to the Judge and all contrary opinion, my view that the Workmen's Compensation Board does not come within the purview of the "Crown Costs Act" and that the Workmen's Compensation Board is liable to pay costs. It follows, in my opinion, that the appellants were entitled to costs on the *certiorari* proceedings as against the Workmen's Compensation Board—the appeal to be allowed. *Appeal dismissed.*

ALTA.

S. C.

NELSON AND CRANSTON v. THE NATIONAL TRUST Co. Ltd. Re BUTTERWORTH ESTATE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. March 26, 1920.

EXECUTORS AND ADMINISTRATORS (§ I—2)—GRANT OF ADMINISTRATION IN ESTATE OF MAN WHO DISAPPEARED—OPPOSITION TO GRANT BY PURCHASER OF LANDS, MENTIONED IN SCHEDULE OF ASSETS, FROM PERSON WHO WAS IN POSSESSION OF SAME FOR 17 YEARS.

The fact that property is mentioned in a schedule of assets in papers leading to a grant of administration does not finally decide that such property belongs to the deceased. Claimants to such property may assert their rights freely, the appointment of the administrator allows the claimant to take the initiative and proceed against a definite person; and a person resting his claim on a mere right of possession will know who alone can begin proceedings against him.

Statement.

APPEAL by purchaser of land from an order of Walsh, J., granting an application for administration. Affirmed.

A. H. Gibson, for appellant; *A. Grant*, for defendant.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—In this case Walsh, J., upon the application of The National Trust Company Limited, made an order to this

effect:—"It is ordered that Letters of Administration be granted to the said National Trust Company Limited, as Public Administrator, of the estate of Joseph Butterworth, presumed to be deceased."

It appears that Butterworth is the registered owner of a certain quarter section of land, that he had acquired title by homesteading prior to 1897, that he then left the neighbourhood apparently intending to go to the Yukon and that he has not since been heard of, that after numerous inquiries no trace of him can be found and that he appears to have left no next of kin and was not married. Nelson, who was a neighbour and close friend, appears to have been told by Butterworth before leaving that if he did not return he could have the land. On the mere strength of this Nelson went into occupation and continued in undisturbed possession until 1914 so that the Statute of Limitations had apparently run in his favour. In that year he sold the land to Cranston for $1,000.

In the papers upon which the application for administration was made the land is mentioned as the only asset of the estate. Cranston, however, appeared by his counsel before Walsh, J., and opposed the application. He now appeals from the order the Judge made.

The main ground taken by the appellant was that inasmuch as the estate had escheated there was no estate to administer. This seems to be an entire misapprehension of the situation. Assuming that there has been an escheat still there is nevertheless an estate to be administered. The Court cannot yet assume that there are no creditors until the recognized method of inquiry for these has been adopted. An escheat to the Crown is always subject to debts. Moreover the Crown is the person generally, though not necessarily always, recognized as being entitled in the case of an escheat to administration or to name the administrator. *Kane* v. *Reynolds* (1854), 4 DeG. M. & G. 565. *Dyke* v. *Walford* (1846), 5 Moo. P.C.C. 434 at 495, and Williams on Executors, 10th ed., 341-3.

These authorities of course refer only to personalty because in England real estate went to the heir and administration referred only to personalty. What was usually done in the case of escheated real estate, at least after real estate had by statute been made subject to debts, may be seen in the case of *Evans* v. *Brown* (1842), 15 Beav. 114, L.J. 11 Ch. 349. But in this Province administration

ALTA.

S. C.

NELSON AND CRANSTON v. THE NATIONAL TRUST CO. LTD.

Stuart, J.

is granted of both personalty and realty and therefore the person entitled to the realty if there is, as here, no personalty, is generally granted administration. In the case of an escheat of realty the person entitled is, according to the decision in *The King* v. *Trusts & Guarantee Co.* (1916), 32 D.L.R. 469, 54 Can. S.C.R. 107, the Crown in the right of the Dominion.

It may be, therefore, that Walsh, J., should, upon the suggestion of an escheat, have caused an intimation to be made to the Department of Justice regarding the application. But even as to that there are two things to be said. In the first place it does not seem that it should yet be considered as decided that there is an escheat at all. Some inquiries and advertisements ought surely to be made under the direction of the Court before it can be finally decided that there are no next-of-kin in existence and some one must be charged with this duty. Who else is more proper than an administrator appointed by the Court? In the next place it is not absolutely binding on the Court to name the appointee of the Crown as administrator even if there is an admitted escheat though it would perhaps even in our special conditions in general be done. Besides it will still be open to the Crown to apply to revoke the grant if for any reason it thinks a wrong appointment has been made.

The question of the administration of the estates of deceased persons is a question which the local Legislature has undoubtedly the right to legislate upon and it has done so in this Province by the statute referring to the grant of administration to the Public Administrator in cases where the next-of-kin are not discoverable.

All this is of course aside from the question as to the right of the appellant to intervene and oppose the grant. The mention of a particular piece of property in the schedule of assets in the papers leading to the grant does not decide finally that that property belongs to the deceased. Any person claiming to own the property described is just as free as ever to assert his right. And indeed it is only by the appointment of an administrator that any person is named against whom he can proceed to assert his right if he needs to take the initiative himself as perhaps he does where the deceased is at any rate the registered owner. Of course, if he intends to rest on a mere right of possession he will not need to begin any proceedings but at any rate he will know who it is that alone can begin proceedings against him.

ALTA.

S. C.

NELSON AND CRANSTON v. THE NATIONAL TRUST CO. LTD.

Stuart, J.

The appeal therefore should be dismissed with costs. But there is a further observation that it seems right to make. The order of Walsh, J., contains the phrase "presumed to be deceased." We do not know whether the letters have yet been actually issued but probably they have been held pending this appeal. It would seem that the words quoted ought not to appear in the order. Barnes, J., in *Re Jackson* (1902), 87 L.T. 747 at 748 said: "The Court never did presume death but gave the applicant leave to swear the death and the applicant then had to swear to the fact, etc." This is perhaps a little peculiar, but the general idea is obviously correct. The Court must only act on the proven fact of death in granting administration. It permits a certain method of proof but that should not be carried into the order in any way. The order ought therefore to be amended by striking out the words "presumed to be deceased" and inserting in lieu thereof the words "who died between the year 1897 and the year 1918" and this should be carried into the letters. It appears that no exact date can or ought to be fixed as the date of the death in such a case.

Appeal dismissed.

MATHESON v. TOWN OF MITCHELL.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Maclaren and Magee, JJ.A., Latchford and Masten, JJ. December, 19, 1919.

WILLS (§ III G—128)—DEVISE OF LAND TO MUNICIPALITY FOR PARK—PROVISO TO KEEP IN REPAIR—FORFEITURE FOR BREACH—ACCEPTANCE—BREACH.

Land being devised by the testator to a corporation, and the habendum to the corporation and its successors in office forever, the proviso in the will that the land should revert to the estate upon the neglect or refusal of the corporation to keep the same in repair is void, for the reason that it is an express common law condition subsequent and is obnoxious to the rule against perpetuities.

[*Re St. Patrick's Market* (1909), 1 O.W.N. 92, approved and followed.]

Statement.

APPEAL from the judgment of Rose, J., dismissing an action brought by the executor of the will of the late Thomas Matheson for a mandamus to compel the Town Council of Mitchell to keep in proper repair as a public park certain land devised to it for that purpose by the said Thomas Matheson, or in the alternative that the lands should be given up to the plaintiff to form part of the estate of the testator. Affirmed.

J. C. Makins, K.C., for the appellant.

F. H. Thompson, K.C., for the defendants, respondents.

ONT.

S. C.

MATHESON v. TOWN OF MITCHELL.

Maclaren, J.A.

MACLAREN, J.A.:—The trial Judge held that the case was not a proper one for a mandatory order such as was formerly made in the Court of Chancery, for the simple reason that, if it was made, the Court would have to assume the obligation of superintending for all time to come the performance of continuous duties, in the performance of which the exercise of a certain amount of discretion must necessarily be allowed to the defendants, which is an obligation that the Court does not assume. In this I am of the opinion that he was right.

As to the alternative claim of the plaintiff that it should be held that the property had reverted to the estate under a proviso in the will to the effect that if the town council should not keep the land and the fences surrounding it in proper order and repair and as a public park should be kept, in that event he cancelled the gift and directed that the said lands should revert to and form part of his estate. The trial Judge recognised the fact that in the nature of things it would not be incumbent on the town council to keep up the park in the same condition as if it had been a park inside the town, and yet that it was evidently contemplated that it be kept up as a suitable place for the holding of school and other picnics, sports, etc. He further held, upon the evidence, that from at latest a year or two after the death of the testator there had been continuous neglect on the part of the town council to keep the property in order or repair, or as a public park, situated outside the municipality, should be kept.

In answer to this claim the defendants set up the Statute of Limitations, R.S.O. 1914, ch. 75, sec. 5, which provides that no person shall bring an action to recover any land but within 10 years next after the time at which the right to bring such action first accrued; and also sec. 6 (9) of the same statute, which provides that where the person claiming such land has become entitled by reason of any forfeiture or breach of condition such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken.

The trial Judge held, upon the evidence, that there had been a continuous breach of the duty to keep in repair for over 30 years before the institution of the action, and that the plaintiff's right of action first accrued more than 30 years before he instituted it, and that the statute was a good defence. On this ground also, I consider that the action was properly dismissed.

ONT.

S. C.

MATHESON v. TOWN OF MITCHELL.

Maclaren, J.A.

In my opinion, the appeal must also fail on another and perhaps a stronger ground. The clause of the will making the bequest reads as follows:—

"I give and devise to the Corporation of the Town of Mitchell in the County of Perth lots numbers 7 and 8 . . . in the first concession of the Township of Fullarton . . . to have and to hold to the said Corporation of Mitchell and its successors in office for ever and to be used and kept as a place of recreation and amusement for the inhabitants of the said Town of Mitchell for ever and to be called and known as the Matheson Park: Provided that if the said corporation neglects or refuses to keep the same and the fences surrounding it in proper order and repair and as a public park should be kept I hereby in that event cancel the said gift and direct that the said lands shall revert to and form part of my estate."

It is to be observed that the devise is to "the Corporation of the Town of Mitchell," and the habendum "to the said Corporation of Mitchell and its successors in office for ever." According to the authorities, the proviso is an express common law condition subsequent, and is obnoxious to the rule against perpetuities, and consequently void. If the land had been granted to the town corporation so long as it should be used and maintained and kept in proper order and repair and as a public park should be kept, the result might have been different, but it has been granted for ever, and the proviso is wholly inoperative for the reason above stated.

The case is practically on all fours with *Re St. Patrick's Market* (1909), 1 O.W.N. 92; and the conclusion above stated is supported by *In re Trustees of Hollis' Hospital and Hague's Contract*, [1899] 2 Ch. 540; *In re Ashforth*, [1905] 1 Ch. 535; *In re Da Costa*, [1912] 1 Ch. 337; Halsbury's Laws of England, vol. 22, p. 315.

I am consequently of opinion that the appeal should be dismissed, but under the circumstances without costs.

MAGEE, J.A., and LATCHFORD, J., agreed with MACLAREN, J.A.

Magee, J.A.
Latchford, J.

MASTEN, J.:—I agree in the result at which the other members of the Court have arrived, but desire to add a word explaining the views which I entertain.

Masten, J.

I have had an opportunity of perusing the judgment prepared by my brother Maclaren and agree entirely with his view that this is not a proper case for a mandatory order and with the grounds stated by him for so holding.

ONT.

S. C.

MATHESON v. TOWN OF MITCHELL.

Masten, J.

In regard to the alternative claim of the plaintiff seeking a declaration that the property in question has reverted to the testator's estate, and the holding of the trial Judge that the right of the plaintiff to declare a forfeiture is barred by the Statute of Limitations, the impression created on my mind at the argument and by a perusal of the evidence was that grounds of forfeiture or breaches of the condition arose from an early period, but that these were from time to time waived by the action of the plaintiff in demanding that the condition be fulfilled and by his acquiescence in the partial fulfilment of the same at his request, so that the statute did not begin to run until very recently. However, after further consideration of the matter, the course of events appears so confused and obfuscated, and the conclusion to be drawn from all the evidence so doubtful and dependent to so great an extent on the manner in which the evidence was given in the witness-box, that I find myself unable to reverse the finding of the trial Judge in this respect, and consequently agree with his holding that the right of forfeiture is barred, and that the plaintiff's claim on this branch of the case fails. This suffices to dispose of this appeal.

In regard to the last point discussed in the judgment of my brother Maclaren, viz., that the proviso in the will is an express common law condition subsequent to and limiting an estate in fee simple, and that it is obnoxious to the rule against perpetuities, and void, I prefer to express no opinion. I find the point exceedingly difficult: see *In re Randell* (1888), 38 Ch. D. 213, at p. 218; and, as it is not necessary to the disposition of this appeal, I prefer to reserve any expression of opinion until the point necessarily arises. *Appeal dismissed.*

MAN.

K. B.

McCOLL v. CANADIAN PACIFIC R. Co.

Manitoba King's Bench, Galt, J. March 13, 1920.

MASTER AND SERVANT (§ V—340)—CLAIM OF PLAINTIFF UNDER RAILWAY ACT—PROVISION REPUGNANT TO SECTION OF WORKMEN'S COMPENSATION ACT—DOMINION ACT OVERRULES—INJUNCTION RESTRAINING DEFENDANT FROM APPLYING TO BOARD.

Where the widow of a man killed in an accident on the railway bases her claim against the company upon sec. 385 of the Railway Act (Canada), 1919, and this section, even though repugnant to sec. 13 of the Workmen's Compensation Act, Manitoba, 6 Geo. V. 1916, ch. 125, gives her a right of action; the provisions of the Railway Act, R.S.C. 1906, ch. 37, cannot be overridden by an Act of a local Legislature, and an injunction will issue restraining the defendant company from applying to the Workmen's Compensation Board asking that the case be dealt with by the Board.

MAN.

K. B.

McCOLL v. CANADIAN PACIFIC R. Co.

APPLICATION for an injunction restraining the defendant company from applying to the Workmen's Compensation Board to determine a case brought at common law and under the Dominion Railway Act by a widow on behalf of herself and infant child for damages for the death of her husband. Injunction granted.

D. Campbell for plaintiff; *L. J. Reycraft*, K.C., for defendant.

Galt, J.

GALT, J.:—This action was commenced by Amelia McColl, the widow and administratrix of William McColl, deceased, on January 3, 1920. She sues at common law on behalf of herself and her infant child Grace McColl, and by virtue of ch. 36, R.S.M. 1913, and ch. 37, R.S.C. 1906, and amendments thereto.

The plaintiff alleges that her late husband was a bridge and building foreman in the employment of the defendant company and that on or about October 27, 1919, while the said McColl was riding upon one of the defendant's trains the car in which he was so riding was wrecked and set on fire owing to the negligence of the defendants, and the said McColl was thereby killed.

The plaintiff further alleges that the Board of Railway Commissioners for Canada, pursuant to sec. 30 R.S.C. 1906, ch. 37, by order numbered 7599, General Order numbered 43, required the defendant in loading its railway cars to be governed by the clearance limits of the road over which they passed and further that the defendant loaded a certain railway car with a large heavy slab of concrete or stone in such a way that it would not pass under or between the copings of the defendant's bridge over Higgins Ave. on its line of railway in the City of Winnipeg, and that the defendant attempted to haul the aforesaid car between the aforesaid bridge copings with the result that the slab came in contact with the coping on the said bridge and caused the car in which the said McColl was riding to take fire and the said McColl thereby lost his life.

On January 6, 1920, the defendants gave notice to the plaintiff that under the Workmen's Compensation Act of Manitoba, 6 Geo. V. 1916, ch. 125, an application would be made to the Workmen's Compensation Board on Friday, January 9, 1920, at 12.00 o'clock noon for an adjudication and determination of the question of the plaintiff's right to compensation under the said Workmen's Compensation Act and as to whether the action is one the right to bring which is taken away by the Act.

MAN.

K. B.

McCOLL v. CANADIAN PACIFIC R. CO.

Galt, J.

An application for a temporary injunction was made to me and granted, and a motion to continue the same was heard before me in Court on March 3, on which occasion the plaintiff was represented by Mr. David Campbell, the defendants by Mr. L. J. Reycraft, K.C., and, as certain questions of constitutionality of the Workmen's Compensation Act were in question, the Attorney-General, by Mr. John Allen.

The plaintiff bases her claim firstly upon the common law and Lord Campbell's Act, and secondly upon sec. 385 of the Dominion Railway Act, R.S.C. 1906, ch. 37.

The legal attributes of the Workmen's Compensation Board have been dealt with on several occasions in the Courts, but it can hardly be said that these legal attributes have yet been definitely settled.

The object of the Act was doubtless to afford prompt financial assistance to injured workmen to a limited amount. There seems to be no special reason why a workman should not be at liberty to secure his legal rights apart from the Act, unless such rights are wholly taken away.

In *C.N.R.* v. *Wilson*, [1918] 3 W.W.R. 184, I held that the Workmen's Compensation Board is legally a Court, but that it is an inferior Court within the meaning of that term as used for the purpose of prohibition; and therefore where it is shewn to be acting without jurisdiction it may be restrained by a writ of prohibition issued out of the Court of King's Bench. In that case the Board had proceeded to adjudicate on a claim for compensation without giving any notice of the proceedings to the defendant company. An appeal to the Court of Appeal from my judgment was had and reported in (1918), 43 D.L.R. 412, 29 Man. L.R. 193, when the Court, consisting of Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A., dismissed the appeal, Cameron, J.A., dissenting. Perdue, C.J.M., delivered the judgment of the Court, and he says, at page 423: "The inquiry held in this case by the Commissioner under the provisions of the statute was beyond doubt intended by the statute to be a judicial one. His duty therefore was to see that it was conducted as a judicial inquiry." Haggart and Fullerton, JJ.A., concurred in the judgment.

As I read this case the Court of Appeal affirmed my judgment holding that the Workmen's Compensation Board was an inferior

Court; and I would assume that the Court of Appeal would regard the decision as binding, not only on the Court itself, but on each member of the Court, including the dissenting Judge. But in the recent case of *Kowhanko* v. *Tremblay* (1920), 51 D.L.R. 174 (on appeal from a judgment of Mathers, C.J.K.B. (1920), 50 D.L.R. 578), the Court of Appeal, consisting of Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A., appear to have somewhat receded from the decision of the Court in the *C.N.R. Co.* v. *Wilson* case. It is true that the question in the *Kowhanko* case was as to whether or not the Workmen's Compensation Board was a superior Court; but it was held by Cameron, Fullerton and Dennistoun, JJ.A., that the Board is not even an inferior Court. Perdue, C.J.M., says at the end of his judgment: "If the Board exceeds its jurisdiction or acts without jurisdiction it may be restrained: *C.N.R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, 29 Man. L.R. 193." Unless the Board were a Court it could not be restrained: See 10 Hals., secs. 286, 299, 300 and 303. I assume, therefore, that the decision in *C.N.R. Co.* v. *Wilson* is still the law, and that the remarks of the Judges in the *Kowhanko* case to the effect that the Board was not even an inferior Court are merely *obiter dicta*.

The plaintiff's argument on the first branch of her claim is that, apart from the Workmen's Compensation Act, 6 Geo. V. 1916, ch. 125, she has an undoubted right of action which can only be taken away by clear and definite language. It is argued on her behalf that although secs. 11 and 13 of the Act purport to take away any right to compensation apart from the Act, she is not asserting a right to "compensation" but to damages, and that this right has not been taken away by the Act. It is also pointed out that under sec. 18

> compensation shall not be payable unless notice of the accident is given as soon as practicable after the happening of it, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation is made within six months from the happening of the accident or resulting from the accident in case of death within six months from the time of death.

In the present case the plaintiff has never attempted to secure any compensation under the Act and has never given any notice whereby the matter might come before the Board. But the phraseology of sec. 13 is very strong. It reads as follows:—

MAN.

K. B.

McCOLL v. CANADIAN PACIFIC R. CO.

Galt, J.

13. The right to compensation provided by this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer, after the day named by proclamation as mentioned in sec. 3, and no action in respect thereof shall thereafter lie.

It appears to me that the Legislature in this section intended to take away all rights of action other than the right to compensation under the Act.

It may be possible to so interpret the Workmen's Compensation Act as giving a right only to those who desire to take advantage of it, and to leave others, as the present plaintiff, to their legal remedies otherwise; but I cannot resist the conclusion that the Legislature did really intend to restrict injured workmen and their dependents to such relief as they could get under the Act, in all cases to which Part I. applies.

The second branch of the plaintiff's claim depends upon the Railway Act, 9-10 Geo. V. 1919 (Dom.), ch. 68, sec. 385, which reads as follows:—

385. Any company which, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor in Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages shall not be subject to any special limitation except as expressly provided for by this or any other Act.

In answering the argument of Mr. Campbell, based upon this section, Mr. Allen argued that the section was restricted "to any person" injured by such act or omission; "and that inasmuch as the deceased McColl was killed and not merely injured, the clause could not be relied upon by the widow and children, for *actio personalis moritur cum persona*.

This latter objection is not an answer to the plaintiff's contention, because under the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34, sub-sec. 20, "person" includes any body corporate and politic and the heirs, executors, administrators or other legal representatives of such person according to the law of that part of Canada to which the context extends. The plaintiff in the present

case is the administratrix of the late William McColl and as such is entitled to the benefit of the section.

This provision of the Dominion Railway Act cannot, in my opinion, be overridden by any Act of the local Legislature, and the plaintiff is therefore entitled to assert her rights by action.

Mr. Reycraft pointed out that under sec. 3, sub-sec. 2 of the Workmen's Compensation Act the defendants were entitled to apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under the Act and as to whether the action is one the right to bring which is taken away by this Part, and such adjudication shall be final and conclusive. In point of fact this is what the defendants have done. They are the actors so far as regards any proceedings under the Workmen's Compensation Act. At the same time Mr. Reycraft frankly admitted that in case the application came before the Board he thought the Board would entertain it and hold that they were entitled to deal with it. I do not think the plaintiff should be hampered by having her claim dealt with either rightly or wrongly by the Workmen's Compensation Board; but the Board has not yet attempted to deal with the question.

In 10 Hals., par. 292, page 145, it is laid down that, "Prohibition goes as soon as the inferior tribunal proceeds to apply a wrong principle of law when deciding a fact on which the jurisdiction depends." Here the Board has not yet attempted to deal with the case; consequently it would be improper and premature to restrain them. It will be sufficient for the plaintiff's protection to grant an injunction restraining the defendant company from applying to the Board, and I make that order accordingly.

The plaintiff is entitled to her costs of this motion as against the defendants. *Judgment accordingly.*

ESDALE v. BANK OF OTTAWA.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Ives, JJ. March 30, 1920.

JUDGMENT (III B—230)—JUDGMENT ON DEFAULT—COUNTY COURT, ONTARIO—ACTION ON SAME IN ALBERTA—APPLICATION TO SET ASIDE—EFFECT—JURISDICTION.

A judgment obtained in a County Court in another Province by default is held to have no validity in the Supreme Court of Alberta.

When the plaintiff's claim rests entirely on such a judgment, and the defendant has never shewn any intention to submit to the Court's jurisdiction, an application on his behalf for an order setting aside the judgment does not constitute a voluntary submission.

ALTA.

S. C.

ESDALE v. BANK OF OTTAWA.

[*Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670, followed; *Richardson* v. *Allen* (1916), 28 D.L.R. 134, 11 Alta. L.R. 245, referred to; *Guiard* v. *de Clermont*, [1914] 3 K.B. 145; *Harris* v. *Taylor*, [1915] 2 K.B. 580, distinguished.]

APPEAL from the judgment of Hyndman, J., in favour of the plaintiff (1920), 51 D.L.R. 168. Reversed.

S. A. Dickson, for appellant.

J. E. Wallbridge, K.C., for respondents.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's claim is founded solely upon a judgment of the County Court of the County of Carleton in the Province of Ontario. The statement of claim in the County Court action is not before us but it appears from other evidence that the action was upon a promissory note and against the defendant and three others, this defendant being sued as an endorser. It also appears that he claims to have endorsed it for the accommodation of the maker and to have had a good defence to an action on the note. He however resided at the time the action was brought and for several years prior thereto in Edmonton in this Province where he was served and the judgment sued on was obtained upon default of appearance of all the defendants. This defendant subsequently caused a motion to be made to set aside the judgment and give him leave to defend, and an order was made that upon his paying into Court the full amount of the judgment and costs within 21 days the judgment should be set aside and he should be given liberty to defend. He did not comply with the condition and subsequently an order was made vacating the order granting conditional leave to defend.

In the absence of the statement of claim in the County Court action there is nothing to indicate on what ground jurisdiction could be claimed for that Court. Plaintiff's counsel states that the Court being a Court of Record, jurisdiction will be presumed. It is possible that that is the correct view when the Court is a Superior Court of general jurisdiction but I am not satisfied that the same rule applies when the Court is as in this case one of inferior and limited jurisdiction. Whether however it had jurisdiction for any reason it was as respects this defendant not one over his person and in such a case it is settled by *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670, that whatever its effect in Ontario under the local law it is, unless the defendant has submitted to the Court's jurisdiction in the words of Lord Selborne, at page 684, in that case

"by international law an absolute nullity," and "He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except . . . in the country of the forum by which it was pronounced."

It is not denied by plaintiff's counsel that when the judgment was entered it was one to which the above statement of Lord Selborne applied, but he contends and the trial Judge held that the defendant's subsequent conduct gave it a validity which it otherwise would not have had.

It is clear that unless what the defendant did constituted a voluntary submission to the jurisdiction of that Court this Court should ascribe no validity to the judgment.

In *Richardson* v. *Allen* (1916), 28 D.L.R. 134, 11 Alta. L.R. 245, this Division held that whether a defendant has voluntarily submitted is a question of fact. In that case the defendant had defended on the merits and it was held that he had thereby submitted voluntarily to the jurisdiction though he had at the same time contested the foreign Court's jurisdiction. The trial Judge was of opinion that the *ratio decidendi* of *Guiard* v. *de Clermont*, [1914] 3 K.B. 145, 111 L.T. 293, 30 T.L.R. 511, applied. That was a judgment by Lawrence, J., in an action on a judgment obtained in a French Court. The defendant was a resident of and served in England and he entered no appearance to the action and judgment was signed against him in default. He subsequently moved to have the judgment set aside and it was set aside and tried on its merits when he won. An appeal was taken from the judgment in his favour and it was set aside and the original judgment restored. Lawrence, J., held that the judgment sued on which was the judgment of the Court of Appeal and not that of the original Court was entitled to have effect given to it because it was obtained upon proceedings in which the defendant had voluntarily taken part thereby submitting to the Court's jurisdiction. With much respect I cannot see that that case raises the same questions as arise here.

The judgment sued on here is a default judgment before the signing of which the defendant did nothing which could be construed as a submission to the Court's jurisdiction.

The trial Judge quotes certain general propositions from *corpus juris* which he considers support the view that the action of the defendant constituted a general appearance which should

ALTA.

S. C.

ESDALE v. BANK OF OTTAWA.

Harvey, C.J.

relate back to the original judgment. These are all laid down under the general subject of "appearances" and apparently have no special reference to the submission which is necessary to enable foreign Courts to give effect to a judgment though they may have some bearing on that. Some of them quite clearly refer to proceedings before judgment and would thus be scarcely applicable. In several it is stated that the appearance "does not relate back so as to validate void proceedings theretofore had" and I find it stated (4 Corp. Jur. 4, page 1342, note 46 (b)) that:—

(1) In determining whether there has been a waiver of jurisdictional defects by the form of defendant's appearance, a distinction is made by our decisions between an appearance before and an appearance after judgment. An appearance for special purposes before judgment coupled with a demand for relief inconsistent with a claim of want of jurisdiction is a general appearance and a waiver of defects in the service of the summons. But where the appearance is made after judgment, and for want of proper service of process the judgment is void, a different rule applies.

(3) The jurisdictional objection is not waived even by at the same time asking leave to file an answer, thus indicating a willingness to submit to the jurisdiction of the Court as this does not validate the void judgment although the Court may thereafter entertain the cause and proceed as in an action pending in which the defendant has voluntarily appeared.

These propositions appear to relate to proceedings in the Court itself, but they shew that even then an appearance after judgment is not to be taken as a submission to the jurisdiction before the judgment. In *Harris* v. *Taylor*, [1915] 2 K.B. 580, 113 L.T. 221, the Court of Appeal gave effect to a judgment of an Isle of Man Court obtained on default the defendant having before judgment appeared conditionally for the purpose of contesting the Court's jurisdiction, it being held that under the procedure of the Isle of Man Court that appearance might be treated as an appearance for all purposes and therefore constituted a voluntary submission to the Court's jurisdiction.

In the case before us the plaintiff's claim rests entirely upon the default judgment. Before it was signed the defendant had done nothing whatever to shew any intention of submitting to the Court's jurisdiction. I fail to see on what principle his subsequent conduct should be held to indicate a willingness to submit to what had been done before when it was for the express purpose of annulling it. So far as I understand them the authorities do not make it necessary to give what appears to me an unreasonable interpretation to such an application to set aside a judgment.

ALTA.

S. C.

ESDALE v. BANK OF OTTAWA.

Beck, J.

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

STUART and IVES, J., concurred with HARVEY, C.J.

BECK, J.:—I agree that the appeal should be allowed with costs and that the action should be dismissed with costs.

I retain the view which I expressed in my dissenting judgment in *Richardson* v. *Allen*, 28 D.L.R. 134, 11 Alta. L.R. 245, which had it been accepted would have obviated the distinctions from other decided cases which in the present case are made on the judgment of the Chief Justice. *Appeal allowed.*

Re LYNETT.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. January 2, 1920.

DESCENT AND DISTRIBUTION (§ I E—23)—DEATH OF OWNER—RECEIPT OF RENTS BY HUSBAND—ATTEMPT TO SHEW TITLE BY POSSESSION—PETITION UNDER QUIETING TITLES ACT—ONUS OF PROOF—CHARACTER OF HUSBAND'S POSSESSION—ABSENTEES REPRESENTED BEFORE COURT—DEVOLUTION OF ESTATES ACT, R.S.O. 1887, CH. 108.

The husband of the deceased owner of certain property, who died leaving seven children, having occupied his late wife's property for twenty-six years, had only the rights of a tenant by the curtesy under the Devolution of Estates Act, R.S.O. 1887, ch. 108, and could not devise the property to his four daughters by will; being a tenant by the curtesy, he had no interest to devise.

[*Fry and Moore* v. *Speare* (1915-16), 34 O.L.R. 632, 36 O.L.R. 301, distinguished.]

Statement.

APPEAL from the judgment of Falconbridge, C.J.K.B., dismissing an appeal from the Inspector of Titles on a petition under the Quieting Titles Act. Affirmed.

PETITION under the Quieting Titles Act, R.S.O. 1914, ch. 123.

The petitioners were: William Lynett, executor of the will of Patrick Hanrahan, deceased; and Mary Hertel, Teresa Wells, Elizabeth Williams, and Margaret Malloy, devisees under the same will.

The petition set forth that the petitioners were absolute owners in fee simple in possession of a parcel of land in the town of Owen Sound; that there was no charge or other incumbrance affecting the petitioners' title to the land; and that the only persons having or claiming any charge, incumbrance, estate, right, or interest in the land adverse to the petitioners, were: James H. Hanrahan, Michael Hanrahan, and Myles H. Hanrahan, claiming as tenants in common with the petitioning devisees, as heirs-at-law of Eliza Hanrahan, deceased.

ONT.

S. C.

RE LYNETT.

A "statement of facts" filed by the petitioners was as follows:—

1. Eliza Hanrahan, in whose name the registered title to the land mentioned in the petition stood, died at the City of Chicago, in the State of Illinois, on the 6th March, 1890, intestate, leaving her surviving Patrick Hanrahan, her husband, and seven children, namely, Mary Hertel, Teresa Wells, Elizabeth Williams, Margaret Malloy, James H. Hanrahan, Michael Hanrahan, and Myles H. Hanrahan, and no other heirs-at-law.

2. Previous to the death of Eliza Hanrahan, Patrick Hanrahan resided at the Town of Mount Forest, in the Province of Ontario, and had rented the land mentioned in the petition to Thomas Davis. In March, 1890, Patrick Hanrahan moved to Owen Sound and resided there until his death, on the 18th August, 1916.

3. Patrick Hanrahan was in actual, constant, visible, and unequivocal possession of the land, receiving the rents and profits thereof, to the exclusion of all other persons, from the death of Eliza Hanrahan until his own death, and made no election to remain in possession as tenant by the curtesy. Since his death, the petitioners, as executor of and devisees under the will of Patrick Hanrahan, had been in receipt of the rents and profits arising from the land.

4. At the time the land was purchased by Eliza Hanrahan, it was in an improved state, with a dwelling thereon, which still remained, and the value of the land with improvements was under $3,000.

5. Of the persons adverse in interest to the petitioners, James H. Hanrahan was about 48 years of age; he left Ontario about 1886; his last address known to the petitioners was Duluth, Minnesota. Michael Hanrahan, now about 46 years of age, left Ontario about 1886; his last address known to the petitioners was Duluth, Minnesota. Myles H. Hanrahan, now about 43 years of age, left Ontario about 1888; his last address, so far as known to the petitioners, was Louisville, Kentucky.

No evidence was offered to prove the fact that Patrick Hanrahan had made no election to take by the curtesy.

The Inspector of Titles, by a certificate issued on the 29th May, 1919, found:—

1. That the land was formerly owned in fee simple by Eliza Hanrahan; that she died on the 6th March, 1890, intestate and

leaving her surviving her husband, Patrick Hanrahan, and the seven children above mentioned.

2. That thereupon Patrick Hanrahan became and was tenant by the curtesy in possession of the land, and so continued until his death, which took place on the 18th August, 1916.

3. That Patrick Hanrahan, by his last will and testament, purported to devise all his interest in the land to his four daughters, the petitioners above mentioned; but, being only a tenant by the curtesy, he had no interest to devise.

4. That, since the death of Patrick Hanrahan, the four daughters had been in possession of the land, but such possession had not barred the rights of their brothers, James H. Hanrahan, Michael Hanrahan, and Myles H. Hanrahan, if living, or, if dead, of their representatives.

5. That the petitioner William Lynett had not established any title whatever to the land, and that the four daughters, as heiresses-at-law of their mother, Eliza Hanrahan, had established a title only to an undivided one-seventh part each as tenant in common of and to the said land.

The petitioners appealed from the certificate of the Inspector of Titles.

June 11, 1919. The appeal was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court, Toronto.

H. S. White, for the appellants.

E. C. Cattanach, for the Official Guardian appointed by the Court to represent the three Hanrahans, who could not be found.

August 7, 1919. FALCONBRIDGE, C.J.K.B.:—The matter is quite arguable, and I am by no means free from doubt, but I think that the view taken by the Inspector of Titles is the correct one.

Reference to *Re Murray Canal* (1884), 6 O.R. 685; *Fry and Moore* v. *Speare* (1915-16), 34 O.L.R. 632, 26 D.L.R. 796, 36 O.L.R. 301, 30 D.L.R. 723.

Appeal dismissed—no costs.

The petitioners appealed from the order of FALCONBRIDGE, C.J.K.B.

H. S. White, for the appellants.

E. C. Cattanach, for the Official Guardian.

ONT.

S. C.

RE LYNETT.

Meredith, C.J.C.P.

The judgment of the Court was read by:—

MEREDITH, C.J.C.P.:—The real purpose of the applicants in this quieting title proceeding is to bar irrevocably all claims that the brothers of the female applicants, or any heirs of such brothers, could ever make to any estate or interest in the land in question.

The land was owned by the mother of the brothers and sisters, in her lifetime, and at the time of her death: and she was living in Chicago for some time before and at the time of her death: but it is not made clear how or to whom the rent of the land was paid then.

She is said to have died intestate: and no one seems to have ever been authorised by law to administer her estate: but her husband, who was the father of the brothers and sisters, is proved to have been in receipt of the rent from some time after her death up to the time of his death. She died in the year 1890; and he in the year 1916.

Such receipt of rent by him might have been: as executor *de son tort* of her estate: or rightfully as tenant by the curtesy of her land: or as to one-third of it as if his own under the provisions of the Devolution of Estates Act then in force, and as to the other two-thirds wrongfully—in violation of his own and his dead wife's children's rights and interests: or else as to their shares rightfully as their agent protecting them for them.

Under such Devolution of Estates Act, the father would take one-third of the deceased's estate absolutely unless he elected, within six months after his wife's death, to take as tenant by the curtesy, such election being made in the manner provided for in the Act: but it must be remembered that the Act did not prevent his so taking without such an election if he chose to and none of the other persons interested in the land objected; if the election be made as provided for in the Act, he takes notwithstanding objection: and it must be remembered too that, under the Act, the whole estate of the deceased devolved upon and became vested in the deceased's legal personal representative, not the husband and children.

There has been so far really no evidence given of the actual character or purpose of the husband's receipt of the rents: nor is there really any evidence of the time when the first rent was paid to him. A tenant for 17 years gave evidence of continuous

payment by him; but he seems to have become a tenant after the mother's death. All of the four sisters have made affidavits regarding matters not material, but one only has said anything upon the subject on which the rights of the parties depend; though all of them must be able to give some evidence, even if only negative, upon it: and I can have no manner of doubt that, if any reasonable means be taken to disclose or discover the father's intentions or purposes, the rights of the children can be made plain. Such evidence as has been given by the one sister is vague and quite insufficient for ordinary purposes of litigation, not to speak of as a foundation for a court's certificate of absolute and indefeasible title.

Then, though each of the five applicants has sworn that two of the brothers live in Duluth and the other in Louisville, no effort seems to have been made to serve any of them with notice of these proceedings. An advertisement giving notice of them was published in a newspaper at each of those places—a commonly ineffectual proceeding; and one of the sisters has sworn that she has not heard from them for many years; but that is very far from being sufficient to warrant giving effect behind their backs to the real purpose of these proceedings, even regardless of the fact that the other sisters, though each has made an affidavit, have said nothing on the subject.

It is true that upon this appeal counsel for the Official Guardian appeared for the absent brothers—apparently having been informally, at some stage of the proceedings before the learned Judge whose refusal of a certificate of title is the subject of this appeal, requested by him to do so: but without having been in communication with any of them, and without being able to throw any light upon the question of fact upon which the rights of the parties depend.

The appellants' case is therefore still, substantially, entirely an *ex parte* one, and so one in which the onus is upon them of proving satisfactorily the facts necessary to entitle them to a certificate of title such as I have mentioned.

The learned and experienced Inspector of Titles seems to have been of opinion that, in the absence of any direct evidence, and with very little circumstantial evidence, upon the real question on which the rights of the parties depend, he should consider

ONT.
S. C.
RE LYNETT.
Meredith, C.J.C.P.

the father's possession a rightful rather than a wrongful one—a wrong to his own children—and so attributed it to a tenancy by the curtesy, under which the father was entitled to the whole of the rents, just as he received them, during his life: and the learned Judge, who had to consider whether the applicants were entitled to the certificate of title, with some hesitation agreed with the Inspector that they were not: and this appeal is an appeal against his refusal of the certificate.

I am quite in accord with the learned Judge in his conclusion that the applicants have not made out a case entitling them to the certificate which they seek; but my conclusion is not based upon the ground that the father must or should be now taken to have been in possession as tenant by the curtesy; it is upon the ground that the applicants have quite failed so far to give such evidence of possession as confers upon them as devisees of their father an absolute and indefeasible title.

The appellants' attempt to confine attention to the provisions of the Devolution of Estates Act only, cannot succeed: the case involves other questions quite as important if not more so. But, if so confined, the appellants should not have a certificate without additional evidence: the Act did not give the father a right to possession upon his wife's death: under it he might have obtained at once possession of the whole land as tenant by the curtesy; and even after the six months it did not preclude him from so remaining in possession, no one, having a right to object, objecting.

He may have been in possession in any of the ways I have mentioned: and the fact that in his will he did not devise the land to his daughters, but devised to them only "all my interest in the house and lot . . . of which I have been in receipt of the rents," goes a long way, in my mind, to shew that he never had, or intended to have, a wrongful possession against his own and his dead wife's children—daughters and sons. There is nothing in the evidence to indicate that he was not a father who would deem it his highest duty to protect their interests.

The case of the McNab children, *Fry and Moore* v. *Speare*, 34 O.L.R. 632, 26 D.L.R. 796, and, in appeal, 36 O.L.R. 301, 30 D.L.R. 723, was a case very different from this; for, though it was there said that parents do not ordinarily take undue advantage of their children, it was found that every act, circumstance, and

word indicated complete exclusion of all the step-children from any part or lot in the possession or control of the land, and from any benefit from the rent and profits of it. Here there is no evidence of the father having or desiring to have any more out of the land than he lawfully had in it as a surviving husband.

The appeal should, in my opinion, be dismissed: but the case should go back to the Referee, if the appellants desire it, so that they may give further evidence, which should include evidence regarding the brothers, or their heirs, whose rights, if any, should not be bound behind their backs in such a doubtful case as this, and when, as I have no doubt, some of them can easily be found.

Appeal dismissed.

BELYEA v. CITY OF SAINT JOHN.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Barry, JJ. November 21, 1919.

FISHERIES (§ II—10)—LEASE OF WATER LOT—ST. JOHN HARBOUR—FISHING PRIVILEGES—INJUNCTION—APPEAL.

The lessee of a water lot in the harbour of the City of St. John, not having had the right of fishing, in the waters over the land leased to him, the city, having expressly withheld from sale, as empowered to do by statute the fishing rights over the lot in question, cannot take any right of fishing or of erecting weirs under his lease.

Statement.

APPEAL by defendant from a judgment of Grimmer, J., in an action claiming an injunction to restrain defendant from fishing with a weir or otherwise on a fishing lot on Saint John harbour. Affirmed.

E. P. Raymond supports appeal.

J. B. M. Baxter, K.C., contra.

The judgment of the Court was delivered by

Barry, J.

BARRY, J.:—On November 16, 1917, the City of Saint John, for the consideration of the annual rent of $5, by an instrument under its common seal and the hands of the mayor and the common clerk, demised and leased to James Frederick Belyea, for the term of 7 years from November 1, 1917, lots Nos. two (2) and three (3) in block Y and No. five (5) in block X on the west side of the harbour of Saint John, "with all and singular the rights, members and appurtenances to the said lot belonging or in any wise appertaining." Lot No. five, which is wholly situate between high and low water mark, and is the one with which the present

N. B.

S. C.

BELYEA v. CITY OF SAINT JOHN.

Barry, J.

litigation is concerned, comprises a part of the area set apart by the common council of the City of Saint John as fishing lot No. 21, on the plan of fishing lots on the western side of the harbour. The lease granted by the city does not, in express terms, convey to the lessee any fishery rights, neither is there in it any reservation to the lessors of any right of fishery. It was said at the argument in the Chancery Division, and is not disputed, that Belyea obtained the lease from the city on the representation that he wanted the land for the purpose of erecting upon it, or upon land adjacent to it, of which he was in possession, a fish-curing establishment.

It appears that some time in April last, Belyea erected a weir on lot No. 5, and that on the 22nd and 23rd days of that month, took fish from the weir which he had so erected there. The city then commenced this action against the appellant, claiming by the endorsement to its writ of summons an injunction to restrain the defendant from fishing with a weir or otherwise on fishing lot No. 21 on the western side of the harbour. Upon the affidavits of George G. Hare and Frank W. Lord, Grimmer, J., granted an interim order of injunction in terms of the plaintiff's claim, the city entering into the usual undertaking to abide by any order that the Court should subsequently make as to damages.

On May 2 last, a motion was made before Grimmer, J., to dissolve the injunction upon 10 distinct grounds, only the last 3 of which, however, I think it necessary to refer to. These were:—

8. The sole right of fishing, hauling the seine, erecting weirs and taking fish between high and low water mark on the west side of the harbour of the City of Saint John is vested in the inhabitants of the City of Saint John on the west side of the harbour.

9. The defendant, by virtue of the lease granted to him by the plaintiff, has the sole and exclusive right of fishing, hauling the seine, erecting weirs and taking the fish on the lot of land described in the lease being the lot in question.

10. Apart from the lease, the defendant as an inhabitant of the City of Saint John on the west side of the harbour, has the right to fish, haul the seine, erect a weir and to take the fish on the lot in question, between high and low water mark on the west side of the harbour.

After hearing argument and upon consideration, Grimmer, J., on June 30 last, pronounced a judgment in which he finds that the defendant was without authority in erecting a weir on lot No. 5 a portion of fishing lot No. 21, and that he had illegally and improperly taken fish from the said weir. An order for a decree

was made continuing, during the term of the lease, the injunction already granted, restraining the defendant from fishing on lot No. 5.

From this judgment and order the present appeal is taken, the grounds of appeal being:—

Error on the part of the Judge in deciding,

1. That by the charter of the City of Saint John, the control of the fisheries within the limits of the harbour of the City of Saint John, was fixed and placed in the mayor, aldermen and commonalty of the City of Saint John.

2. That by the said charter, the grant of the fisheries was to the common council of the City of Saint John.

3. That the appellant had no authority to erect a weir upon the said lot No. 5, which is a portion of the fishery lot No. 21.

4. That the appellant had improperly taken fish from the weir which he had erected on lot No. 5.

In the judgment appealed from it is held that by the charter granted by Geo. III. to the City of Saint John on May 18, 1785, and confirmed by Act of the Legislature of the Province, it was intended that the control of the fisheries within the limits of the city thereby created, should be fixed and placed in the corporation, and the right of fishing on the west side of the harbour conferred upon and reserved to the freemen and inhabitants of that side; and that by subsequent legislation, to which the Judge refers and quotes from at considerable length, the full control and management of the fisheries is vested in the common council of the city, the right of fishing on the west side being still preserved as originally granted to the freemen and inhabitants of the west side.

The settled law of the realm appears to be that beyond the territorial waters, *i.e.*, such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of His Majesty, all subjects of the realm have, by international law, the right to fish in common with the rest of the world, unless restrained by Act of Parliament. Within the territorial waters, subject to the ebb and flow of the tide, the public, being subjects of the realm, are entitled to fish, except where the Crown, or some subject of the Crown has gained a propriety exclusive of the public right, or Parliament has restricted the common law rights of the public. Originally, the bed of the sea, and of all tidal rivers and estuaries within the realm belonged to the Crown, as part of the waste of the kingdom, and as owner of the soil the fishery was vested in the Crown, but by common law the

N. B.

S. C.

BELYEA v. CITY OF SAINT JOHN.

Barry, J.

public had a public common of fishery over such soil. But even the public common of fishery must be exercised reasonably and in accordance with the statute law.

By the charter of the City of Saint John, and ch. 46 of the Acts of Assembly of the Province of the year 1786 confirming it, Parliament has restricted the common law rights of the public; the right of fishing in the harbour on the west side is restricted to the freemen and inhabitants living on that side of the harbour; the general public is therefore inferentially excluded. In the judgment appealed from, Grimmer, J., at considerable length quotes from the city charter those passages upon which he bases—and as I think, correctly bases—his conclusion that the control of the fishing was by the charter vested in the corporation, and the right of fishing on the west side of the harbour reserved and restricted to the freemen and inhabitants, and since he has so fully gone into the matter there would seem to be no necessity of my repeating those quotations here.

The corporation of the City of Saint John, being empowered by its charter to do so, made certain by-laws affecting the public, or some portion of the public, and having the force of law within the sphere of their legitimate operation. By these by-laws, it is admitted, a mode was provided for the drawing by lot annually, by the freemen and inhabitants of the west side of the fishery lots laid out and established on that side of the harbour. This mode of apportioning the fishing lots amongst those entitled to them, which was known as the "Fishery Draft of the City of Saint John" was abolished by ch. 50, 25 Vict., of the Acts of the General Assembly of the Province and a new method provided for the sale of the fisheries. By sec. 3 of the chapter referred to, it was provided that from thenceforth, the fisheries between high and low water mark and the sole fishing, hauling the seine, erecting weirs and taking fish on the west side of the harbour, should, annually, on the first Tuesday of January, be set off in lots and each sold at public auction to the highest bidder; provision was made for a re-sale in case of non-payment by the purchaser of the amount bid for any lot, and directions given for the disposition and appropriation of the moneys obtained from the sale of the fisheries.

The annual sale by auction was to be conducted under the direction of a committee of the common council, and on the pur-

chase and payment of the purchase money, the common council was required to grant to the purchaser a certificate of purchase, and thereupon the purchaser became entitled to the same rights and privileges in every respect, as if he had drawn his lot under the system which had theretofore obtained, known as the fishery draft.

Whatever doubts there may exist in the minds of any one as to the power and authority of the respondent to control and regulate the fisheries of the harbour of the City of Saint John under its charter as confirmed by the Legislature—and for myself I cannot see that there are any—must, I think, be set at rest by the provisions of sec. 6 of ch. 50, 25 Vict. This legislation was passed anterior to Confederation, was clearly within the competence of the Legislature of the Province, and no conflict can arise in regard to it as to the respective powers of the Provincial and the Dominion Parliaments under the distribution of the powers given by the B.N.A. Act. Whatever proprietary rights vested in the Province at the date of the B.N.A. Act, 1867, remained so, unless by its express enactment transferred to the Dominion, and such a transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject matter of those proprietary rights. *Att'y-Gen'l for Canada* v. *Att'y-Gen'l for Ontario, etc.*, [1898] A.C. 700. Section 6, which I have mentioned, provides:

> The common council of the said City shall have the power by ordinance to appoint directors of the fisheries, and generally to regulate the fisheries and laying out and fishing the fishing lots within the City of Saint John; and if the common council shall not before the first day of December, next after the passing of this Act, make an ordinance for that purpose, the ordinance which shall be in force at the time of the passing of this Act, shall be and remain in full force.

Ordinances in force at the time of the passing of the Act and ordinances subsequently passed, which were repugnant to or inconsistent with the terms of the Act, were declared to be void and of no effect.

By 39 Vict. ch. 27, the committee of the common council for the time being appointed under the 5th section of 25 Vict. ch. 50, is authorized from time to time to postpone the sale of the fishery lots or any of them under the third section of the Act, from the first Tuesday in January in any year, to such other day or days in the month of January or the month of February in any year,

N. B.

S. C.

BELYEA v. CITY OF SAINT JOHN.

Barry, J.

as to the committee may seem best, and to fix an upset price upon any or all of the fishery lots at the time of sale.

Because of the necessity for providing extended accommodation for the growing trade and commerce of the port, and it becoming necessary to use for wharves and other trade facilities, the places and situations where the fishery lots had previously been laid out, the Legislature by ch. 62, 10 Edw. VII., 1910, enacted and declared that neither the City of Saint John nor the common council thereof should be longer bound, to set off and sell as fishing lots, any of the land, beach or flats between high and low water mark in the harbour, which, in the opinion of the common council, expressed by a majority vote, might be required for harbour improvements or for trade facilities. But that any of the fishery lots might be withheld from sale and used for any other purpose than fishery lots, as the city might, by vote of the common council, decide. This legislation leaves it practically in the hands of the corporation to decide whether it will grant to any one any fishing rights at all; thus depriving, as the Legislature undoubtedly had the right to do, the public and the freemen and inhabitants of West Saint John of any common law or statutory right which theretofore they may have had of fishing in the waters above the lots laid out as fishery lots.

Then follows the legislation of 1914, 6 Geo. V. ch. 70, duplicating and overlapping, as it seems to me, but without expressly repealing, some of the previous legislation to which I have adverted. Power and authority is given to the city to sell the fisheries between high and low water mark on the west side of the harbour, at the times and in the manner stipulated, with power to fix an upset price upon any or all of the fishing lots at the time of sale. But it is not necessary to set off or sell any lot or lots which, in the opinion of the corporation, may be required for works of a public character, or in the vicinity of which work of such a character may be intended to be carried on. In regard to any of the lots which may not or need not be sold, the committee of the corporation having charge of the sales, may sell rights of fishing thereon, and may limit the time and manner in which such rights shall be exercised, and may impose certain conditions laid down in the Act in regard to claims for interference with the fishery rights which may be so granted. By this same Act power is given to the common

council to grant permission to extend weir foundations below low water mark and to cause the came to be removed.

Here then we have a body of legislation which, apart altogether from the charter itself, seems to me to vest in the respondent the absolute control of the fisheries on the west side of the harbour of the City of Saint John. It goes without saying that it takes from the freemen and inhabitants of the west side common law rights which they before possessed. But in the progress of events and especially in legislating in regard to the commercial and industrial development of a comparatively new country, it must often happen that the interests of individuals or of a particular class, have to be made subservient to the public good; and while it is doubtless true that in passing the various statutes to which I have alluded the Legislature was aware of the distinct injury it was doing to a certain class of individuals, that is, the freemen and inhabitants of West Saint John, it is, I think, on the other hand, but fair to assume that it was discharging its legislative functions in what it conceived to be the highest commercial interests of the chief seaport of the Province.

It is not disputed that as a general proposition, a grant of private lands covered with water carries with it the right of fishing in the waters over those lands. And a corporation created by charter and ratified by Act of Parliament as the City of Saint John was, has, at common law, power to deal with its property and incur liability in the same way as an ordinary individual; but where the common law rights have been limited and circumscribed by statute, as is the case with the City of Saint John in regard to its fisheries, its powers extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation.

While the city has the power to grant to the freemen and inhabitants of the west side fishery rights on that side of the harbour, it can only do so in the way, and by carrying out the conditions, laid down in 25 Vict. ch. 50. This, admittedly, was not done in the present case. The city is not obliged to sell any of its fishing privileges between high and low water mark unless it wishes to do so: 10 Edw. VII. ch. 62. It may withhold from sale, and use for any other purpose than fishing lots, any of the fishery lots laid out on the west side. It is admitted by the appellant that fishery

N. B.

S. C.

BELYEA
v.
CITY OF
SAINT JOHN.

Barry, J.

lot No. 21 of which the lot in controversy is a part, together with four other fishery lots, namely, Nos. 22, 23, 24 and 25, were withdrawn by the city from sale as fishery lots on December 15, 1914, and have not since been offered for sale at any sale of fishery lots on the west side of the harbour.

A corporation as a general rule and apart from the operation of general or special statutes has the same powers and is subject to the same liabilities as a natural person. It may make leases and grants. And because the doctrine and ordinary rules relating to estoppel apply to corporations as much as to individuals, it was suggested at the argument that the city, having granted to the appellant a lease for 7 years of lot No. 5, without any reservation in regard to the right or privilege of fishing in the waters over it, might, possibly, be now estopped by its deed from denying that the appellant has that right or privilege. But the authorities appear to be clear that a corporation cannot be estopped by deed or otherwise from shewing that it had no power to do that which it purports to have done; *Fairtitle* v. *Gilbert* (1787), 2 Term. Rep. 169; *Re Companies Acts; Ex parte Watson* (1888), 21 Q.B.D. 301. And if the subject matter of the contract which has been entered into between the City of Saint John and the appellant is beyond the scope of the constitution of the corporation which is to be found in its charter as modified and circumscribed by statute, it is beyond the powers of the corporation to make the contract which is therefore void *ab initio* and cannot be ratified. While the corporation of Saint John, speaking in a general way, has the management and control of the harbour fisheries, it has not a free hand in regard to the disposal of them. It is restricted by the statute as to its dealing with the fisheries which the Crown turned over to it, and these restrictions are absolute and cannot be modified or waived by the members composing the corporation, even although they should be all unanimously in favour of such modification or waiver. *Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354; *Mann and Beattie* v. *Edinburgh, etc., Co.*, [1893] A.C. 69.

The right of fishing which the appellant claims in the waters over the land which has been leased to him by the city, not having been sold to him according to the rules and conditions laid down in the statute, but the city, on the contrary, having, as it had the statutory right to do, expressly withheld from sale the fishing

rights over lot No. 21, the appellant cannot, in my opinion, take any right of fishing, or of erecting weirs, under his lease, and his appeal must fail.

The appeal is dismissed, with costs.

Appeal dismissed.

WHIMSTER v. DRAGONI.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. March, 19, 1920.

INTOXICATING LIQUORS (§ III C—65)—SALE OF LIQUOR—CONVICTION OF EMPLOYEE OF ACCUSED—PUNISHMENT ALSO OF ACTUAL OFFENDER—PROHIBITION ACT, 6 GEO. V. 1916 (B.C.), CH. 49, SECS. 38 AND 39.

By virtue of the provisions of secs. 38 and 39 of the Prohibition Act (B.C.), the conviction and punishment of any employee or servant of any person unlawfully selling liquor under these sections shall not absolve the actual offender from guilt and punishment.

[*Rex* v. *Martin* (1916), 28 D.L.R. 578, 26 Can. Crim. Cas. 42, 9 Alta. L.R. 265, note 5 Can. Cr. Cas. 430, distinguished.]

Statement.

APPEAL by prosecution from a judgment of a County Judge in an action under the B.C. Prohibition Act (1916), 6 Geo. V. ch. 49. Reversed.

W. D. Carter, K.C., for appellant; *A. Macneil*, for respondent.

Galliher, J.A.

GALLIHER, J.A.:—Mr. Macneil takes the preliminary objection that the magistrate had no jurisdiction—basing his objection upon the fact that the offence charged had been committed within the municipality of Fernie, and that the police officials of that municipality only and *not* the Provincial police authorities (who laid and prosecuted the charge) had power to do so.

It seems to me that sec. 29, sub-sec. 1, of the Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49, is clear enough. It reads as follows:

> The duty of seeing that the provisions of this Act are complied with and of enforcing the same and of prosecuting persons offending against such provisions shall devolve upon the superintendent and upon all constables and officers of every provincial and of every municipal police force in the Province, and they shall severally have full authority to enforce all such provisions.

Mr. Macneil refers us to sec. 409 of the Municipal Act, 4 Geo. V. 1914 (B.C.), ch. 52, by which the Lieutenant-Governor-in-Council is given power to direct the Superintendent of Police to take charge of the policing of any municipality and thereafter during such time as shall be fixed by Order-in-Council, all officers and constables of the municipality shall be under the sole direction and control of the Provincial Police. Also to sec. 6 of 2 Geo. V. 1911 (B.C.), ch. 169, the Motor Vehicles Act, where the Super-

B. C.

C. A.

WHIMSTER v. DRAGONI.

Galliher, J.A.

intendent of Provincial Police is primarily charged with the enforcement of the provisions of the Act with directions that all chiefs of police, police officers and constables, shall aid in the enforcement of the Act and the prevention of infractions of same. And again to sec. 418 of the Municipal Act of 1914, defining the duties of municipalities as to enforcement of the law.

From all these he argues that had it been the intention of the Legislature when passing the Prohibition Act, that the Provincial police should have authority to act within the limits of a municipality, a special section authorising them so to do would have been inserted.

In support of this argument he invokes sub-sec. 3 of sec. 28 of the Prohibition Act, which directs that penalties resulting from proceedings by Provincial authorities are paid into the Consolidated Revenue Fund, and those resulting from proceedings by municipal authorities are paid into the treasury of the municipality.

If the Provincial officers have power to enforce the provisions of the Act within municipalities, this sub-section would create no difficulty as the penalty would go to those most diligent in enforcing the Act.

I think the language in sec. 29, which imposes on the superintendent, officers and constables of the Provincial police the duty of seeing that the provisions of the Act are complied with and of prosecuting persons offending against same, is broad enough to fix their authority either within or without municipalities.

I would over-rule the objection.

On the main appeal secs. 38 and 39 of the Prohibition Act have to be considered. Secs. 38 and 39, sub-sec. 1, are as follows:—

> The occupant of any house, shop, room, or other place in which any sale, barter, or traffic of liquor or any matter, act, or thing in contravention of any of the provisions of this Act has taken place shall be personally liable to the penalty and punishment prescribed in this Act, notwithstanding such sale, barter, traffic, matter, act or thing be made by some other person who cannot be proved to have acted so under or by the directions of such occupant; and proof of the fact of such sale, barter, or traffic or other act, matter or thing by any person in the employ of such occupant, or who is suffered to be or remain in or upon the premises of such occupant, or to act in any way for such occupant, shall be conclusive evidence that such sale, barter or traffic or other act, matter or thing took place with the authority and by the direction of such occupant.

(39) (1) Every offence against the provisions of this Act committed by the employee, servant, agent or workman of any person unlawfully selling liquor shall be deemed to be the offence of the person so unlawfully selling liquor, and such person shall be answerable for and shall be punished for such offence; provided that nothing therein shall absolve the actual offender from guilt and punishment, but he shall be punished also.

B. C.
C. A.
WHIMSTER v. DRAGONI.
Galliher, J.A.

Mr. Macneil's argument is that as the employee has been convicted and a penalty imposed, you cannot impose on another a like sentence for the same offence, citing *Rex* v. *Martin* (1916), 28 D.L.R. 578, 26 Can. Cr. Cas. 42, 9 Alta. L.R. 265, and note in 5 Can. Cr. Cas., at page 430.

Neither of these can be regarded as authorities when we consider the definite and specific wording of our sec. 39 (1), differing from the Act, 1915, Alta., ch. 89, under which *Rex* v. *Martin* was decided.

The Legislature has seen fit to place this enactment on the statute books and it is not for us to question the wisdom or unwisdom of same, but to interpret and give effect to it as we find it, and in my opinion the language is so clear as not to admit of doubt.

It was pointed out that sub-sec. 2 of sec. 39 could not be reconciled with sec. 38, but Mr. Carter for the Crown has pointed out to us that this sub-section is directed to an offence by an employee of a vendor and sec. 2 of the Act defines "vendor" as a person appointed by the Lieutenant-Governor-in-Council under sec. 4 of the Prohibition Act, so that sub-section has no reference to an ordinary seller of liquor.

Martin, McPHILLIPS, and Eberts, JJ.A. would allow the appeal.

Martin, J.A.
McPhillips, J.A.
Eberts, J.A.

Appeal allowed.

WHIMSTER v. MILLS.

B. C.
C. A.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. March 19, 1920.

Appeal allowed for the same reasons as given in *Whimster* v. *Dragoni*, ante 503.

B. C.

C. A.

WHIMSTER v. NORTHERN CAFE Co.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. March 19, 1920.

Galliher, J.A.

GALLIHER, J.A.:—There is one point in this appeal not raised in *Whimster* v. *Dragoni*—in other respects my reasons in that case apply.

The offender here convicted is a corporation and was fined $1,000 under sec. 28 (1) of the Act, 6 Geo. V. 1916, ch. 49.

There is a manifest error in the words used, convicted "under this sub-section."

Section 28 (1) provides the penalty for committing a breach of any of the provisions of sec. 10 of the Act and imposes imprisonment for a first and second or subsequent offence against persons convicted and, as a corporation cannot be imprisoned, goes on to provide a penalty in case the offender shall be a corporation, and in doing so uses in the same sub-section these words, "and if the offender convicted *under this sub-section* be a corporation, it shall be liable to a penalty of one thousand dollars."

There is of course no offender convicted under this sub-section, which is one imposing a penalty for an offence under sec. 10 of the Act, but it is clear what the Legislature had in mind, viz., the dealing with a corporation offender which could not be dealt with in the same way as an individual.

The words used are, I think, a manifest slip or error and may be regarded as surplusage and struck out.

In referring to sub-sec. 2 of sec. 28, I find the error is not perpetuated.

To give effect to these words, "under this sub-section" would render it meaningless, so far as a corporation offender is concerned, and I think we should not do so when the intention of the Legislature is so clear.

Martin, J.A.
McPhillips, J.A.
Eberts, J.A.

MARTIN, MCPHILLIPS and EBERTS, JJ.A., agreed that the appeal should be allowed. *Appeal allowed.*

CHOTEM v. PORTEOUS.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. March 30, 1920.

DAMAGES (§ III J—201)—INJURY TO MOTOR TRUCK—NEGLIGENCE OF DEFENDANT—SPECIAL AND GENERAL DAMAGES—ERROR—APPEAL.

Where a chattel has been injured by a negligent act, the cost of repairing it, the difference in value between the former worth and that of the chattel when repaired, and damage sustained for loss of use of the chattel are all recoverable. General damages are not allowed.

[*Moon* v. *Stephens* (1915), 23 D.L.R. 223, 8 S.L.R. 218, followed.]

APPEAL from a judgment awarding the plaintiff damages for injury to his auto-delivery truck, received through collision with the automobile of the defendant. Reversed. Statement.

D. A. McNiven, for appellant; *J. W. Estie*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The District Court Judge found that the collision occurred through the negligence of the defendant, and he awarded as special damages the costs of repairing the plaintiff's truck, $105.95, also the amount paid for use of another car while the plaintiff's was being repaired, $30, and general damages $50. From the judgment the defendant appeals. Lamont, J.A.

The evidence amply supports the finding of the trial Judge that the collision was due solely to the negligence of the defendant. It also establishes that the plaintiff was entitled to the sums awarded as special damages. In my opinion, however, the Judge erred in awarding general damages in this case. The underlying principle upon which Courts proceed in awarding damages in actions for torts is, to place the injured person in the same situation, so far as money can do it, as he would have been in had the occurrence which affected him adversely not taken place. As applied to chattels injured by a negligent act, the rule is laid down in 21 Hals. 485, as follows:—

> 809. Where a chattel has been injured owing to a negligent act, the cost of repairing it, the difference in value between the former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable. Loss of profits may also be recovered if it can be shewn that they follow directly from the wrongful act, but not otherwise. As a rule, damages are not given for the depreciation of the value of an article owing to a fall in the market price during the period of delay occasioned by the defendant's negligence.

In *Moon* v. *Stephens* (1915), 23 D.L.R. 223, 8 S.L.R. 218, the defendant's mules while running at large ran into the plaintiff's horses, causing them to become frightened, in consequence of

SASK.

C. A.

CHOTEM v. PORTEOUS.

Lamont, J. A.

which they ran over a plough; one horse was injured, and some injury was done to the machinery. The District Court Judge allowed damages for depreciation to the horse, damages to the machinery, medicine and veterinary's fees, together with $25 general damages. On appeal to the Court *en banc* the general damages were disallowed. The decision in that case in my opinion governs the case at Bar.

Counsel for the plaintiff contended that the plaintiff had suffered loss over and above the special damages awarded. The plaintiff had in his evidence testified that the car he rented while his own was being repaired was smaller than his own, which necessitated a greater number of trips to make deliveries, with the result that it consumed more gas; that the delivery driver had to work longer hours to make the necessary deliveries, and that he was inconvenienced in the carrying on of his business.

If he had been put to additional expense by reason of the smaller car consuming a greater quantity of gas, and by reason of his having to pay his delivery man additional wages for extra hours necessitated by the use of the smaller car and he had shewn what this additional expense amounted to, he would have been entitled to judgment for the same. But he did not give any evidence as to the amount of such loss, neither did he shew that his business in any way suffered as a result of the collision. That being so, he is not entitled under the head of general damages to ask the defendant to contribute $50 to make good a loss which the evidence does not shew he sustained. The general damages will therefore be disallowed.

The appeal should therefore be allowed with costs, and the judgment reduced by $50.

I notice in the judgment appealed from, that the Judge, in view of what was held by the Court *en banc* in *Moon* v. *Stephens*, supra, gave judgment for the general damages at the risk of counsel for the plaintiff, who agreed to accept the risk.

I know of no principle upon which such a judgment can be given. *Moon* v. *Stephens* was binding upon the trial Judge, as it is on us, and, until overruled, should be followed where applicable, even although counsel should be willing to take a judgment inconsistent therewith "at his own risk." I am not sure just what is the effect of counsel agreeing to take a judgment at his own risk.

SASK.

C. A.

CHOTEM v. PORTEOUS.

Lamont, J. A.

Primâ facie it would appear to me to involve a personal obligation upon counsel to be responsible for the costs of the appeal in case it is held that he was not entitled to the judgment. This point, however, is not material at this stage. I call attention to it to indicate to those acting as counsel the risk they may be running by such practice.

Appeal allowed.

STERLING ENGINE WORKS v. RED DEER LUMBER Co.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. April 6, 1920.

CONTRACTS (II D—194)—REPAIRS TO CHATTEL—WORK DONE—DEFECTIVE MATERIAL—IMPLIED CONDITION AS TO FITNESS OF MATERIAL—SALE OF GOODS ACT, R.S.M., 1913, CH. 174.

A contract made to furnish a machine or movable thing of any kind and (before the property in it passes) affix it to land or to another chattel is not a contract for the sale of goods.

The intention is plainly not to make a sale of movables as such, but to improve the land or other chattel as the case may be, and the consideration to be paid is not for a transfer of chattels, but for work and labour done and material supplied.

There is no implied condition that the materials supplied shall be reasonably fit for the purpose required according to sec. 16 of the Sale of Goods Act, R.S.M. 1913, ch. 174.

[*Clark* v. *Bulmer* (1843), 11 M. & W. 249, 152 E.R. 793, referred to; *Jones* v. *Bright* (1829), 5 Bing. 533, 130 E.R. 1162, distinguished.]

Statement.

APPEAL by plaintiff and cross-appeal from the trial judgment, (1919), 48 D.L.R. 484, in an action to recover the amount due on an account for work, labour, and material furnished. Appeal allowed, cross-appeal dismissed.

A. E. Hoskin, K.C., and *J. C. Collinson*, for appellant.

A. C. Ferguson and *P. Baker*, for respondent.

Fullerton, J.A.

FULLERTON, J.A.:—This action is for work and labour done and materials supplied in connection with the repair of an engine.

The main defence is that the plaintiff used inferior materials in repairing the fire-box of the engine, which necessitated the work being done over again. Some months after the repairs had been completed the defendant discovered that portions of the plates in the fire-box had become laminated or blistered. It is admitted that this was due to a latent defect which could not be detected by the plaintiff.

The only question to determine in this appeal is whether the contract in question is one for the sale of goods or for work, labour and materials supplied. If the former, then an implied condition that the goods shall be reasonably fit for the purpose required

MAN.

C. A.

STERLING ENGINE WORKS v. RED DEER LIMITED.

Fullerton, J.A.

will arise by virtue of sec. 16 (*a*) of The Sale of Goods Act, R.S.M. 1913, ch. 174, and the fact that the defects were latent will not excuse the vendor.

The trial Judge bases his decision in favour of the defendant on the assumption that the contract was for the sale of goods. He says in his judgment: "I am of the opinion that when the locomotive was re-delivered by the plaintiffs all the new material in it passed by sale to the defendant."

Benjamin on Sale (5th ed., 1906), at page 164, lays down the following proposition:—

> Where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do work, there is a bailment by the employer, and a contract for work and labour, or for work, labour and materials (as the case may be), by the workman. Materials added by the workman, on being affixed to or blended with the employer's materials, thereupon vest in the employer by accession, and not under any contract of sale.

Benjamin, page 162:—

> The principles already discussed have shewn that a contract of sale is not constituted merely by reason that the property in the materials is to be transferred to the employer. If they are simply accessory to work and labour, the contract is for work, labour and materials.

Benjamin, page 163:—

> Where a contract is made to furnish a machine or a movable thing of any kind, and (before the property in it passes) to fix it to land (or to another chattel), it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables as such, but to improve the land (or other chattel, as the case may be). The consideration to be paid to the workman is not for a transfer of chattels, but for work and labour done and materials furnished.

Beven, in his work on Negligence, speaking of the duties of a bailee under a bailment *locatio operis faciendi*, says (Can. ed.), vol. 2, page 808:—

> In this species of bailment every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes . . . He is required to bestow ordinary diligence, and that care and prudence which the average prudent man takes in his own concerns. For the contract is for mutual benefit; therefore the bailee is not answerable for slight neglect, nor for a loss by inevitable accident or irresistible force, or from the inherent defect of the thing itself, unless he took the risk on himself; he is only answerable for ordinary neglect.

The contract in question here was not a contract for the sale of goods but for work, labour and materials supplied. The Sale of Goods Act therefore has no application.

I would allow the appeal with costs and direct that judgment be entered in favour of the plaintiff for the amount claimed.

The cross-appeal of the defendant will be dismissed with costs and the counterclaim dismissed with costs.

DENNISTOUN, J.A.:—The point for decision on this appeal is whether or not there is an implied condition that materials supplied are free from latent defects, the contract being for work, labour and materials done and furnished in making general repairs to a locomotive engine the property of the defendant company.

The defective materials consisted of two steel plates which were built by the plaintiff company into the firebox of the defendant's locomotive and which after return of the engine to the defendant and user for several months became useless through latent defect. The firebox appears to have been built of new materials throughout.

It was admitted by counsel on the argument before this Court that the defect was latent and that there was no evidence of negligence on the part of the plaintiff.

The plaintiff sued for $849.45, balance unpaid of an account for $3,349.45, which was the total amount charged for the work labour and materials which were furnished on a time and material basis.

The defendant counterclaimed for $4,600 damages and such counterclaim was treated as an action for breach of warranty, under sec. 52 of the Sale of Goods Act, R.S.M. 1913, ch. 174, by the trial Judge who gave damages to the defendant by wiping off the account sued for and allowing the sum of $37.20 in addition thereto.

It may be noted that the value of the work and materials supplied by the plaintiff was $3,349.45, of which sum the materials supplied for the firebox were charged at $461.14, and of these materials, the trial Judge finds, that portions of two steel plates costing $37.20 were defective.

Negotiations between the plaintiff and defendant for the replacement of these defective plates having failed, the defendants sent their engine to Winnipeg at large expense and paid other repairers the sum of $2,000 for replacing the laminated plates with new steel.

MAN.

C. A.

STERLING ENGINE WORKS v. RED DEER LIMITED.

Dennistoun, J.A.

The contract was not, as I construe it, a sale of goods within the meaning of sec. 16 of the Sale of Goods Act, R.S.M. 1913, ch. 174, which is in part as follows:

(a) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.

There is no evidence to suggest that the plaintiff, the Sterling Engine Company, Limited, was a vendor of or dealer in steel plates. Their business appears to have been to repair engines. They did not sell any steel plates as such to the defendant. What they did was to rivet certain steel plates which they purchased in the market as suitable for this job, to the defendant's engine, to build them into it, in the course of making general repairs which included the re-construction of the firebox, so that the title in the plates passed to the defendant not by bargain and sale as held by the trial Judge, but by accession: *Seath* v. *Moore* (1886), 11 App. Cas. 350; Benjamin on Sale (5th ed.), page 164; *Clark* v. *Bulmer* (1843), 11 M. & W. 249, 152 E.R. 793.

The case under consideration differs materially from *Jones* v. *Bright* (1829), 5 Bing. 533, 130 E.R. 1167, which was much relied on. In that case the defendant was a manufacturer of copper sheathing which the plaintiff purchased and placed upon his ship. The material being unfit for the purpose for which it was purchased the defendant was held liable in damages.

Had Bright been employed as a shipwright by Jones to sheathe his ship with copper and incidentally to supply a number of plates in connection with his contract for work and labour, I do not think he would have been held responsible for latent defects in the plates which he supplied as an accessory to his contract without any negligence on his part.

In order to recover upon his counterclaim in this case the defendant must shew under the statute quoted:—

That he bought goods from the plaintiff which it was the seller's business to supply relying on the seller's skill or judgment as to the particular purpose for which the goods were required.

There is no evidence to support such a contract and in my opinion the defendant cannot maintain his counterclaim under the statute.

Has he then any remedy at common law? The trial Judge in his reasons for judgment says that the question does not appear to have arisen in any case hitherto reported. That being so, the view is forced upon one that an implied warranty against latent defects in materials furnished under a contract for work, labour and materials, is not recognized at common law.

There can be no doubt that under such a contract there may be an action for damages by reason of negligence or lack of skill on the part of the contractor, but no authority has been cited which would make him liable for a latent defect which was due to no act or omission on his part.

It is often difficult to determine the nature of the contract. The point is a narrow one and may appear to create on occasions an anomalous situation in respect to the rights of the parties, but once it has been determined whether the contract be one of sale or to furnish work, labour and materials, the duty of applying the recognized rules of law is free from difficulty.

The trial Judge determines the character of the contract in the following words, 48 D.L.R. at 495: "Under the authorities above set forth I am of opinion that when the locomotive was re-delivered by the plaintiffs all the new material in it passed by sale to the defendants, with all the rights incident to sale."

With great respect I am of opinion that the ownership of each plate, rivet or other particle of material built into the defendant's engine by the plaintiff passed to the defendant at the time it was affixed to that engine and not otherwise. *Clark* v. *Bulmer*, 11 M. & W. 249, 152 E.R. 793.

Further, that there was no contract of sale, but a contract for general repairs which included the furnishing of new materials where necessary, and that the plaintiff was not liable in damages for latent defects in materials which it did not manufacture, did not keep for sale, and which so far as it knew or could ascertain by inspection were fit for the purpose to which they were applied. *Allis-Chalmers* v. *Walker* (1910), 21 Man. L.R. 770; Bevan on Negligence, Can. ed., page 804-808; Benjamin on Sale, 5th ed., page 164; *Randall* v. *Newsone* (1877), 2 Q.B.D. 102.

MAN.

C. A.

STERLING ENGINE WORKS v. RED DEER LIMITED.

I would allow the appeal and enter judgment for the plaintiff for $849.45 with interest from the date of the issue of the statement of claim with costs in the Court of King's Bench and the Court of Appeal. The counterclaim and cross-appeal should be dismissed with costs.

PERDUE, C.J.M., CAMERON and HAGGART, JJ.A., concur in the result. *Appeal allowed.*

ONT.

S. C.

ADAMS v. KEERS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., and Middleton, J. December 19, 1919.

MORTGAGE (§ VII B—150)—ACTION FOR FORECLOSURE—CO-OWNERS OF EQUITY OF REDEMPTION—ADVANCES BY ONE—CHARGE ON SHARES OF OTHERS—REDEMPTION—TACKING—CONSENT TO SALE.

In an action for foreclosure on a mortgage, there is one mortgage and one equity of redemption. Any of the co-owners of the equity may redeem, but on redemption must pay the entire debt. Such owner can only set up against his co-owners the amount of their respective shares, but would be entitled to tack to such share of the mortgage any balance due to him by his co-owners with respect to advances and must give credit for any balance due by him.

Persons having a charge upon the share of a co-owner stand in the same position as that co-owner and none of the original owners, by making a charge upon his share, can interfere with the rights, or add to the burdens of his co-owners.

Statement.

APPEAL by defendant Ferguson from an order of Masten, J. (1919), 46 O.L.R. 113, in a mortgage action for foreclosure. Varied.

J. W. Payne, for the appellant and the defendant Keers.

H. A. Harrison, for the defendant the Toronto Railway Company.

J. R. Roaf, for the defendant Gray.

Middleton, J.

MIDDLETON, J.:—Ferguson, Keers, and Gray are in equity entitled to the land in proportions of 40 per cent, 35 per cent., and 25 per cent., respectively.

It is said that advances have been made by one or more of the owners for the common benefit in excess of his or their due proportion. On an account being taken, the amount of such excess will be a charge on the interest of those in default.

In Adams's hands the mortgage could not be divided. There was one mortgage and one equity of redeem. Any one of the owners might redeem, but on redemption he must pay the entire debt.

ONT.

S. C.

ADAMS v. KEERS.

Middleton, J.

After redemption by any one of the co-owners, the mortgage could not be set up by him as against his co-owners. He could set up against them only the amount of their respective shares, and he would be entitled to tack to such share of the mortgage any balance due to him by such owner on the accounting with respect to advances, and would be bound to give credit for any balance due by him.

Any person having a charge upon the share of one co-owner would undoubtedly have the right to redeem the whole mortgage in the plaintiff's hands, but after redemption the incumbrancer would have no greater right than the owner of the share upon which he held the charge. None of the original owners can, by making a charge upon his share, interfere with the rights of his co-owners or impose any added burden upon them.

The judgment should be varied in accordance with the views expressed and the consent now given to a sale taking place, and there should be no costs of the appeal below or of this order, as in our opinion neither party was entirely right in his contention.

Meredith, C.J.O. Maclaren, J.A. Magee, J.A.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., agreed with MIDDLETON, J.

Hodgins, J.A.

HODGINS, J.A. (dissenting):—Appeal from an order of Masten, J., dated the 9th June, 1919, referring matters back to the Master in Ordinary, in a foreclosure action.

All parties agree that a sale is desirable and indeed necessary, as the land is a city lot, 18′ 6″ in frontage, and cannot be partitioned. Objection is made to the payment of costs of the appeal or of the order appealed from both by the appellant and the respondent the Toronto Railway Company.

The action is an ordinary foreclosure action, the original plaintiff being a first mortgagee. Ferguson, Keers, and Gray are entitled to the equity of redemption, in unequal shares, under a trust agreement. Ferguson claims that he and Keers have made considerable payments for carrying charges, such as taxes and interest, which are said to be, under the trust agreement, a charge prior to any division into the respective shares.

The Master in Ordinary took the account of the amount due the plaintiff and the Toronto Railway Company, which had a small execution against the interest of Keers. The Master's reports treat this execution as against both Keers and Gray,

ONT.
S. C.
ADAMS
v.
KEERS.
Hodgins, J.A.

while the learned Judge says that it is only against Keers. In the view I take of the proper order to be made on this appeal, it is not necessary to determine which is correct.

The report of the 20th September, 1918, appointed a day for redemption by the Toronto Railway Company as an incumbrancer, and the company redeemed the plaintiff. Upon proceeding with the reference to foreclose the owners of the equity of redemption, the Master fixed one day for redemption by all the co-owners; but, as the Toronto Railway Company's execution did not affect Ferguson's interest, the redemption-moneys as to him were fixed at $1,010.45, and as to the other owners at $1,174.91, the latter sum including the claim on the execution. I think this was the proper practice. "Wherever a number of persons . . . come in under the same instrument . . . there no successive rights to redeem are given, but only one single common right of redemption:" *per* Sir W. Page Wood, V.-C., in *Beevor* v. *Luck* (1867), L.R. 4 Eq. 537, at p. 548. In *Bartlett* v. *Rees* (1871), L.R. 12 Eq. 395, Lord Romilly, M.R., laid it down that in a foreclosure suit, when questions as to priorities not affecting the plaintiff are raised between co-defendants, the Court will fix a day certain for all to redeem or be foreclosed, without prejudice to the rights of the several defendants *inter se*. This was followed by Chitty, J., in *Platt* v. *Mendel* (1884), 27 Ch. D. 246, and appears to have been the practice in Ontario: see *Hill* v. *Forsyth* (1859), 7 Gr. 461.

The Toronto Railway Company, which was then the party entitled to carry on the action, appealed, contending that the three parties interested must redeem their separate interests, and that the Master should have so reported and found what the interest of each amounted to, and apportioned the mortgage accordingly.

Masten, J., adopted this view, and his order now in appeal, refers the matter back on that footing, his reason being that, if Ferguson redeems the Toronto Railway Company, it in turn can redeem him, and so on *ad infinitum*. He refers to *Flint* v. *Howard*, [1893] 2 Ch. 54, as authority for the apportionment directed.

I think that under the circumstances here this order was technically wrong, although on adjusting the rights of the parties some such apportionment will be necessary.

If the original plaintiff were still plaintiff, it would be unjust to him to require him to have his mortgage split up into three parts, each limited to an undivided share of an unascertained amount, particularly if the claim made by Ferguson that the carrying charges must be paid before Gray's share can be ascertained is made out. In Coote on Mortgages, 8th ed., p. 718, it is laid down that "a co-mortgagor is, however, not entitled or compellable to redeem his part only of the mortgaged property, but must redeem the whole, subject, as between himself and his co-mortgagors, to his right to contribution in respect of the amount paid by him to redeem the mortgage and to the rights of all other persons interested in the equity of redemption." Is the legal position changed because the Toronto Railway Company is now in the plaintiff's shoes? I do not think so.

I agree that none of the original owners can, by making a charge upon his share, interfere with the rights of his co-owners or impose any added burden upon them. But where a charge has been placed upon one share, as here, the chargee is an incumbrancer, and acquires two very important rights, neither of which impose any additional burden upon the co-owners. One is the right to redeem on the footing of being a subsequent mortgagee, and the other is the right upon paying the first mortgage to resist redemption by the co-owner upon whose interest his charge rests, except upon the terms that he should redeem his incumbrance as well as the prior mortgage: *Gilmour* v. *Cameron* (1857), 6 Gr. 290. These rights follow from the position given to an execution creditor whose claim has been allowed in the Master's office.

Boyd, C., says, in *Federal Life Assurance Co. of Canada* v. *Stinson* (1906), 13 O.L.R. 127, 131, speaking of an assignee for creditors, after execution creditors had proved claims in the Master's office prior to the assignment for the benefit of creditors: "The assignee can get no relief in this action other than that claimable by his assingor—the right to redeem all these securities as consolidated in the report of the Master." In this view the Court of Appeal agreed (*S.C.*, p. 134).

On appeal to the Supreme Court of Canada, where the judgment was affirmed (*S.C.*, *sub nom. Scott* v. *Swanson* (1907), 39 Can. S.C.R. 229), Maclennan, J., was equally clear upon the same point. At pp. 234 and 235 he said: "The defendant had become

ONT.
S. C.
ADAMS
v.
KEERS.
Hodgins, J.A.

something more than a mere judgment or execution creditor. He had become a mortgagee of the lands in question, not merely to secure the original mortgage debt, but also the judgment debts."

If each of the co-owners had incumbered his share, no doubt care would be needed to work out a decree on redemption, but no greater difficulty would be encountered than was experienced in the cases of *Sober* v. *Kemp* and *Flint* v. *Howard*, both referred to later on, where the form of judgment and the scheme of redemption are given in full.

But what would effect a change would be the redemption of the Toronto Railway Company by Ferguson. The learned Judge views it as if, in that case, the Toronto Railway Company could again redeem Ferguson with exactly the same result.

With great respect, I am unable to agree in that conclusion. When Ferguson redeems, he stands in a different position from an ordinary mortgagee. He has then paid the mortgage upon his share, as to part of which at all events he is, as between himself and his co-owers and subject to an accounting with them, liable to pay. In other words, he has cleared his share, and is entitled to claim that he has acquired the legal as well as the equitable estate in it, and is not liable to be redeemed as to it by his co-owners or their assignees. He would, except so far as it was necessary to treat the mortgage as still existing in order to enforce it as against the shares of his co-owners, hold the land upon reconveyance by the Toronto Railway Company upon the trusts of the instrument between the parties: *Wicks* v. *Scrivens* (1860), 1 J. & H. 215; *Pearce* v. *Morris* (1869), L.R. 5 Ch. 227.

This case much resembles *Sober* v. *Kemp* (1847), 6 Hare 155, referred to in Coote on Mortgages, 8th ed., pp. 889-890. There the plaintiff had purchased one of three houses, all of which were subject to a mortgage, but had not paid his purchase-money. He redeemed the mortgage, and, when redeemed by the subsequent mortgagees, was held entitled to retain the house he had bought and to be paid the amount due upon the mortgage after deducting the balance of purchase-money due by him, reassigning only the balance of the property. The first mortgage comprised the plaintiff's house, No. 23 Sussex Square, and 26 and 27 Lewis Crescent. The subsequent mortgages spoken of below covered,

not 23 Sussex Square, but 26 and 27 Lewis Crescent, and another house, No. 28 in the same street, as well as other hereditaments. The Vice-Chancellor said (p. 159):—

"The subsequent mortgagees cannot be injured by having the option given them either to redeem the plaintiff's mortgage upon the property comprised in her security" (that is, houses 23, 26, and 27), "and take a conveyance of the premises which are subject to the security of the subsequent mortgagees" (that is, houses 26 and 27), "or to be foreclosed as to the latter, and retain their security over the other property comprised in their mortgages, discharged from the prior mortgage of the plaintiff."

He added:—

"The contract" (to purchase No. 23 Sussex Square) "gave the plaintiff nothing but an equitable title; but by paying off the whole of the mortgage-money due to Siveright" (the first mortgagee), "and taking a transfer of that mortgage, the plaintiff acquired the legal estate in the term of years . . . Suppose the bill had been brought by Mr. Kemp, the mortgagor, to redeem, —could he have been heard to say that he would redeem otherwise than subject to the contract as to No. 23? and, if the mortgagor had redeemed, the plaintiff might thereupon have brought her bill for specific performance of the contract, and would have been entitled to that relief as to No. 23, on the same terms as it is sought in this suit. Can there be any difference in respect to this equity of the plaintiff as against Mr. Kemp, and as against those who claim under Mr. Kemp, subject to the contract? The plaintiff paid her purchase-money to Mr. Kemp, and took the estate subject to a prior legal charge; she has got in the prior legal estate, and she asks, by this suit, to avail herself of that legal estate for the purpose of protecting her interest in the property, to the extent of the moneys which she has actually paid, and no further."

The case of *Flint* v. *Howard*, [1893] 2 Ch. 54, relied on by the learned Judge, as I read it, illustrates a somewhat similar principle. There Flint had become the absolute owner, through foreclosure, of a reversion on which alone he had a mortgage for £5,000 and which was one of the properties included in the first mortgage, the other being a paper mill. Romer, J., says, at p. 61:—

"When the plaintiff has redeemed" (the first mortgagee) "what position will he then stand in with reference to the rights

ONT.

S. C.

ADAMS v. KEERS.

Hodgins, J.A.

of redemption of the subsequent mortgagees of the paper mills? Clearly inasmuch as the plaintiff is absolute owner of, and no longer mortgagee of, the reversionary interest (now represented by the fund in Court) he cannot be redeemed in respect of that property . . . In my judgment, there must be an apportionment according to the values of the two properties."

In appeal, Lindley, L.J., said on this point (p. 69):—

"In apportioning the £6,000 between the two properties in the event of Howard seeking to redeem the plaintiff after he has become first mortgagee, the learned Judge has applied to this case the principle of *Barnes* v. *Racster* (1842) 1 Y. & C. Ch. 401, and *Bugden* v. *Bignold* (1843), 2 Y. & C. Ch. 377, and it is difficult to see what other course could be adopted. The £5,000 being no longer a subsisting charge, and the plaintiff's right to redeem the £6,000 being incontestable, I see no other way of avoiding the absurdity of perpetual recurring redemptions to which I have already alluded."

An example of the alteration in the effect of redemption caused by the actual situation of the parties, is afforded by *Perkins* v. *Vanderlip* (1865), 11 Gr. 488, where a purchaser of part of the mortgaged premises, who, however, had bought with covenants against incumbrance, was held to be entitled, on redeeming the plaintiffs as first mortgagees, to retain, if he were redeemed again by the plaintiffs, who were also second mortgagees, his own twelve acres, re-assigning the balance only.

In this case Ferguson is bound to pay part of the first mortgage, how much is uncertain, and so he cannot require the full amount of the mortgage upon redemption by his co-owners or their assignees, nor can he be compelled, on the demand of an execution creditor upon an undivided share of his co-owner, to part with his share of the property included in the mortgage to the extent to which he has enlarged it by freeing it from his proper share of the incumbrance. The position is entirely changed by his redeeming the charge which rests upon his own share as well as on that of others and for payment of which, according to his interest in the property, he is liable. The execution creditor can claim no higher right than his execution debtor. Ferguson would, therefore, be entitled, if redeemed again by the Toronto Railway Company, to retain his own share and re-assign only the balance of the

ONT.

S. C.

ADAMS v. KEERS.

Hodgins, J.A.

property, being first charged with his proper proportion of the mortgage-moneys and receiving the balance due after that deduction.

There is no unfairness in this, as the execution creditor has only a charge upon the share of the others, and he cannot object to Ferguson being allowed to retain his share free from his proper proportion of the mortgage.

It is to be observed, however, that this state of affairs can only come about after Ferguson has redeemed the Toronto Railway Company, and thereby succeeded to the position of first mortgagee. Hence, I think the order appealed from is wrong in making the apportionment precede, instead of follow, redemption upon the footing of the report of the 5th June, 1919. The Toronto Railway Company is, however, entitled to insist on redemption under the terms of that report. Its objection to it was probably due to the fact that it allowed Ferguson to redeem without paying its execution. But that was correct, as it did not bind his share. If the company insists on redemption by Ferguson, then the time under that report should be extended for a month. In default of redemption, there should be foreclosure of all the co-owners. If redemption takes place, there should be, as all parties agree, an order for sale and of reference to the Master to settle the priorities and all matters as between the defendants *inter se*, including the Toronto Railway Company as incumbrancer.

The result is that the appeal should be allowed and the order set aside. The Toronto Railway Company moved too soon, and should pay Ferguson's costs of the appeal to this Court and to Masten, J. No costs to Gray. Further directions should be reserved until after the Master's report on sale, which should ascertain the rights of all parties and distribute the money accordingly.

Order below varied.

ONT.

S. C.

Re CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

(Annotated.)

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. December 19, 1919.

PHYSICIANS AND SURGEONS (§ III—55)—"INFAMOUS OR DISGRACEFUL CONDUCT IN A PROFESSIONAL RESPECT"—ONTARIO MEDICAL ACT, R.S.O. 1914, CH. 161, SEC. 31 (1)—CONVICTION FOR OFFENCE AGAINST ONTARIO TEMPERANCE ACT, SEC. 51—EVIDENCE—FINDING OF DISCIPLINE COMMITTEE—ADOPTION BY COLLEGE COUNCIL—ORDER FOR REMOVAL OF NAME FROM REGISTER—PENALTY—FAIR TRIAL.

A medical practitioner, having been convicted by a police magistrate for a violation of sec. 51 of the Ontario Temperance Act, was charged by the Council of the College of Physicians and Surgeons of Ontario "that in respect of the said conviction you were guilty of infamous or disgraceful conduct in a professional respect and have rendered yourself liable to have your name erased from the register of the said college." The committee found that "in respect of the conviction he was guilty of infamous and disgraceful conduct in a professional respect;" and the council adopted the report of the committee, found him "guilty of infamous or disgraceful conduct in a professional respect;" and directed that his name be erased from the register of the college:—

Upon appeal, under sec. 34 of the Ontario Medical Act, R.S.O. 1914, ch. 161, the Court held that the evidence warranted the finding that he had been guilty of "infamous or disgraceful conduct in a professional respect," within the meaning of sec. 31 (1) of the Act.

The evidence as to the numerous prescriptions given by him though not in itself sufficient to warrant a finding against him, was relevant to the inquiry which the committee had to make; and the plaintiff had no ground for complaint of unfairness or want of notice.

Statement.

APPEAL by a registered medical practitioner, from an order or resolution of the college council directing that the name of the appellant be stricken from the register of the college, on the ground that he had been guilty of "infamous or disgraceful conduct in a professional respect:" Ontario Medical Act, R.S.O. 1914, ch. 161, sec. 31 (1).

The appellant had been convicted by a Police Magistrate of a violation of sec. 51 of the Ontario Temperance Act; and the resolution or order was based upon a report of the dicipline committee of the council finding that the appellant had been guilty of infamous and disgraceful conduct in a professional respect in connection with the subject-matter of his conviction by the magistrate.

The right of appeal from the decision of the council to a Divisional Court of the Appellate Division is given by sec. 34 of the Ontario Medical Act.

F. D. Davis, for appellant.

H. W. Shapley, for the college council, respondents.

Maclaren, J.A.

MACLAREN, J.A.:—This is an appeal by Dr. Cherniak, of Windsor, a registered medical practitioner, against a resolution

of the Council of the College of Physicians and Surgeons of Ontario, under the Ontario Medical Act, R.S.O. 1914, ch. 161, sec. 31, adopting a report of the discipline committee of the said council.

The resolution of the council was in the following terms:—

"That the report of the discipline committee be adopted, and that, upon the facts ascertained and appearing in the said report and the evidence therein referred to, the said Dr. Cherniak be found guilty of infamous or disgraceful conduct in a professional respect; and that the name of the said Dr. Cherniak be and the same is hereby erased from the register; and that the registrar be hereby ordered to erase the said name from the register accordingly."

The proceedings were begun by a prosecution of the appellant before the Police Magistrate for the City of Windsor for a violation of sec. 51 of the Ontario Temperance Act, "by unlawfully giving and administering intoxicating liquors to a person not in need of liquor, and when the use of such liquor was unnecessary, and otherwise in contravention of the Ontario Temperance Act."

No copy of the conviction or of the evidence before the magistrate was brought before us; but the appellant admitted the conviction, and told the committee what the evidence before the magistrate was. As he was the only witness examined before the committee, and was represented there by the same counsel as he had before the magistrate, he had a full opportunity of presenting the whole matter, including the evidence given before the magistrate, in the light most favourable to himself.

His evidence given before the committee was that a young woman had come to his office and complained of a cold and asked for a prescription for a quart of whisky. He refused this, but gave her 6 ounces of whisky, in a bottle, and some quinine mixture, for her cold. He then went upstairs to get his dinner, and she requested permission to remain in his office, which he granted. Fifteen minutes later a noise was heard below, and the housekeeper going down found the patient gone and the back-door open. Later, after he was summoned by the magistrate, he learned that she had been picked up drunk on the street with a quart bottle of his whisky in her possession. He says that at the trial she swore that she did not know how she got the bottle. The magistrate found

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Maclaren, J.A.

him guilty and fined him $200 and costs. We were told by his counsel that he moved to quash the conviction, but failed, and that he paid the fine and costs, amounting together to $229.

Section 31 (1) of the Act reads as follows:—

"Where any registered medical practitioner has either before or after he is registered been convicted either in his Majesty's Dominions or elsewhere of an offence, which, if committed in Canada, would be an indictable offence, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register."

Clause (4) provides that when a court of record in Ontario decides that a criminal offence has been committed, the registrar shall immediately erase from the register the name of the practitioner. It operates automatically, without any action by the medical council.

The trial of Dr. Cherniak now in question was not for an indictable offence, but was a summary trial before a magistrate. The notice given to him was that the discipline committee of the medical council was to make inquiry whether he had been guilty of infamous or disgraceful conduct in a professional respect, in connection with the subject-matter of his conviction by the police magistrate.

The fact of the conviction had to be proved like any other fact, and it was proved by the admissions of the accused; and the committee first and the council afterwards were the parties who had to decide whether his conduct as so proved and found was infamous or disgraceful in a professional respect. The committee reported "that in respect of the conviction he was guilty of infamous and disgraceful conduct in a professional respect and that the committee recommended to the council that action be taken in the premises by erasing from the register the name of the said Dr. I. N. Cherniak;" and the council adopted the report of the committee, in the terms above given.

Our Medical Act, while generally adopting the language of the English Medical Act, has, in the clause which we have to construe here, adopted instead the language of the English Dental Act of 1878, which reads, "guilty of any infamous or disgraceful conduct in a professional respect," while the English Medical Act reads,

"guilty of infamous conduct in any professional respect." I consider that the two words, for our present purpose, may be treated as synonymous; they are given as synonyms in the New Standard and Century Dictionaries and in Soule's Dictionary of English Synonyms. "Infamous" is probably the more intense of the two, and Murray's Oxford Dictionary speaks of it as "one of the strongest adjectives of detestation." I do not know that the addition of "disgraceful" makes it either stronger or weaker; but it is more colloquial, and more frequently used.

It is to be remembered that this is not an appeal from the conviction by the police magistrate or from the order of the Judge who refused to quash it; but from the order of the medical council adopting the report of the discipline committee and ordering the erasure of the appellant's name from the register.

The conviction had to be proved as a fact, as it was the foundation for the investigation by the discipline committee and the council; and it was proved by the admissions of the accused.

It was then the duty of the committee to investigate, and of the council to decide, upon the evidence, whether the conduct of the accused as thus established was "infamous or disgraceful conduct in a professional respect."

There has been a difference of opinion in the Courts, both in England and this country, as to whether these words are to be interpreted as they are understood generally by ordinary men or as they are understood in the profession. I am of opinion, however, that the proper rule is that laid down in the unanimous judgment of the English Court of Appeal in *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, at p. 763, where it is said:—

"If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the general medical council to say that he has been guilty of 'infamous conduct in a professional respect'."

The language of our present statute was adopted in 1887 by our Legislature, by 50 Vict. ch. 24, sec. 3, and was re-enacted in R.S.O. 1897, ch. 176, sec. 33 (1), after the English Court of Appeal had interpreted the words as above in the *Allinson* case; and, in

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Maclaren, J.A.

the absence of any decision of a Canadian Court of at least equal authority, I think we should adopt the rule laid down by the Privy Council in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, at p. 344, and follow the decision of the English Court of Appeal. See *Hollender* v. *Ffoulkes* (1894), 26 O.R. 61, at p. 66. Even if there had been no such binding rule as that laid down by the Privy Council, I am of opinion that our Legislature, in providing from time to time for the maintenance of discipline among the members of the various learned professions, has clearly shewn its intention that professional ethics and the rules governing the same should be interpreted and enforced by the respective members in each of the professions. Even in the clerical profession, where there was no statute, and the rules were made by the body itself, this Court and the Supreme Court have laid down a similar rule: *Ash* v. *Methodist Church* (1900), 27 A.R. Ont. 602; (1901), 31 Can.S.C.R. 497.

As above stated, Dr. Cherniak, the appellant, himself, was the only witness examined before the committee as to what evidence was given before the police magistrate. When the appellant paused, counsel for the prosecution asked: "Was there any other evidence given? A. No; that is all the evidence." Mr. Davis (counsel for the accused): "That is all the *material* evidence. What about the collateral evidence? What other evidence was there given? That you prescribed liquor in a large number of instances? A. No; that is all the evidence they took up. Q. Did the license inspector give any evidence? A. The license inspector didn't give any evidence whatever, except the number of prescriptions I gave."

On further examination, the appellant stated that he had been in practice in Windsor for 6 months before the day of the offence for which he was convicted, and that in the month of February he had given 250 liquor prescriptions, of which the case of the young woman was one; or, rather, that he had dispensed 250 doses of liquor; as he says, "I dispense my own medicine." In January the number was about 250, and in December and previous months 200. All this evidence came from the appellant himself, and he was not in any way taken by surprise, as it was, according to his own statement, a mere repetition of the evidence before the magistrate. The committee could not tell in advance what might be his evidence on the subject, or how it might bear upon the

matter which they were to investigate. He was assisted by the same counsel at the trial and on the investigation before the committee. When the committee came to make their report to the council they stated specifically that it was "in respect of the conviction" that he was guilty of infamous and disgraceful conduct in a professional respect, and it was on account of this that they recommended that his name be erased from the register.

As I have said, I am of opinion that the Legislature chose as the deciding body the members of the council, specially on account of their fitness to decide these questions of professional ethics, and that we should give to their unanimous decision at least as much weight as we would to the verdict of a jury on a question of fact submitted to them.

The penalty imposed, namely, the erasure of the name of the appellant from the register, was the only one that could be imposed under the statute in force at the time of the commission of the offence. Under sec. 32 of the Act, the council may at any time, on the report of the discipline committee, direct the registrar to restore the name of the appellant to the register.

In my opinion, the appeal should be dismissed.

MEREDITH, C.J.O.:—I agree that the appeal should be dismissed. Meredith, C.J.O.

I take it that the complaint which the appellant was called upon to answer was in substance a complaint that he had been guilty of the offence of which he had been convicted, and that in committing it the appellant had been guilty of infamous and disgraceful conduct in a professional respect.

The conviction itself would not have justified the respondents in finding the appellant guilty of the offence, nor did the respondents assume that it would. The appellant was examined as a witness, and detailed the circumstances under which he prescribed liquor for the young woman, and how she obtained the bottle of liquor which she got. The discipline committee was not bound to accept his explanation, but might, in my opinion, have properly reached the conclusion, to which the committee no doubt came, that the appellant connived at the woman getting the quantity of liquor which she desired to get, and afforded her the opportunity for getting it.

The evidence as to the numerous prescriptions the appellant had given, though not in itself sufficient to warrant a finding against

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Meredith, C.J.O.

the appellant—and indeed the giving of them was not a subject of the complaint against him—was relevant to the inquiry which the committee had to enter upon in dealing with the complaint, as throwing light upon the motive that actuated the appellant in his dealings with the woman.

In the view I take, it is unnecessary to express any opinion as to whether the character of the act, as to its being infamous or disgraceful, is to be judged according to the standard adopted in *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, or that adopted in *Re Crichton* (1906), 13 O.L.R. 271, because, in either view, it was, in my opinion, open to the discipline committee to find that the appellant's conduct was infamous or disgraceful conduct in a professional respect.

Physicians are entrusted by the Legislature with the privilege of prescribing liquor under certain conditions for their patients, and for a physician to abuse that privilege by supplying liquor to be drunk as a beverage is, in my opinion, to be guilty of infamous or disgraceful conduct in a professional respect, within the meaning of sec. 31 of the Ontario Medical Act.

Hodgins, J.A.

HODGINS, J.A.:—Under the terms of the Ontario Medical Act, R.S.O. 1914, ch. 161, sec. 31, the council must find that the practitioner has been guilty of infamous or disgraceful conduct in a professional respect, unless his case falls within the other provision of that section. The meaning of similar words was explained by the Court of Appeal in England, composed of Lord Esher, M.R., Lopes and Davey, L.JJ., in *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, at pp. 760, 761:—

"'If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency,' then it is open to the general medical council to say that he has been guilty of 'infamous conduct in a professional respect'."

This definition was prepared by Lopes, L.J., with the assistance of his brother Judges, and it is to be noted that the offence was peculiarly one against members of the medical profession who were in advertisements denounced as poisoners, etc.

The words of our statute differ from those of the English Act, which are "infamous misconduct in any professional respect."

The Canadian wording is wider in scope, as it adds the words "or disgraceful," an expression which, though much wider, is less concentrated than "infamous," a word somewhat liable to misconception.

In the case of *Re Crichton*, 13 O.L.R. 271, the question under our statute is stated to be whether the conduct of the medical man "in the practice of his profession has been infamous or disgraceful *in the ordinary sense of the epithets, and according to the common judgment of men*" (p. 282). This is applying a different standard —the ordinary man as against the learned professional man—and is more in line perhaps with the opinion of Lord Justice Bowen in *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch.D. 366, at pp. 383, 384.

In the *Allinson* case the definition apparently treats the words as if they were "in a professional aspect," instead of "in a professional respect."

I think we should adopt the same point of view as that taken in *Re Crichton*, and define the phrase as requiring such conduct as may be considered infamous or disgraceful in a professional respect, in the ordinary sense as understood among ordinary men. This is apparently the view of the late Chief Justice Armour and the other members of the Queen's Bench Division in *Re Washington* (1893), 23 O.R. 299, at p. 311. The matter is of importance, as those who sit as judges are themselves registered physicians, who may not always be conscious of failure to distinguish what they consider disgraceful conduct from that protected by sub-sec. 2. I mean the acceptance and practice of other theories of medicine or the practice of other cults. I regret that upon this point I am not in accord with my brother Maclaren. *Trimble* v. *Hill*, 5 App. Cas. 342, to which he refers, contains only a dictum, as Burton, J.A., calls it, or an expression of opinion, worthy of course of respectful attention, that the Courts in Canada should govern themselves by the judgment of the Court of Appeal in England in its construction of a statute where a like enactment has been passed by the local Legislature.

Here the words are not the same, but ampler, and so the suggested rule of construction has no application. But, if it had, then, notwithstanding the contrary opinion of Riddell, J., in *Crowe* v. *Graham* (1910), 22 O.L.R. 145, 148, that it is "a canon

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Hodgins, J.A.

by which all Colonial Courts must govern themselves," I prefer to adhere to the views of Moss, C.J.O., so well expressed in *Jacobs* v. *Beaver* (1908), 17 O.L.R. 496, at pp. 499, 500.

While it is right and proper that the Canadian Courts shall be governed by the authoritative judgments of the Judicial Committee, which is a court of appeal from their decisions, it does not follow that the final appellate tribunal in a Province should accept as conclusive what a court of similar jurisdiction in England has pronounced as being the proper construction of a statute in terms identical with a Canadian Act.

In the enactment of statutory provisions, the elements of prepossession and forces of environment and association are so strong that in construing legislation it is hard to shake them off. This is often felt, even in decisions of the Privy Council regarding local statutes. It would, I think, be a misfortune if our Courts were to allow their functions to be encroached upon from any idea that propriety requires that they should be bound by decisions other than those recognised as binding upon all Dominion and Colonial Courts.

Approaching the subject from this point of view, the questions to be determined are, first, whether the conclusion of the medical council is one which can be interfered with, in view of the words of the Act so interpreted and of the discretion given to the medical council, and whether the result was properly and fairly obtained.

The evidence given before the committee was that of the appellant alone. The formal charge was laid by setting out the appellant's conviction by the Police Magistrate for the City of Windsor "for unlawfully giving and administering intoxicating liquor to a person not in need of liquor, and when the use of such liquor was unnecessary, and otherwise in contravention of the provisions of the Ontario Temperance Act," and concluding that "in respect of the said conviction you were guilty of infamous or disgraceful conduct in a professional respect."

The appellant admitted the conviction for the offence as stated and the payment by him of the fine, and said that he had "nothing to explain outside of just how it happened." His account was, shortly, that a young lady of about 21 came into his office, complained of a cold, and asked for a quart of whisky, which he refused to give her, but said he would give her 6 ounces. He did so out

of a quart bottle, and also gave her some quinine mixture for a cold. She asked to be left in the front-office, and he left the door between that room and his consultation-room open "so the woman could pass in from the waiting-room." He then went upstairs, and about a quarter of an hour afterwards heard a noise, and sent down, discovering that the young lady had gone and that the back-door was open. She was picked up drunk on the streets a few hours later, with his quart bottle of whisky in her possession, and was sent to the hospital. He further said that she must have drunk whisky while he was upstairs, and that he supposed she took his quart bottle of whisky and got out by the back-door. In addition to this evidence, which he says is what was given before the magistrate, he stated that the license inspector told of the number of prescriptions which he had given during the month of February, as being 250. He also adds that he never gives whisky except when he thinks a man needs it, and always makes an examination. During the proceedings he was asked about his prescriptions in the month of December, 1918, and January, 1919. He admits them to have been about 200 for each month; he sees about between 40 and 45 patients a day; has been in practice 10 months, and is the only doctor that can speak foreign languages, referring to Russian and Jewish Polak. Since his conviction, he says, he has been giving these prescriptions at the rate of about 6 or 7 a day or 210 a month, but never in any case except where he thought it was necessary.

I do not think the evidence regarding the number of prescriptions throws any legal light upon the question in issue as to his conduct. It is not shewn that they were given in violation of the Act; and, however one might suspect, and indeed even believe, that great laxity must have prevailed in any office where such a large number of orders for whisky were given, yet where the statute permits and legalises prescriptions of 6 ounces of whisky, it is not possible to contend that mere number is evidence that they were improperly given or were in excess of the legal quantity.

But I think they throw light in another direction. The Ontario Medical Act is a new Act; and, until it was passed, prescription by a physician was not the only way in which whisky could be obtained. Once it was passed, that became practically the only avenue by which liquor could be got by the majority of

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Hodgins, J.A.

men and women. It was a new duty cast upon the doctors, and one which has considerably added to their duties, as well as to the income of many of them. That being so, when there is evidence that a doctor is prescribing whisky as a medicine under the Ontario Temperance Act at the rate stated, it is not hard to conclude that he betrays a familiarity with the Act and its limitations so far as he and the public are concerned. If a member of a learned profession, fully acquainted with the law, the object of which is patent to all, while actively taking advantage of the professional duties it lays upon him and the fees it produces, deliberately breaks it, under the circumstances which he himself discloses, I would be quite prepared to say that the medical council were justified in finding that person guilty of conduct in the practice of his profession which is infamous or disgraceful in a professional respect.

A young woman of about 21, found a few hours afterwards drunk on the streets of Windsor, to whom he has given whisky as well as quinine for a cold, is not likely to have imposed upon a medical man in a matter so familiar. To leave her, after she had asked for a quart of whisky for a cold, in a waiting-room, with every opportunity to get whatever she wanted, is rather suggestive of the offence described. The police magistrate evidently took this view, and it is not an unreasonable one. I am quite unable to see how this Court can properly say that the finding of the medical council upon that point was one which reasonable men could not have reached.

Upon the second branch, I do not think anything has occurred which entitles the appellant to complain of unfairness or want of notice. While it is true that the whole report of the discipline committee was adopted and that it is stated in the decision of the council that, "upon the facts ascertained appearing in the said report and the evidence therein referred to," the appellant was guilty of infamous or disgraceful conduct, it must be borne in mind that the charge is distinctly limited to infamous and disgraceful conduct *in a professional respect in respect of the conviction which is recited*, and that the report of the committee goes on to find distinctly that the infamous and disgraceful conduct is in respect of the conviction. I do not think that the answers to the questions asked regarding the number of prescriptions he had given during the

months of December, January, and February, could form the basis of a finding against him, but I think they were admissible in the view that I have mentioned. Had it been otherwise, and had the charge and finding not been so specific with regard to the conviction, the reception of evidence which might have prejudiced the appellant would have to be considered, although it would require much more than is here presented to throw doubt upon the legality of the finding of the council: see *Re Washington*, 23 O.R. at p. 312. An inquiry under our statute is made a judicial one by sec. 33 and by the nature of its proceedings and object. I think this must have been the view of the Judges who at one time or another were concerned with the long-fought case of *Re Stinson and College of Physicians and Surgeons of Ontario* (1911), 22 O.L.R. 627. Our procedure differs from that under the English Act in some respects, notably by the fact that erasure does not involve disqualification from practising, and that there is no appeal, nor is jurisdiction conferred upon the Court to restore the name to the register.

Whatever opinions may be held in regard to the advisability of the many stringent provisions inserted in the Ontario Temperance Act, it is still the law of the land, and to my mind it ought to be impossible to hold that in a learned profession, such as the medical profession, the deliberate breach of the provisions of the Act for gain by one quite familiar with them, should be held to be otherwise than disgraceful conduct in a professional respect. It is to be observed that the council have the right to find a practitioner guilty of either infamous *or* disgraceful conduct; and that, while a discipline committee reports that he is guilty of both infamous and disgraceful conduct, the council has found him guilty, under the terms of the Act, of infamous or disgraceful conduct in a professional respect.

While I think the appeal should be dismissed, I cannot help regretting that the medical council did not act upon the powers conferred upon it at the last session of the Legislature* and suspend this young physician, instead of erasing his name from the register. Unfortunately the legislation gives the Divisional Court no power to substitute the lesser punishment, notwithstanding larger power possessed by the Court under sec. 34 of the present Act. The more merciful course was taken by the present Court of Appeal in

*See 9 Geo. V. ch. 25, sec. 21, adding sec. 32*a*. to the Ontario Medical Act.

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Ferguson, J.A.

England in *In re A Solicitor* (1918), 62 Sol. Jo. 351, in a case worse in a professional sense than this.

FERGUSON, J.A. (dissenting):—This is an appeal by Dr. I. N. Cherniak, Windsor, from a decision and order of the Council of the College of Physicians and Surgeons, dated the 26th June, 1919, whereby, acting under the provisions of the Medical Act, R.S.O. 1914, ch. 161, they found the appellant guilty of infamous or disgraceful conduct in a professional respect, and ordered his name to be erased from the college register.

The charge upon which Dr. Cherniak was summoned reads:—

"1. That you, the said I. N. Cherniak, were on the 15th day of February, 1919, convicted by Alfred Miers, Esquire, Police Magistrate for the City of Windsor, of unlawfully giving and administering intoxicating liquor to a person not in need of liquor, and when the use of such liquor was unnecessary, and otherwise in contravention of the provisions of the Ontario Temperance Act.

"2. And that in respect of the said above mentioned conviction you were fined two hundred dollars and twenty-nine dollars and fifty cents costs, or in default of payment thereof to imprisonment in the common gaol for three months.

"3. And that in respect of the said conviction you were guilty of infamous or disgraceful conduct in a professional respect and have rendered yourself liable to have your name erased from the register of the said college as aforesaid."

The charge was inquired into by a committee, and it was on the report of the committee that the council acted.

The finding of the committee reads:—

"3. That the said Dr. I. N. Cherniak, we find, unlawfully gave and administered intoxicating liquors to persons in order that the same might be used as a beverage in contravention of the provisions of the Ontario Temperance Act.

"4. That in respect of the conviction he was guilty of infamous and disgraceful conduct in a professional respect and that the committee recommend to the council that action be taken in the premises by erasing from the register the name of the said Dr. I. N. Cherniak.

"5. That the committee recommend that the council order that the said Dr. I. N. Cherniak do pay the costs of and incidental to the erasure of his name from the register."

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Ferguson, J.A.

It is, I think, important to notice that the appellant is, by para. 3, found guilty of unlawfully giving liquors to more than one person. As I read the summons, no such charge was made. The charge was confined to the one occasion in respect of which the accused was convicted of having prescribed liquor when there was no necessity therefor.

The only evidence before the committee was that of the appellant, and his account of the circumstances leading up to his conviction, which he admitted, reads:—

"8. Q. Tell how it happened? A. That certain day, I don't remember just what day it was, this person in question, a young lady about 21, I should judge, came in the office and complained of a cold, and asked for a prescription for a quart of whisky, and I refused to give her a prescription for a quart, I told her she didn't require so much, and I said, 'I will tell you what I will do, I will give you 6 ounces.' I poured 6 ounces in a bottle and gave her some quinine mixture for a cold; that is all I know about it. After I was through with her, she asked to be left in the office in the front, my waiting-room; she was the last patient in, and I consented, and I went upstairs to have my dinner; and in my consultation-room there was a stove, and it was nice and warm in my room, but cold in the waiting-room, so I left the door open, so the woman could pass in from the waiting-room. I went upstairs, and about 15 minutes afterwards I heard a racket as though some one was going through my operating-room. I sent the lady of the house down, and she found nobody there, but the back-door was open. That is the last I heard about it till I got my summons. She was found with a big bottle of whisky, a quart bottle, and in a drunken condition.

"9. Q. Not the bottle you gave her? A. No.

"10. Q. She was arrested? A. She was not arrested, she was picked up drunk, and I think she was sent to the hospital.

"By Dr. Becker: 11. Q. She was found with your quart bottle in her possession? A. Yes.

"12. Q. She took that out of your office? A. I imagine she took it out of my office. She must have seen where I took my other whisky from in my dispensary. I dispense my own medicine.

"By Mr. Shapley: 13. Q. You came up before the magistrate? A. Yes.

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Ferguson, J.A.

"14. Q. What evidence was given there? A. She gave the evidence that she didn't know—she admitted she had asked me for a quart of whisky, and I refused to give it to her, but she said I poured it right out in my own waiting-room, which I positively denied: she also gave evidence she didn't know how she got the quart of whisky, but she didn't say I gave it to her.

"15. Q. You filled the bottle from your own supply and gave it to her? A. Yes.

"16. Q. Apparently she drank it on the premises? A. She must have drank it while I was upstairs, and I suppose she went to the room and took the bottle of whisky and got out the back-door.

"17. Q. Your bottle? A. Yes.

"18. Q. You think she did that from what you know? A. I think she did because she didn't have any when she was in my office, I don't think.

"19. Q. Your bottle of whisky was missing? A. Yes, it was.

"20. By Dr. Young: What was the size of your bottle? A. It was a quart round bottle.

"21. Q. You missed the bottle from your office, did you? A. Yes."

In my view, that is all the evidence that was *properly* before the council, or that is now before this Court, touching the matters charged; but, travelling outside the record and charge, the committee required the accused to state how many liquor prescriptions he had given during the months of December, January, and February, and obtained from him the information that his practice was largely among foreigners, that he saw on an average 40 or 45 patients a day, and that he issued, on an average, for the months of December, January, and February, about 200 liquor prescriptions per month; but he pledges his oath that in every case liquor was necessary.

There is nothing in the evidence before the committee, in respect of the charge on which the appellant was convicted, in the nature of an admission that the liquor given at that time was given as a beverage, or that it was not necessary; and I do not think that establishing the fact that he gave one or 20 improper prescriptions establishes or is evidence that all or any of the other liquor prescriptions that he gave were illegal or unlawful. I agree with the

opinion of Clute, J., stated in *Rex* v. *MacLaren*, (1917), 39 O.L.R. 416, at p. 422, where he says:—

"The prosecution asked for a conviction upon the inference to be drawn from the number of prescriptions given within the time. The number given might raise a suspicion in one's mind, but is no evidence whatever in proof of the fact . . . There is no reason to think that the physician who gave his evidence was not stating the truth. It is not whether some other physician might think it advisable to give liquor in so many cases. It is the judgment of the attending physician, who may deem it necessary."

It may be that giving 200 prescriptions per month is, in the opinion of the medical council, infamous or disgraceful conduct in a professional respect; the committee did not so find; but, if it is, the appellant should have an opportunity of preparing to meet such a charge. The power to deprive a doctor of his good name, his professional standing, and his means of livelihood, must, I think, be exercised with caution, and only after the fairest and fullest opportunity has been given to the accused of preparing to meet and answer a charge.

The committee does not indicate the act or acts which constitute, in its opinion, the disgraceful or infamous conduct found by para. 4 of its report; and I am unable to find, in the evidence before the committee, anything to support a finding that the appellant's conduct, on the occasion in respect of which he was convicted, was infamous or disgraceful.

It is true that the accused admitted his conviction, but I do not think that that, in itself, furnishes any evidence on which the council might base a finding of infamous or disgraceful conduct.

Section 31 of the Act deals with convictions, and provides that where a doctor has been convicted of an *indictable* offence, or has been guilty of infamous or disgraceful conduct, he shall be liable to have his name erased from the register; to my mind the effect of this provision is that, if it appears that the conviction was in respect of a matter which is not an indictable offence, then evidence other than the conviction is required to establish infamous or disgraceful conduct; and, unless such other evidence is before the members of the council, they have not power or jurisdiction to inflict upon a brother practitioner the severe punishment meted out by the sentence pronounced in the case of this appellant.

ONT.

S. C.

RE CHERNIAK AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Ferguson, J.A.

Had the admission of the appellant in reference to the prescriptions been brought out on cross-examination, it might have been successfully contended that the appellant's credibility, his motives, could be tested in that way—but that is not what took place. Counsel for the college put the appellant in the witness-box and questioned him on this point, not, I think, for the purpose of testing his credibility, but for the purpose for which the committee improperly received and used it, namely, of making out and supporting the finding on a charge not made—"that the appellant unlawfully administered intoxicating liquors to person(s) in order that the same might be used as a beverage."

I would allow the appeal.

Magee, J.A.

MAGEE, J.A., agreed with FERGUSON, J.A.

Appeal dismissed.

Annotation.

ANNOTATION.

INFAMOUS OR DISGRACEFUL CONDUCT OF A PHYSICIAN IN A PROFESSIONAL RESPECT.

Doctor Cherniak, a registered medical practitioner (after being convicted, by a police magistrate, of having violated sec. 51 of the Ontario Temperance Act, by giving and administering to a person intoxicating liquor, when unnecessary), was charged by the Council of the College of Physicians and Surgeons of Ontario, that, in respect of the said conviction, he was guilty of infamous and disgraceful conduct in a professional respect; and, this charge being enquired into by the Committee of the Council, Dr. Cherniak gave evidence in which he admitted the conviction, and gave the facts on which it was based, namely, that a young woman had visited him in his office, and, complaining of a cold, asked him for a prescription for a quart of whiskey, which he refused, but, as he dispensed his own medicines, he gave her six ounces of whiskey from the stock he had in his office, that he then left her alone in a waiting room adjoining his office, and went upstairs to have his dinner, that the woman then apparently helped herself to a quart bottle of whiskey, for she was afterwards found drunk in the street with a quart bottle (identified as his), which had contained whiskey. The Council's Committee found and reported that he was guilty of infamous and disgraceful conduct in a professional respect, and the Council adopted the report and directed Dr. Cherniak's name to be erased from the register of the College.

Upon an appeal taken by Dr. Cherniak, under section 34 of the Ontario Medical Act, it was held that the evidence warranted the finding; two of the Judges of the Court of Appeal dissenting on the grounds, principally, that the Council's Committee did not indicate, in their report, the act or acts which constitute, in their opinion, the infamous or disgraceful conduct which they found Dr. Cherniak guilty of.

It seems to us that the fact of the doctor, having—when asked by the woman for a prescription for a quart of whiskey—given her six ounces of the

liquor from his office stock, and having then left her alone in an adjoining waiting room with full opportunity of obtaining from his office, in his absence, what she wanted, was what the police magistrate rightly considered evidence upon which he found the doctor guilty of administering intoxicating liquor, unnecessarily; and, as one of the Judges remarked, the Court of Appeal could not conclude the finding of the Medical Council's Committee, that the doctor was guilty of infamous and disgraceful conduct in a professional respect, to be unreasonable; although it certainly might have been as well, if the Council's Committee (whether bound or not to so do), had, in their report, mentioned that as the basis of their finding. Annotation.

REX v. MACDONALD.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Ives, JJ. April 23, 1920.

CRIMINAL LAW (§ II A—38)—READING OVER AND SIGNING EVIDENCE—CRIMINAL CODE, SEC. 684—SHORTHAND.

The provisions of sec. 684, sub-sec. 1, of the Criminal Code requiring the evidence to be read over to the accused unless such reading is dispensed with do not apply where the evidence is taken down in shorthand.

[Review of authorities.]

Statement

APPEAL from the refusal by Walsh, J., to quash a warrant of commitment for trial after a preliminary enquiry. Affirmed.

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

F. S. Selwood, for respondent.

Harvey, C.J.

HARVEY, C.J.:—Section 684 sub-sec. 1 of the Cr. Code relating to preliminary inquiries provides that "after the examination of the witnesses produced on the part of the prosecution has been completed, and after the depositions have been signed as aforesaid, the Justice unless he discharges the accused person shall ask him whether he wishes the depositions to be read again, and unless the accused dispenses therewith, shall read or cause them to be read again."

The depositions were not read to the accused in this case nor was she asked if she wished to have them read and she did not dispense with the reading and the application to quash is founded on this ground.

It appears from the reasons for judgment of the Judge that the only question argued before him was whether the provisions of the section were directory or mandatory, it being assumed that they applied to the inquiry. He, however, expressed no opinion on the point argued having come to the conclusion that the section has no application to such an inquiry as this in which the depositions were taken in shorthand.

ALTA.

S. C.

REX v. MACDONALD.

Harvey, C.J.

The only two authorities to which the Judge was referred were two Quebec cases. The first in point of time was *McDonald* v. *The King* (1916), 30 D.L.R. 738, 26 Can. Cr. Cas. 175, a decision of the Court of King's Bench on a motion for leave to appeal from a conviction on indictment. One of the grounds of objection was that the depositions having been taken in shorthand they should have been extended and signed and then read to the accused unless he dispensed with the reading. It is to be gathered from the report that the accused was asked if he wished to have them read and that the stenographer was present and could have read them from his notes if the accused had desired to have them read, and that he did not then object that they had not been extended and signed. The Court held that the objection was unfounded.

The other case was a decision of the Chief Justice of the Superior Court, *Rex* v. *Beaulieu* (1917), 28 Can. Cr. Cas. 336. In that case the depositions were also in shorthand but no offer was made to read them.

Sir Francois Lemieux, C.J., says at 337:

> The question to be determined is whether the provision of sec. 684 of the Cr. Code, that the Justice of the Peace shall ask the accused if he desires that the depositions be read again, unless he is relieved from doing so by the accused, is imperative or merely permissive.

He held that it was imperative.

In both the Quebec cases the applicability of the section appears to have been assumed there being no suggestion in the reports that this was questioned, and the case of *Rex* v. *Rouleau* (1910), 17 Can. Cr. Cas. 281, also a Quebec case to which the Judge below calls attention not having been referred to in either case.

This last case was a decision of a Judge of the Court of King's Bench and was to the effect, in the words of the head note at p. 281, that

> The provisions of article 684 of the Cr. Code respecting the second reading of the depositions of witnesses for the prosecution do not apply where the proceedings on the preliminary enquiry before the magistrate are taken down in shorthand, but only where the depositions are transcribed in longhand.

This is the only decision on the express point to which our attention has been directed.

It is to be noted that the section refers to this reading in terms which indicate that it is a second reading and it is necessary,

therefore, to refer back to ascertain the particulars of the first reading. Section 682 provides that the evidence of the witnesses for the prosecution shall be taken down in writing by the Justice and the depositions read over to and signed by the witness in the presence of the accused before he is called on for his defence. This is quite clearly the first reading and the first portion of sec. 683 requires the Justice to have the depositions written in a legible hand and on one side of the paper only. These provisions and sec. 684 are in complete harmony. Under them we find the procedure to be that the evidence is taken down, not word for word, but in narrative form by the Justice, then read over to the witness and any necessary corrections made and then signed by the witness. Then after all the witnesses have signed their depositions the Justice asks the accused if he wishes to have them read again and if he does not dispense with the reading they are read agair But sec. 683 contains more and it is the additional part which causes the confusion. It provides that the evidence of the witnesses may be taken in shorthand and that where it is so taken it shall not be necessary that it be read over or signed by the witnesses.

Now it is quite clear that this reading being dispensed with, any reading to the accused cannot be a reading "again" and, therefore, cannot come within the express words of sec. 684.

The history of the legislation is somewhat interesting though not so illuminating as in some cases.

The Criminal Procedure Act, ch. 174, R.S.C. 1886, sec. 69, contains the substantive provisions of the present sec. 682. Then sec. 70 provides that "after the examinations of all the witnesses for the prosecution have been completed the Justice . . . shall without requiring the attendance of the witnesses read or cause to be read to the accused the depositions taken against him." He then asked him, as he does now after they have been read or the reading dispensed with, if he wishes to make any statement informing him that he need not do so and that anything he does say will be taken down in writing and may be read against him.

At that time the accused was not permitted to call witnesses and it thus seems clear that the reading of the depositions to him had no regard to any evidence that might be given to counteract or explain it.

ALTA.

S. C.

REX v. MACDONALD.

Harvey, C.J.

In 1892 when the Criminal Code was passed the provisions of sec. 69 were incorporated in sec. 590 with some added details and with the added provision which we now find in 683 for the evidence to be taken in shorthand. There is no reference to any earlier legislation for this provision and I take it that this was its first appearance. It provides as the present section does that the shorthand evidence need not be read to or signed by the witnesses.

The old sec. 70 of the Criminal Procedure Act is changed and appears as sec. 591 in almost the same terms as in the present sec. 684.

Thus we find that at the same time that the first reading of the depositions is dispensed with in certain cases, the reading to the accused is also dispensed with if the accused desires and the reading to him is spoken of as a reading "again" and is provided for only "after the examination of the witnesses on the part of the prosecution has been completed *and after the depositions have been signed as aforesaid*," the italicized words appearing now for the first time.

If before the depositions are required to be read to the accused they must be signed, then only such depositions as are required to be signed can be required to be read and this confirms the interpretation to be drawn from the use of the word "again."

It is suggested that to hold that the depositions which are signed and thus are the only depositions which, having been read once, can be read "again," are the only ones to which sec. 684 applies is scarcely consistent with the provisions of its second sub-section, which provides that: "When the depositions have been again read, or the reading dispensed with" the accused shall be asked if he wishes to make a statement.

It is suggested that this provision for the reading being dispensed with refers to the preceding sub-section, which directs the depositions to be read "unless the accused dispenses therewith," but it appears to me that the expression "the reading dispensed with" may be given a wider interpretation and include the dispensing with the reading by the statute. It would have been perfectly simple to have said, instead of "the reading dispensed with," "the accused has dispensed with the reading thereof" if it had been intended to limit the meaning to the accused's

option. Instead the section uses a more general term which is undoubtedly wide enough to include a statutory dispensation.

It is true the reading to the accused is not expressly dispensed with and it is urged that if Parliament had intended to dispense with the reading to him as well as to the witness it would have been simple to have added the name of the accused but it is to be noted that the express provision dispensing with the reading is in the section relating solely to the taking of the evidence and the wording is "it shall not be necessary that such evidence be read over to or signed by the witness." Even if this were an appropriate place to provide expressly for the reading to the accused being dispensed with, which it is not, the simple insertion of the word "accused" would not accomplish it. But even though the reading to the accused is not expressly dispensed with, yet for the reasons I have stated it seems to me that by virtue of the wording of sec. 684 and the express dispensing with reading to and signing by the witness, it is impliedly dispensed with.

We are, of course, not concerned with the policy of the legislation except in so far as it may assist us in interpreting it but in this case as the history of the legislation shews the whole purpose of the reading to the accused has regard to the statement which he may desire to make, which statement may be used against him. The statement if he makes one will be of facts within his knowledge and it is difficult to see how any prejudice can arise from his having failed to remember any particulars of the evidence all of which he has heard given.

I think the judgment is right and I would dismiss the appeal with costs.

STUART, J.:—I would dismiss this appeal. Parliament in leaving the legislation in the shape in which it now stands had undoubtedly forced upon the Court the exercise of very ingenious mental gymnastics, assuming the section (684) to be mandatory. Stuart, J.

As a matter of fact by sec. 686 it is only "after the proceedings *required* by sec. 684 are completed" that the accused must be asked if he wishes to call any witnesses.

The question is what is "required" by sec. 684 where there is a stenographer as permitted by sec. 683?

Certainly if the provisions of the first sub-section of 684 do not apply where there is a stenographer then there is also no

ALTA.

S. C.

REX v. MACDONALD.

Stuart, J.

obligation upon the magistrate to read the warning contained in sub-sec. 2 because it is only "when the depositions have been again read or the reading dispensed with" that the magistrate is to address the accused as stated.

I cannot bring my mind to believe that the words "or the reading dispensed with" ought to be given any other interpretation than "dispensed with by the accused" as just before mentioned.

I prefer to solve the problem by saying that even if the conclusion reached by my brother Ives in regard to the meaning of the section is correct (and I hesitate to say that it is not—or that it is—the provision should in all the circumstances and as applicable to stenographic reporting be regarded as directory and not mandatory.

Beck, J.

BECK, J., concurred with Ives, J.

Ives, J.

IVES, J.:—This is an appeal from my brother Walsh, J., in Chambers, dismissing an application by the accused to quash a committal for trial made by a police magistrate.

The evidence on the preliminary inquiry before the magistrate was taken in shorthand and the depositions were not read over to the accused nor did she dispense with such reading. She was not asked if she wished them read. Upon this ground alone the accused moves to quash the order of committal for trial and the warrant issued thereon.

The issue here turns upon the interpretation of sec. 684 of the Cr. Code. Let us bear in mind that we are called upon to interpret a criminal statute and that the liberty of the subject is involved. Sec. 682 provides: That the Justice holding the inquiry shall take the evidence of the witnesses called on the part of the prosecution; that such evidence shall be given upon oath in the presence of the accused who shall be entitled to cross-examine; that the evidence of each witness shall be taken down in writing in the form of a deposition; that such deposition shall, in the presence of the accused and of the Justice at some time before the accused is called on for his defence, be read over to and signed by the witness and the Justice; that the signature of the Justice may either be at the end of the deposition of each witness or at the end of several or of all the depositions.

Section 683, as amended by 3-4 Geo. V. 1913, ch. 13, sec. 25, is in the following words:

Every Justice holding a preliminary inquiry shall cause the depositions to be written in a legible hand and on one side only of each sheet of paper on which they are written: Provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer who may be appointed by the Justice and who, before acting, shall unless he is a duly sworn official court stenographer, make oath that he shall truly and faithfully report the evidence.

2. Where evidence is so taken it shall not be necessary that such evidence be read over to or signed by the witness but it shall be sufficient if the transcripts be signed by the Justice and be accompanied by an affidavit of the stenographer, or, if the stenographer is a duly sworn court stenographer, by the stenographer's certificate that it is a true report of the evidence.

Both of the above sections were formerly comprised in sec. 590 of the Code of 1892, 55-56 Vict. ch. 29.

Section 684 is as follows:

After the examination of the witnesses produced on the part of the prosecution has been completed and *after* the depositions have been signed as *aforesaid*, the Justice, unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and *unless* the accused dispenses therewith, shall read or cause them to be read again.

2. When the depositions have been again read, or the reading dispensed with, the accused shall be addressed by the Justice in these words or to the like effect: "Having heard the evidence do you wish to say anything in answer to the charge? etc."

We must remember that the proceedings are but a preliminary inquiry; that the magistrate does not try the guilt or innocence of the accused but determines only if there is sufficient evidence to put the accused upon trial. At the stage of the inquiry where sec. 684 operates the proceedings have reached an exceedingly critical point for the accused. Heretofore he has not been addressed in any way that requires an answer. But at this point he is about to be asked if he has anything to say, and whatever he answers will be written down and will confront him at trial. At trial, Courts are most cautious in admitting previous statements of the accused and must be assured that such statements are voluntary before they will be admitted. Surely then at this inquiry in an atmosphere of law and authority care must be taken that the accused is of a freshened mind before he is called upon to decide his course.

The inquiry may have lasted several weeks, with much evidence and numerous adjournments to break the thread of the story which is being told by witnesses for the prosecution. And hence the wise provision that the whole evidence be read to the accused unless he dispenses with that formality. Not only so but it must

ALTA.

S. C.

REX v. MACDONALD.

Ives, J.

first be signed by the Justice, in order, I think, that the accused may be guarded against meeting the evidence in any but the form in which it was given at the preliminary inquiry and identified by the Justice's signature. Nothing in sec. 683 dispenses with the signature of the Justice, even though the reading of the depositions to the witnesses is by that section made unnecessary where taken down in shorthand.

The provision in sec. 682, sub-sec. 4, that at some time *before* the accused is called on for his defence the deposition shall be read over to and signed by the witness and Justice in the presence of the accused is only modified in part by the provision of sec. 683, sub-sec. 2, making it unnecessary, in the case of a deposition taken in shorthand, that it be read over to or signed by the witness "but it shall be sufficient if the transcripts be signed by the Justice, etc.," and as it is unnecessary to read the depositions to the witnesses which is the first and only reading up to this point the word "again" in sec. 684 is not effective and demands no attention, but the word "aforesaid" in that section is effective and bears out my argument that the transcript of the evidence must be signed by the Justice before the evidence is read to the accused. This reading of the evidence to the accused before calling upon him for a defence is not for the purpose of enabling any corrections to be made by witnesses—which was the reason for reading it over to the witnesses—because when the direction contained in 684 is being carried out the witnesses may or may not be present. Indeed the original section contemplates the absence of the witnesses. The words of sec. 30, 32-33 Vict., 1869 (Dom.), ch. 30, are:

> After the examinations of all the witnesses for the prosecution have been completed, the Justice or one of the Justices, by or before whom the examinations have been completed shall, *without requiring the attendance of the witnesses*, read or cause to be read to the accused the depositions taken against him and shall say to him these words, etc.

I think then that when shorthand reporting of evidence was adopted the Legislature deemed that method so efficient that it was unnecessary to read a deposition to a witness for the purpose of correction and so dispensed with such reading but as the reading over to the accused was not provided for with the object of correcting the deposition of a witness it is not proper to construe the provision in sec. 683 as impliedly amending 684 and so dispensing

with a provision in 684 which was not enacted for the same reason as the provision in 682, sub-sec. 4, which is dispensed with.

The opinion that the words of 684 requiring the Justice to inquire of the accused if he wishes the depositions read over, and the compliance with what the accused decides, before calling upon him for his defence, are imperative and not permissive is clearly expressed by Sir Francois Lemieux, C.J., in the case of *Rex* v. *Beaulieu*, 28 Can. Cr. Cas. 336. Also the case of *McDonald* v. *The King*, 30 D.L.R. 738, 26 Can. Cr. Cas. 175, is a judgment of the Court of King's Bench in Montreal. This was a petition for leave to appeal and one ground was (page 739) "that the accused was not lawfully called upon for voluntary statement under sec. 684 inasmuch as the evidence had not yet been transcribed when he was so called upon." Cross, J., who delivered the opinion of the Court, on this point says, at page 740:

> In our opinion when the evidence has been taken in shorthand, the accused party can lawfully be asked if he wishes the depositions to be read again before the stenographer's transcript has been made. In such a case, sec. 684 is sufficiently complied with, if when the Justice asks the accused whether he wishes the depositions to be read again, he has the stenographer in attendance with his note-book ready to do the reading, even if the depositions have not yet been transcribed, though of course we do not say that the accused may not ask to have the transcript made before he is called upon for the statement.

I cannot but feel convinced that before delivering this considered judgment the question arising in the case at Bar must have been present in the minds of that Court yet it does not seem to have occurred to any of the Judges of Appeal in *McDonald* v. *The King* to question the necessity of strict compliance with 684.

I note too, of course, that the language in the above case expresses an opinion contrary to mine as to the necessity of the Justice signing the transcript before asking the accused if he wishes the evidence read over, but I will let my opinion stand to be useful, possibly in bringing about a revision by legislative enactment or settled by an appellate Court. The only argument in favour of a permissive interpretation of the words used in sec. 684 is based on convenience and that is a ground within the decision of Parliament not this Court.

I would allow the appeal and set aside the order of committal made by the police magistrate.

Appeal dismissed by an equally divided Court.

ONT.

S. C.

NORTHERN PIPE LINE Co. v. DOMINION SUGAR Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. February 20, 1920.

RAILWAY BOARD (§ II—10)—POWERS OF ONTARIO AND MUNICIPAL BOARD—SUPPLY OF NATURAL GAS—PRICE FIXED BY BOARD—ORDERS OF BOARD—8 GEO. V. 1918 (ONT.), CH. 12.

The Statute 8 Geo. V. 1918, ch. 12, empowered the Ontario Railway and Municipal Board to control the supply and distribution of natural gas, and to fix the price to be paid for the same.

In pursuance of these powers by orders dated 27th June, 1918, and 28th November, 1918, the Board fixed the price of the gas to be supplied by the defendants to the plaintiffs and that price must be the governing rate.

A person refusing or neglecting to obey an order of the Board commits an offence against the Act, and consequently the defendants had no right to cut off the plaintiff's gas for non-payment; the order of the Board to supply the same being operative when the threat was made.

Statement.

APPEAL by defendant from the trial judgment granting a perpetual injunction restraining it from shutting off the supply of gas of the plaintiffs.

The judgment appealed from is as follows:—

FALCONBRIDGE, C.J.K.B.:—The facts are not in dispute and are entirely set out in the exhibits filed. The contentions of the parties appear with great particularity in the pleadings.

The points raised as to the jurisdiction of the Legislature of Ontario to constitute a tribunal with the powers of the Ontario Railway and Municipal Board and as to the power of that Board to deal with the matters in question were not argued before me but were formally mentioned so as to preserve them for adjudication hereafter.

As to the main case, I had at the trial a very strong opinion that plaintiffs were entitled to succeed and I reserved judgment only for the purpose of verifying the authorities cited. The result has been to confirm that opinion.

Statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect or the object, subject-matter, or context shews a contrary intention: Beal's Cardinal Rules of Legal Interpretation, 2nd ed., page 414 *et seq.*

As to the order of the Board having been made without hearing plaintiffs as to their contract, the basic authority is *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180. See the cases mentioned in Talbot & Fort's Index in which that case has been judicially noticed; also *Smith* v. *The Queen* (1878), 3 App.

Cas. 614, at pages 623-4-5; *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*, [1906] A.C. 535, at 539, 540; *Vestry of St. James etc.* v. *Feary* (1890), 24 Q.B.D. 703, at 709, 710, 712; *Attorney-General* v. *Hooper* [1893], 3 Ch. 483, at 487.

I hold also that defendants had and have no right to shut off the gas to enforce payment, or in default of payment, of their demands.

As far as I have looked at the cases cited to the contrary in Thornton's Law of Oil and Gas, they seem to depend on contract, statute, or rule assented to by the consumer. The same remark applies to *Husey* v. *Gas Light and Coke Co.* (1902), 18 T.L.R. 299.

Plaintiffs will have judgment (1) for a perpetual injunction or mandatory order restraining defendants from shutting off the supply of gas; (2) an order for payment to plaintiffs of the amount in the Merchants Bank of Chatham settled by the parties at $22,659.88, and accrued interest, and such further sum as shall be paid into the bank after May 1, 1919; (3) costs of suit.

Fifteen days' stay.

J. G. Kerr, for appellant.

W. Nesbitt, K.C., and *J. M. Pike*, K.C., for respondents.

The judgment of the Court was delivered by

HODGINS, J.A.:—The respondents are consumers of natural gas and brought this action against the appellants who are producers and transmitters of it. Under various agreements of which the principal one bears date October 8, 1909 (Ex. 4), the respondents were entitled to a supply from the appellants of natural gas to the full extent of their requirements at the price of 12 cents per 1,000 cubic feet. This privilege was to last so long as gas was or could be produced and supplied from certain territory therein designated, and, subject to the requirements of the respondents, the appellants could supply gas for domestic use and for operating gas engines in the town of Wallaceburg. Hodgins, J.A.

The respondents obtained an injunction to prevent the appellants cutting off their supply of natural gas, a threat so to do having been made on account of the non-payment of the appellant's claim for gas supplied during the months of July and August, 1918, at the rate of 35 cents per 1,000 cubic feet.

The contest between the parties is now practically reduced down to a question as to whether the amount to be charged for

ONT.

S. C.

NORTHERN PIPE LINE CO. v. DOMINION SUGAR CO.

Hodgins, J.A.

those 2 months should be at the rate of 12 cents per 1,000 cubic feet as per the contract which I have mentioned, or at the rate of 35 cents as claimed by the appellants or, under an order dated November 28, 1918, at the rate of 25 cents, and whether the orders made by the Board were not contrary to natural justice and should be disregarded so far as they purported to interfere with the contract.

There is also raised the question whether the respondents were justified in moving for the injunction to restrain the appellants from cutting off the supply of gas on account of non-payment of their claim. Upon the injunction being obtained, the respondents submitted to pay at the rate of 12 cents per 1,000 cubic feet and to deposit into Court a sum equal to 23 cents per 1,000 cubic feet, all without prejudice to their contentions.

On February 6, 1918, the Ontario Legislature, by ch. 12 of 8 Geo. V., 1918, vested in the Ontario Railway and Municipal Board some very extensive powers regarding natural gas. The Act contains a preamble which recites that complaints have been made by and on behalf of numerous inhabitants of that part of Western Ontario where natural gas is in use as a fuel, stating that much distress and suffering have been caused at various times and especially during the winter of 1917-18 because of the insufficiency of natural gas. It further details the result of an inquiry directed by the Lieutenant-Governor in Council and conducted by the Ontario Railway and Municipal Board as to the situation with respect to the supply of natural gas in that part of Ontario and as to its production, transmission, conservation, distribution and sale by companies, municipalities and persons interested, including their contractual rights.

The Board, as appears, reported that it had deemed it expedient to attempt to adjudicate conclusively upon the contractual rights, but went on to point out that during the prolonged period of cold weather in December, 1918, and January, 1919, the supply of natural gas for domestic consumers was almost negligible, resulting in great privations and suffering, and that a permanent solution of the problem would need legislation and inquiry.

The Act in question was then passed, vesting in the Board power "to control and regulate the production, transmission, distribution, sale and disposal and consumption of all natural gas

produced in Ontario" (sec. 3, sub-sec. 1). It also made it a good defence to any action against anyone distributing or selling natural gas that they were doing so in accordance with the order and direction of the Board, and went on to provide for the making of orders and the giving of directions for the due conservation and the distribution of natural gas in such localities, "to such classes of consumers, for such periods and at such times as may best serve in the opinion of the Board to prevent suffering or inconvenience to the general public and particularly to the users and consumers of natural gas for domestic purposes" (sec. 4).

Special power was given, among other things, to shut off the supply of natural gas to any corporation, company or individual and to consumers generally in any locality, for such periods as the Board might deem proper, for dividing the fields of production and for the fixing of rates to be charged to distributors and consumers or to any class of consumers in any locality. The Act further imposed penalties, and in default, imprisonment, for refusing or neglecting to obey the orders and directions of the Board. It is to be noted that the Board had, under an amendment passed in 1919, 9 Geo. V. ch. 13, power over works for the production, transmission and supply of natural gas as a public utility.

The situation as affecting the parties to this litigation appears to be as follows:—

The appellants were bound to supply all the natural gas needed by the respondents, who had, in that way, the first right to all the gas produced or transmitted by the appellants; for this they were to pay the comparatively small rate of 12 cents per 1,000 cubic feet. This course of dealing had continued since 1909, and, subject to the gas lasting out, would continue indefinitely. Its effect of course was to subordinate the domestic consumers to the interests of the manufacturer, and it probably may be taken as an illustration of how the difficulties occurred, which the principal Act referred to is intended to deal with. So long as there was plenty of natural gas for all parties no objection would arise, but in view of the privation and suffering caused by the lack of heat when natural gas became insufficient for all wants, the situation became entirely changed.

The report of the Board referred to in the legislation in question was put in as exhibit No. 12, and it shews that the respondents

ONT.

S. C.

NORTHERN PIPE LINE CO. v. DOMINION SUGAR CO.

Hodgins, J.A.

were represented at the inquiry, also that Dr. T. K. Holmes, a shareholder in the appellants' company, was present and that the appellants, who are a subsidiary company of the Union Natural Gas Co. were practically represented by their parent company, which appeared by its counsel.

The Board in its report says: "It is with the operations of the companies Nos. 5, 6 and 7 (No. 6 being the Northern Pipe Line Company) that this inquiry is concerned," premising that No. 6, the Northern Pipe Line Co., is a subsidiary company of No. 7, the Union Natural Gas Co.

The Board further points out that during the development of the field in question scores of agreements were made and municipal by-laws passed defining rights and granting franchises. These agreements had been filed with the Board. One of them is the agreement already referred to (Ex. 4), under which the appellants are prohibited from supplying gas to any person or corporation until the requirements of the respondents, and the Dominion Glass Company (formerly Sydenham), both carrying on business at the town of Wallaceburg had been fully met. The Board conclude and state that if this and similar agreements are to be given full effect to, the hands of the Board would be tied and their action ineffective, and they recommended legislative action.

I mention these facts because complaint was made that the appellants were not heard by the Board after the legislation was passed and that it was contrary to natural justice that orders should be made affecting their contractual rights without such notice.

In the view I take of the effect of the legislation, I do not think that the objection is a good one, but, apart from that, it is impossible to resist the conclusion that the rights of the parties under the agreement in question were before the Board, were fully considered by it, and that it was the very fact that these and other contractual relations existed which caused the legislation to take the form which it assumed. The objection is really not so much that the appellants did not have notice of the orders and directions of the Board after the legislation was passed, but that their contractual rights have been disregarded and set at naught. If, as appears to have been the fact, the legislation was intended to cut the situation loose from the entanglements created by these

very agreements, I can quite understand the feeling of chagrin which would result. But while it is usual for the Legislature to hear parties affected by private legislation it has never been the practice when the policy of the Government upon a public question is being considered that the executive should give notice to the parties likely to be affected by it. But here the unusual course of holding a public inquiry was adopted, and in it the rights of parties arising out of the contracts covering the region in question and dealing with production, supply, transmission and rates had to be considered and were considered in their presence. No question can therefore arise except a subsidiary one, namely, whether the Board when vested with all its powers under 8 Geo. V. 1918, ch. 12, should have notified the parties whose right to gas in quantities or whose prices for supplying were being affected. If the appellants were entitled to receive notice either before the orders were made or afterwards, then I am inclined to the view, having regard to the recital in the principal Act and its provisions, particularly sec. 7, coupled with secs. 3 (as amended), 21, 22, 23, 25, 26, 29 and 37 of the Act respecting the Ontario Railway and Municipal Board, R.S.O. 1914, ch. 186, that ample power and opportunity existed under the last mentioned Act for an application by the appellants to revise or review the orders now complained of and possibly to appeal therefrom. Previous notice is not essential if the party affected has notice sufficient to enable him to be heard of to appeal—*Cooper* v. *Wandsworth District Board*, 14 C.B. (N.S.) 180; *Vestry of St. James etc.* v. *Feary*, 24 Q.B.D. 703; *Att'y-Gen'l* v. *Hooper*, [1893] 3 Ch. 483; *Local Gov. Board* v. *Arlidge*, [1915] A.C. 120.

But the question of the applicability of ch. 186 was not argued before us, and there is another aspect already alluded to which seems to me to afford a sufficient answer to the claim to antecedent notice. That aspect is that the provisions of the principal Act, having in view the legislative effort to rid the situation, admittedly acute, and affecting large numbers of householders in Western Ontario of the difficulties created by these very contracts, are so worded as to make their further enforcement by either party impossible while the Act operated.

That Act, 8 Geo. V. 1918, ch. 12, puts the Board in full control of the "production, transmission, distribution, sale, and disposal

ONT.

S. C.

NORTHERN PIPE LINE CO. v. DOMINION SUGAR CO.

Hodgins, J.A.

and consumption of all natural gas produced in Ontario," and enables it to exercise its powers "notwithstanding the provisions of any . . . agreement, franchise, bargain, or arrangement" (sec. 3). Its orders where followed are declared to afford a good defence to any one obeying them if sued and heavy penalty is imposed, payment of which may be enforced by imprisonment, for any refusal or neglect to obey the Board's orders or directions. This makes the performance of the contract in question, and any other similar agreement, illegal. I cannot distinguish the effect of these provisions from those detailed in *Brightman* v. *Tate*, [1919] 1 K.B. 463, and the conclusion reached by McCardie, J., seems logical and sound. If it became illegal to supply gas pursuant to the contract, it also became illegal to pay for it, or to exact or sue for payment pursuant to its terms. If then the performance of the contract became, by Act of the Legislature, illegal, there is no foundation for saying that before granting a permit for the sale to the appellants, the Board should have notified them so that they might set up the provisions of a void agreement in an endeavour to get some of its provisions reinstated or regard had to the bargain it embodied.

The agreement was, for the time being, at least, dead, and the rights of the parties were gone for that time also by a legislative Act. And it must follow, as it seems to me, that no right could have survived which would require to be regarded before action could be taken by the Board. However serious to the companies concerned the consequences of the original Act were, the loss was occasioned not by want of notice or knowledge but by the fact that, before the orders were made, the Legislature had deprived the companies of the benefits flowing from their advantageous position in order to favour the local inhabitants of the region who were suffering privations and cold because those benefits were being diverted from them.

With the rights and wrongs of the different producers and consumers concerned, whether manufacturers, pipe line companies or householders, we have nothing to do. The Court can only deal with the situation as the statute leaves it. The issue between the parties, if they think their rights have been invaded without due compensation, must be fought out in some other forum.

The main questions left to be disposed of seem to be whether the Act of 8 Geo. V. 1918, ch. 12, empowered the Board not only

to control the supply and distribution of natural gas, but to fix the price at which it should be sold, and whether the Board did in this case exercise these powers.

While in my view the supplying of natural gas pursuant to any contract or otherwise, contrary to the order and direction of the Board became an illegal act, it is not necessary to consider whether the prohibition went to the root of the contract and so released the parties from further performance.

The respondents naturally do not disaffirm the contract but attempt to rely upon it, while the appellants merely assert that during those two months they were supplying natural gas under the terms of the orders of the Board, which orders they say are quite consistent with suspension and not abrogation of the contract in question.

The point as to abrogation was not argued, and it would need much more evidence than was submitted to enable a conclusion to be reached upon that point if it had to be decided: See *Western R. Co.* v. *Windsor etc., R. Co.* (1882), 7 App. Cas. 178, 190; *Leiston Gas Co.* v. *Leiston*, [1916] 1 K.B. 912, and *Blackburn Bobbin Co.* v. *Allen*, [1918] 2 K.B. 467. But whether there was merely suspension or abrogation, the result in this case must be the same. I agree with what I take to be the view of the Judicial Committee in *Cook* v. *Ricketson*, [1901] A.C. 588, and of Sarjant, J., in *Metropolitan Electric Supply Co.* v. *London County Council*, [1919] 1 Ch. 357, that suspension means an annulment of the rights and obligations accruing during the suspension, and that the parties for the time being are in the same position as if the contract did not exist.

The Board made an order on June 27, 1918, but followed it up by another order dated November 28, 1918. The effect of the first order was that no corporation etc., was to distribute or consume natural gas for purposes other than gas engines, special processes, steam pumps and exploration for natural gas; that meters should be placed on the service pipes supplying natural gas to every corporation, etc., and that all gas consumed should be charged and paid for on the basis of the quantity consumed and not a flat rate. It further provided that every corporation, etc., being a consumer should be charged a rate equal to the highest domestic rate charged in the municipality irrespective of the

ONT.

S. C.

NORTHERN PIPE LINE CO. v. DOMINION SUGAR CO.

Hodgins, J.A.

purpose for which the gas was used. The later order of November recited this provision, and went on to say that in Wallaceburg that rate was 35 cents per 1,000 cubic feet, and that in view of the large quantities of natural gas being consumed by the respondents and another company, both in Wallaceburg, it seemed just and reasonable to the Board that no higher rate than 25 cents per 1,000 cubic feet should be charged by the appellants to the respondents and the other company. This order was to be effective from the previous June 27, and directed that "no higher rate shall be charged by the Northern Pipe Line Company for gas supplied to the Dominion Sugar Company . . . than 25 cents per 1,000 cubic feet," and that "all necessary adjustments and rebates shall be made . . . in respect of the gas supplied heretofore since June 27, 1918, in order to make the charge for the same conformable to this order."

From the evidence it appears that the respondents were very anxious to obtain gas in large quantities, and a great deal of correspondence between them and members of the Government and the Board took place in which every effort was made to have the orders relaxed.

Permits, as appears from exhibit 13, were issued by the Board to the respondents addressed to the Union Natural Gas Co. on June 29, 1918, July 18, 1918, August 27, 1918, December 3, 1918, and January 7, 1919. In no case is the price fixed. As the legislation came into force on February 6, 1918, and the earliest permit put in, June 29, 1918, used these words: "continue supply of gas," it is clear that gas had been supplied previous to the permits which form exhibit 13, but so far as this case is concerned they commence with that permit.

Before June 27, 1918, no evidence shews that the Board had used its powers to fix the rate; after that date, however, the conclusion seems inevitable that the supply was, in the words of the Act, "a sale and disposal" on the one side and a consumption on the other hand of natural gas permitted, controlled and regulated by the Board. The price fixed, namely, 55 cents, would govern unless the order of November reduced it to the rate of 25 cents. It is to be noted that in the correspondence put in, while objection is taken to the reduction in the supply of gas there is no protest at all about rates and no request for any hearing on that point.

With regard to the proper rate to be charged, as none of the permits provided for any special rate they must be taken to have been obtained by the respondents on the terms of the order of June 27, namely, at the rate of 35 cents per 1,000 cubic feet. The order of November, however, is clearly in case of that position, and I think its proper construction—and indeed its only construction—is that it reduced the rate from 35 cents to 25 cents. The order is not well expressed, and it was urged that the words "not more than" indicated a right to a lower rate, but as I view it, the rate must be fixed by the Board, and having already determined upon 35 cents the special provision that the respondents shall not be charged more than 25 cents must have been a relaxation in their favour. I think the result is that that is the governing rate from and after June 27, 1918. This rate makes the charge accord with the contention put forward in the evidence by the respondents that the domestic rate was 25 cents not 35 cents per 1,000 cubic feet.

I am unable to see that the Public Utilities Act is in any sense applicable.

I think the judgment appealed from should be reversed, and that there should be judgment upon the counterclaim for the appellants for the amount which, calculating the gas supplied at 25 cents per 1,000 feet, will be due to them less the amount already paid at the rate of 12 cents per 1,000 feet.

A subsidiary question was argued: that is, as to the right of the appellants to cut off the gas for non-payment. At the time this threat was made, the orders of the Board were operative and, the supply was being given pursuant thereto. Under the statute, any person who refuses or neglects to obey any order of the Board is subject to a heavy penalty, and the act of turning off the gas, when it was being supplied pursuant to a permit which had been obtained for the supply, would, in my judgment, have been an offence against the Act and consequently illegal. For that reason, alone, I think the respondents were justified in obtaining an injunction order and should have the costs thereof.

Judgment accordingly.

CAN.

Ex. C.

GAUTHIER v. THE KING.

Exchequer Court of Canada, Audette, J. January 10, 1920.

EVIDENCE (§ II H—227)—GOVERNMENT RAILWAY—COLLISION—ACCIDENT—NEGLIGENCE—EXCHEQUER COURT ACT. SEC. 20.

Under sec. 20 of the Exchequer Court Act, the burden of proof rests on the petitioner, and if he cannot prove negligence as set out in this section he cannot succeed in an action against the Crown for damages.

[*Thibault* v. *The King* (1918), 41 D.L.R. 222, 17 Can. Ex. 366; *Thompson* v. *Ashington Coal Co.* (1901), 84 L.T.R. 412, 3 B.W.C. (O.S.) 21, referred to.]

Statement. PETITION of right to recover from the Crown damages alleged to have been suffered by the suppliant in a collision on the Intercolonial Railway, a railway of the Government of Canada. The accident happened at Bic Station below Levis, by reason of a runaway snow-plow colliding with the rear of the accomodation passenger train which suppliant had boarded to see his brother-in-law.

P. E. Gagnon & Sasseville, for suppliant.

H. P. Garon, K.C., for respondent.

Audette, J. AUDETTE, J.:—The petitioner, who is a butcher and dealer in animals at Bic, went, on February 23, 1917, to the railway station to meet his brother-in-law whom he expected, with some animals, upon the accommodation train. Upon the arrival of the train, not being contented with staying on the station platform, he got on board the passenger car, and, while he was on board, a snow-plow, detached from its train, coming down the grade which is 2% to 2½% between St. Fabien and Bic, struck the passenger car in which he was. Gauthier was then thrown violently off the car upon the snow beside the track, sustaining several injuries, and as the result of this accident he seeks to-day by his petition of right, as amended at the trial, damages to the extent of $14,480.

At the opening of the case, observing that the accident occurred on February 23, 1917, and that the petition of right was filed on May 16, 1918, I called the attention of the parties to the fact that the case was apparently prescribed. Upon it being represented that the petition had been left with the Department of the Secretary of State as required by sec. 4 of the Petition of Right Act, before the expiry of the year, I allowed subsequent evidence of it to be given, and went on with the merits of the case. This evidence has now been furnished, and, conformably to numerous

decisions of this Court upon this point, it is held that the deposit of the petition of right with the Secretary of State, as provided by the Act, had the effect of preventing prescription running from that date.

Now, the special circumstances in which the accident happened are these, Gauthier, receiving from this brother-in-law the letter, Ex. 1, tells us that he first went to the station to ascertain from the station master where the animals he was expecting would be detrained; for the animal enclosure was then full of snow. However, on this point, the station master tells us that he does not remember having seen Gauthier at the station on the date in question and that in the winter time it is usual to detrain animals at the baggage sheds, and that they had already been detrained at that place that season. Besides, if Gauthier was a dealer in animals it must be presumed that he would be aware of this custom and that it was unnecessary for him to go there to obtain information on this point.

Gauthier tells us that when the accommodation train reached the station the conductor got off the train. Then an Englishman also got off (at another place in his evidence he tells us that the Englishman did not get off but remained upon one of the steps of the car) and he asked, in English, if there were any people who had potatoes for sale, and that he would pay $2 a minot. Then he adds that the train conductor repeated this in French. Gauthier then asked the conductor if it was the person who had gone into the train who bought the potatoes, and the conductor answered him, "Yes, if there are any persons who want to see him, go and see him," and further on he adds that the conductor also said: "Yes, if there are any persons who want to see him let them go on the train." Gauthier got on board the train as, he says, he was expecting his brother-in-law who ought to be there, in order to tell him where to put the animals out. Declaring that his brother-in-law was not in the train, Gauthier entered into conversation with the potato dealer in order to sell some potatoes, "and a few minutes afterwards," he says "the snow-plow came and I do not know how I left there. Afterwards, when I regained consciousness, I was on a snow bank beside the railway track."

Upon the other point, with regard to the announcement made by the potato dealer, Gauthier is again contradicted by Achille

CAN.
EX. C.
GAUTHIER
v.
THE KING.
Audette, J.

Rioux, the conductor, who says that he did not recognize Gauthier that day, and that he never to his knowledge met Gauthier that day. That he does not remember Gauthier speaking to him then, and he denies having said in French that this Englishman wanted to buy potatoes, and he adds that when he left the train the Englishman, McKinnan, was in the car and that as soon as he got off he (the conductor) called out "all on board." And in reply to other questions he again denies that Gauthier had asked him if the man who went into the car was the potato dealer and he adds that he is able to swear that he did not see Gauthier that day and that Gauthier did not speak to him. Henri Turcotte, the baggage master at Bic, examined by the petitioner, swears that he saw Gauthier at the station on the day of the accident, but that he did not see a man who was offering to sell potatoes. The station master, also examined by the petitioner, declares that he did not hear the conductor making the announcement about the sale of potatoes.

In this case, as an action for damages against the Crown lies only for breach of contract or under a statute, the action, in order to succeed, must necessarily come within sec. 20 of the Exchequer Court Act of Canada, as amended by 9-10 Edw. VII. 1910, ch. 19, which requires:—

1. That it be a public work; 2. That there was negligence of an employee or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway; 3. That the accident must be the result of such negligence.

Now, as some days before the accident there had been a heavy fall of snow, a gang of I.C.R. employees had been working for 3 or 4 days in the Bic mountain to take away the snow with the very same plow. This work was done by means of an engine and a rotating plow, called during the trial a "rotary plow," and as the witness Fortier says all "had been well till then, and there was nothing defective." In front of this plow was a flat car called "Butterfly," upon which there were wings to raise the snow. Now, on the day of the accident this work train, at the time of the passing of the accommodation train, returned to St. Fabien Station, from the place where it was working, an operation which it had already performed two or three times that very day; was put on the farmers' siding, and 15 to 20 minutes after the passing of the

accommodation to St. Fabien was again put on the way to return to its place of work so interrupted between St. Fabien and Bic. It is a distance of 6 miles between these two stations, and a very pronounced grade of from 2% to 2½%. About 4 miles from St. Fabien, the plow, as well as the flat car which preceded it, became detached from the engine. On both sides we see what immediately happened.

On the car, in addition to the automatic brakes which were applied from the moment that all communication or signalling was interrupted, and which became normally effective, there were also hand brakes which were applied, but without success. The car having already acquired its momentum it was impossible to make it answer to the brakes and it continued to descend towards Bic Station. On the engine employed with the plow was also noticed the departure of the plow. Signals were exchanged and the engine set out after the plow for the purpose of rejoining it and coupling it; but the numerous curves prevented it from being able to effect the coupling, and the plow went on to Bic Station where it came into collision with the rear of the accommodation train standing at the station and damaged the passenger car attached to the end of the train, and injured the passengers who were on board, including the petitioner.

On the engine, soon after it was noticed that the plow was detached, some one stopped the train to shut off the air which was escaping as a result of a defective joining of the rubber of the automatic brakes, and it is after that that chase was made after the plow.

This plow and its train had given good service every day previously and on part of the day of the accident, having made the same trip two or three times that very day. All the witnesses heard with regard to the state of the plow, Vaillancourt, A. Côte, N. Côté, J. B. Laforest and Fortier, tell us, without the least hesitation and in a convincing manner (and the care given to their train entirely agrees with what we know in a general way), that the plow, its coupling, and the brakes of the whole train were regularly tested and inspected every day, and even several times a day; that a special examination had been made that very day when the train was on the farmers' siding. Then, to confirm it all, after the accident, upon examination of the plow at Bic station,

CAN.
Ex. C.
GAUTHIER
v.
THE KING.
Audette, J.

it was ascertained that the brakes were duly applied to the rear wheels (those of the front were not then examined, but the brakes work together) and that the coupling was in no way broken or damaged, the coupling was unfastened, the rod was out, but the lever was not raised.

Many conjectures and hypotheses have been suggested with regard to the cause of the accident. One can always give free course to one's imagination, but no one could give us the real cause or explain it. It has been suggested that ice might have got into the coupling and caused the rod to come out or that snow might have got in between the shoe and the wheel, and that consequently the brakes could not work properly; but none of these were ascertained after the accident, for the car was found in perfect order.

After having made a study of the evidence it is impossible for me to come to the conclusion that the accident had resulted from the negligence of an employee of the railway. All seem to have done their duty and the cause of the accident remains clouded in darkness.

The burden of proof, the *onus probandi*, rests on the petitioner, and he has failed entirely to prove negligence under sec. 20 of the Exchequer Court Act. The cause of the accident has not been shewn or proved. The action does not come within the class covered by sec. 20 above mentioned. *Colpitts* v. *The Queen* (1899), 6 Can. Ex. 254; *Dubé* v. *The Queen* (1892), 3 Can. Ex. 147; *Thibault* v. *The King* (1918), 41 D.L.R. 222, 17 Can. Ex. 366; *The Western Assurance Co.* v. *The King* (1909), 12 Can. Ex. 239.

What happened was unexpected and resulted from fortuitous chance. *Thompson* v. *Ashington Coal Co.* (1901), 84 L.T.R. 412, 3 B.W.C. (O.S.) 21. As I have already had occasion to say in the case of *Thibault* v. *The King*, *supra*, "what happened was fortuitous and unexpected. The event was unforseen and unintended, and was an unlooked for mishap or an untoward event which was not expected or designed." *Fenton* v. *Thorley Co.*, [1903] A.C. 443, 89 L.T.R. 314, 52 W.R. 81; *Higgins* v. *Campbell*, [1904] 1 K.B. 328. It was a personal injury by accident. *In re Briscoe* v. *Metropolitan St. Ry. Co.* (1909), 120 Southwestern Rep. 1162 at 1165, an accident is defined as "such an unvoidable casualty as occurs without anybody being to blame for it; that

is, without anybody being guilty of negligence in doing or permitting to be done, or in omitting to do, the particular things that caused such casualty."

"If in the prosecution of a lawful act, an accident, purely accidental arise, no action can be supported for an injury arising from such accident," *Davis* v. *Saunders* (1770), 2 Chitty's R. 639.

I therefore am of the opinion that the petitioner has not proved his case, that he has not proved negligence by an employee of the Crown as required by sec. 20 of the Exchequer Court Act and that the action should be dismissed.

However, having arrived at this point in the case I could not finish without saying a word on the subject of the point which was the chief question at the trial—namely whether Gauthier, having got on board the train under the circumstances we know, was a transgressor, a *trespasser*.

If we accept Gauthier's account of what passed between him and the conductor of the accommodation train, it is clear that Gauthier, after having heard the conductor (a fact, however, denied by the conductor) tell him that the potato dealer was the one who got on the train (although the conductor, in his evidence, tells us that the potato dealer remained inside the car) and adding "yes, if any person wants to see him they can go on the train," that he would have profited by this permission, specifically given, to see the dealer, in order to extend it to that of seeing his brother-in-law. Then, after having related this conversation, Gauthier tells us that he then went on board the train, as he was expecting his brother-in-law, who should be there, in order to tell him where the animals should be taken off, and that, ascertaining that his brother-in-law was not there, he entered into conversation with the potato dealer.

Analysing all these facts, it is well to remark that one usually awaits passengers on the station platform and that one does not go into a train to get them. Especially is it necessary to remark that Gauthier did not board the train in compliance with the permission claimed to have been given by the conductor for the purpose of meeting the potato dealer, but that he profited by that permission in order to give himself a pretext to enter the train to serve his own ends, which were other than those of speaking to the potato dealer. To-day he sets up this turpitude, trifling

CAN.
EX. C.
GAUTHIER
v.
THE KING.
Audette, J.

if you wish, but which is none the less stamped with a lack of honesty, to justify his entering the train and basing a claim thereon. He boarded the train on the apparent pretext of complying with the specific permission given by the conductor, and to make his story more acceptable he adds that seeing that his brother-in-law was not there he entered into conversation with the dealer. The fact of having thus by chance chatted with the dealer, repeated again and again in his memory after the accident, has it not given rise to this story which seems to be built up for the purposes of this case?

Gauthier went on board with the plausible appearance of having the conductor's permission, but really for another purpose than than that specifically given. He who seeks equity and justice must act with equity and justice. Gauthier knew in his conscience that he lacked a certain amount of honesty, that he was transgressing the rules of fair dealing and was profiting by this permission in order to serve his own ends. *Nullus commodum capere protest de injuria mea propria.*

I do not wish, here, to exaggerate the importance of Gauthier's action, there are, however, shades of probity and rectitude of which most of our good farmers in the Province would not have wished to take advantage of, and which it is always dangerous to allow to percolate into the administration of our actions. There is also a distinction set up to take away the claimed presumption that he would not be a *trespasser* with such permission of the conductor to board the train. In any case, in the absence of negligence, the respondent would not be liable from an abuse of such permission arising entirely from his generosity. Gauthier was not a passenger. There was no contract, with a pecuniary consideration, between him and the Crown. He deemed it suitable to board the train under the circumstances, and to stay there nearly 15 minutes, lingering unduly to gratify his own purposes. Ought he not, then, to assume all risks resulting therefrom—the respondent, by his employees, not, however, causing any injury whatever to him. Thus in the cases of *Indermaure* v. *Dames* (1866), 1 C.P. 274, (1867), L.R. 2 C.P. 311; and *Pritchard* v. *Peto*, [1917] 2 K.B. 173, the railway company was held to have a reasonable duty to keep its train in good order and not to expose the petitioner to any hidden danger of which existence it knew or

should have known, but nothing more. How could he now set up an act of kindness, this permission (if indeed it was given), in order to make it a basis for a punishment in heavy damages?

Assuming for the purpose of argument, that the evidence of Gauthier is quite true, the question would then be—the Court having to decide it—whether a *quondam* who is not a passenger, temporarily boarding a train at a railway station, for a purpose other than that for which he had had specific permission from the conductor, becomes a *trespasser* and whether the railway company owes him any other obligation or duty than those due to a trespasser, and whether he is then on the train at his own risk and peril? Does a specific permission give him passive permission to go on board for any other purpose than that mentioned.

In view, however, of my conclusions in considering the case from the point of view of negligence, as stated above, it would be idle on my part to pronounce on this latter question.

Herdman v. *Maritime Coal Co.* (1919), 49 D.L.R. 90; *Moffat* v. *Bateman* (1869), L.R. 3 P.C. 115; *Grand Trunk* v. *Anderson* (1898), 28 Can. S.C.R. 541; *Leprohon* v. *The Queen* (1894), 4 Can. Ex. 100 at 112 *et seq.*; *Nightingale* v. *Union Colliery Co.* (1903), 2 Can. Ry. Cas. 47; (1904), 4 Can. Ry. Cas. 197, 35 Can. S.C.R. 65.

Accordingly the action is dismissed with costs.

CANADIAN COPPER Co. v. LINDALA.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. January 19, 1920.

EVIDENCE (§ XII A—921)—NUISANCE—SULPHUR SMOKE FROM SMELTER WORKS—INJURY TO CROPS—EVIDENCE—EXPERTS—FINDING OF FACTS—DAMAGES.

In actions for damages for injury to crops, by reason of noxious vapours or fumes from defendants' smelting works, the Court held that the plaintiffs had sufficiently established the cause of the injury and that the District Court Judge had properly given preference to the evidence of witnesses who had seen and felt, rather than to the scientific testimony of experts who spoke from signs and from observations which they had made after the events had taken place.

[Effect of scientific testimony of experts considered.]

Statement.

APPEALS by the defendants from judgments of the District Court of the District of Sudbury in the above and four other actions, brought by other plaintiffs against the same defendants, to

ONT.
S. C.
CANADIAN COPPER CO. v. LINDALA.

recover damages for injury to the plaintiffs' crops during the year 1916 by noxious vapours or fumes from the defendants' smelting works. The judgments were for the recovery of various sums as damages, with costs.

D. L. McCarthy, K.C., and *Britton Osler*, for the appellants.

J. H. Clary, for respondents.

Hodgins, J.A.

HODGINS, J.A.:—These appeals by the defendants were argued on the 7th and 8th February, 1918, and on the 20th and 21st March, 1918. They are appeals from the District Court of the District of Sudbury, and consideration of them has been delayed owing to the fact that some cases in the Supreme Court of Ontario, involving the whole of the expert evidence given in these cases, had then been tried and judgment had been delivered by Mr. Justice Middleton, appeals in which were pending. It was thought better to await the argument in those cases. As this has taken place, and the fundamental issues are the same in all,* there is no reason for further delaying judgment.

The evidence in these cases was taken at Sudbury, the taking of it occupied 6 days, and the transcript of the evidence runs to 332 pages. In addition to that, the Court has been favoured by the appellants with a minute analysis of the evidence in each of the five cases, and also with a tabulated extract from the evidence of all the experts who were called, a similar statement of what is called the general evidence, and also particular instances of fundamental facts and inconsistencies, etc., in the judgment of the learned Judge and in the evidence, as well as an exhaustive analysis of the effects of SO^2, the percentage and description of foliar markings. This interesting material reached a total of 290 pages, so that it is evident that the appellants attach unusual importance to these cases, in which the amounts awarded are comparatively trifling, amounting in all to $845, the largest award of damages being $300.

In addition to the evidence given by the owners of the farms in question, testimony was also had from others owning similar farms, and friends and neighbours. The appellants examined a number of gentlemen who not only gave evidence of facts which

*See *Black* v. *Canadian Copper Co.*, *Taillifer* v. *Canadian Copper Co.* (1917), 12 O.W.N. 243, for note of decision of MIDDLETON, J., affirmed on the 19th January, 1920: *Taillifer* v. *Canadian Copper Co.*, 17 O.W.N. 399.

they saw, but were put forward to speak from expert knowldege as graduates of the Ontario Agricultural College and as having devoted considerable time to biology, plant-pathology, etc. These witnesses were in the employment of the appellants at the time of the trial, other than Mr. Martin, who had made an examination of the farms in the district on behalf of the Ontario Government in June, 1916. Mr. Hugh Montgomery, a farmer, whose farm is about 40 miles from Sudbury, also gave evidence for the appellants.

In addition, all the expert evidence in the Supreme Court cases was, by consent, put in, and the learned District Court Judge in his judgment deals with it in this way:—

"It may be here mentioned that I have not only heard expert testimony on this branch of the case, but have examined the several written authorities submitted, all of which for the practical purpose of dealing with the matters in dispute are fully summarised in the judgment of Mr. Justice Middleton in the cases tried before him. It will serve no useful purpose to repeat as to these. I have carefully considered the evidence given on the trials before me, which lasted 6 days and 3 evenings, listened attentively to the one and a half days' argument which followed, and from every point of view that I could I have weighed the evidence in all its bearings, as to weather, soil, drainage, cultivation, prices, dates, diseases, palatability of blighted fodder, wind, moisture, etc."

On the argument in these appeals, no exception was taken, on either side, to the very masterly analysis of the expert evidence given by Mr. Justice Middleton in the Supreme Court cases to which the learned trial Judge here refers. Indeed, it would be difficult to do so when that evidence is read and considered. That summary is, of course, a complete reflection of the views given by the experts and is not intended to be a pronouncement by Mr. Justice Middleton on the merits of the theory, or theories, propounded by them. This is necessarily so, as I have no doubt he followed the rule so well laid down by Lord Justice Bowen in *Fleet* v. *Managers of the Metropolitan Asylums District*, "The Times," 3rd March, 1886, also to be found in the life of Lord Bowen by Sir Henry Cunningham, at p. 162. It is as follows:—

"If we are to act in the present instance, we must fall back upon the opinions of experts, and I wish emphatically to state my

ONT.

S. C.

CANADIAN COPPER CO. v. LINDALA.

Hodgins, J.A.

view, that in a matter like the present, so far from thinking the opinions of experts unsatisfactory, it is to the opinion of experts that I myself should turn with the utmost confidence and faith. Courts of Law and Courts of Justice are not fit places for the exercise of the inductive logic of science. Life is short; it is impossible to place endless time at the disposal of litigants; and the laws of evidence are based upon this very impossibility of prolonging inquiries to endless length. There is hardly a scientific theory in the world which, if we were to examine into it in Law Courts, might not take year after year of the whole time of a tribunal. Supposing, for a moment, one had brought in question the circular theory of storms, and were to propose before a tribunal like this to examine it, not by reference to the opinions of the most experienced persons who have made it a subject of study and investigation, but to inquire ourselves into all the special circumstances of storms, with which witnesses could favour us, who had crossed the Atlantic or the Eastern Seas, in order to form our opinion, assisted, no doubt, by scientific men, as to the circular theory of storms, with all the qualifications which might be adopted, and with all the definitions in which it might be embodied. Take another instance of a law which is very far from likely to be accepted by science, but most probably would be rejected as pure theory, and as utterly beyond reason. I believe there are many persons in India who endeavour to connect the existence of famine raging over tracts of country with spots on the sun. Supposing that theory were brought up in an English Court of Law, we should be bound to embark on an endless inquiry into all the instances in which spots on the sun had been found to be coincident with famines in India. The truth is, when you are dealing with scientific theories, it is hopeless for Courts of Law to do more than to take the evidence of scientific men, subject, no doubt, to cross-examination, which may or may not condescend to particular instances, which may be brought home to them to shew, if it exists, the uncertainty of the grounds upon which their opinions are founded. The result of the admission of this evidence, assuming it, as I do, to be admissible, has been, in my judgment, to shew that the endeavour to utilise such evidence launches us upon an inquiry fit only for the leisure of learned and scientific men, but for which the jury system and the judicial system are probably inadequate."

In that case Lord Justice Bowen had come to the conclusion that the scientific evidence with regard to the theory of aerial transmission of disease shewed that the theory was still uncertain, and he deprecates the idea that Judges are competent to solve what scientific witnesses are unable finally to pronounce upon.

In these cases there is not only this scientific evidence, but the testimony given by those immediately concerned in the growing of crops on their farms, and knowing the climatic and atmospheric conditions, quality of soil, the resultant yield, that of other years, and other matters necessary to be considered here.

Many facts are adduced on both sides, some of which come in conflict with the scientific evidence of what is, or ought to be, the case. The learned trial Judge says:—

"On both sides the evidence was positive. I may add that I am well satisfied that all of these witnesses on both sides believed what they said. Deciding between them as to what really happened, I am led to the conclusion that I must find that sulphur smoke streams did reach these lands as described by those who said that they saw them, and also that the plaintiffs in each case suffered damage by injury caused to their farms. The reason for my so deciding is obvious. The witnesses who speak of what they see and feel are to be taken in preference to those who speak from signs that they see and the observations which they make after the events have happened."

In coming to this conclusion, the learned Judge has, I think, dealt with the scientific and other evidence properly and in accordance with the rule laid down many years ago in the case of *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), L.R. 1 Ch. 349, 353, where Lord Justice Turner made some observations which I herewith reproduce:—

"Speaking with all possible respect to the scientific gentlemen who have given their evidence, and as to whom it is but just to say that they have dealt with the case most ably and most impartially, I think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases of great value in aid or in explanation and qualification of the facts which are proved, but in my judgment it is upon the facts which are proved,

ONT.

S. C.

CANADIAN COPPER CO. v. LINDALA.

Hodgins, J.A.

and not upon such conclusions, the Court ought in these cases mainly to rely. I think so the more strongly in this particular case, because it is obvious that the scientific examinations which have been made . . . must have depended much upon the state of circumstances which existed at the times when those investigations took place." And at the end of the paragraph he adds: "In my view of this case, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts."

Mr. Justice Eve in *Liverpool Corporation* v. *H. Coghill & Son Limited*, [1918] 1 Ch. 307, follows the view there laid down, and makes some observations which I cannot help thinking apply within reasonable limits to these cases (p. 319):—

"More worthy of serious consideration were the questions put to the plaintiffs' experts seeking for their explanation of certain phenomena disclosed in their investigations, such, for example, as the length of time which elapsed before the damage became perceptible, and the undoubted fact that crops of distinct qualities were found to be growing on soil which, according to the analysis, contained the same percentage of borax. These questions admittedly present problems of which at the moment the solution is not wholly apparent, but I may say that the first one is founded upon assumptions of fact which I should by no means accept as established were the inquiry in which I am engaged a scientific one. For the purposes of this case the loose, vague, and quite untested evidence as to the length of time during which the effluent has been discharged on to the farm, its quantity and quality, and the times of its discharge, has been taken as sufficiently accurate, but no scientific investigator worthy of the title would treat it that the consistency of the effluent in these respects was proved to demonstration by the testimony of one man who was there, it is true, but who had nothing to do with and knew nothing about the effluent, even though corroborated by the evidence of another man who was not there at all."

I think that the same criticism, though in a different direction, may be made in this case, and that assumptions of fact have been made upon which much of the scientific evidence is based which have not been established with regard to the farms here in question. Especially is this to be borne in mind in view of the weight sought

to be attached to data, experiments, and conclusions made and reached under different conditions of soil, cultivation, and climatic conditions, in different States of the American Union.

[The learned Judge then made a detailed examination of the evidence, and concluded:]

Hodgins, J.A.

Upon the whole, I am not satisfied that the conclusions of the experts, urged before us as being undeniable and conclusive, go quite that far. They are, no doubt, accurate statements of opinions formed after careful investigation and experiment. But, as applied to the conditions existing near Sudbury, I am not entirely satisfied that they have deprived the respondents of any claim. We must be satisfied in cases such as these that the judgment appealed from is wrong. I am myself not so satisfied—nor indeed quite persuaded that the amounts allowed by the learned trial Judge are as large as might well have been given on the conflicting evidence produced. No such ground has been taken, and the result will therefore be the dismissal of the appeals. The costs below were given upon the proper scale. No question of title as such was involved.

Maclaren, J.A.

MACLAREN, J.A.:—I am of the opinion that the trial Judge adopted the proper principle in the assessment of the damages in these cases; and, he having seen and heard the witnesses, and there being evidence which, if believed, would justify each of the judgments in question, I am of the opinion that all the appeals should be dismissed with costs.

Magee, J.A.

MAGEE, J.A., agreed with HODGINS, J.A.

Ferguson, J.A.

FERGUSON, J.A. (after making a brief statement of the facts):—By consent of counsel, part of the opinion-evidence of experts heard by Mr. Justice Middleton at the trial of certain other actions, dealing with the other claims for damages to crops caused by sulphur fumes, and the opinion of Mr. Justice Middleton in those actions, were admitted as evidence in this action.

The appellants contend that the analysis of the expert testimony by Mr. Justice Middleton and his deductions therefrom and conclusions thereon are correct, and that on these deductions and conclusions the amounts awarded are not justified.

The respondents, while not agreeing to all the deductions made by Mr. Justice Middleton from the scientific testimony, urge that, even on the basis established by his opinion, they have

ONT.

S. C.

CANADIAN COPPER CO. v. LINDALA.

Ferguson, J.A.

made out injury and damage entitling them to hold the awards of the learned trial Judge. Mr. Justice Middleton formed his estimate of the injury and damage on the amount of visible bleaching. In these cases we have not samples of the different crops, but must depend on the oral testimony of the plaintiffs' witnesses as to both the nature and extent of the blight or bleaching. The appellants contend that the blight or bleach sworn to by many witnesses was the result of disease rather than the result of sulphur fume bleaching; in the case of the plaintiff Arthurs, they urge that the evidence shews that the sulphur fume bleaching was too slight to have caused any damage.

The appellants urge further that the learned trial Judge, while purporting to adopt and follow the conclusions of Mr. Justice Middleton, requiring as they do more than slight foliar markings to establish damage, erroneously assumed that some marking and damages followed each smoke visitation.

Mr. Justice Middleton made a very careful and exhaustive study of the scientific evidence, and I see no reason to doubt the correctness of his findings thereon, and I agree with him that on the scientific evidence the conclusion is inevitable that there must be with the smoke sufficient sulphur gas to cause more than slight foliar bleaching, before either injury or damage may be found; and, were I of the opinion that the learned trial Judge had proceeded on a different basis, I should be of the opinion that he had erred, but I do not so read his opinion. He says:—

"These witnesses spoke of the duration of the smoke as well as they could recollect it each time—the time of the day that it happened, *and of the blight which was* immediately visible after."

I cannot see how, in the absence of samples of the crops, this Court can reject as unreliable the oral testimony of blight which the learned trial Judge, who saw the witnesses, accepted, unless we conclude that the testimony establishes clearly that the bleaching sworn to resulted from disease and not at all from sulphur gases.

It is argued that, because fields or patches of crops, which are by nature more susceptible to injury from sulphur gas, escaped, while more hardy crops alongside were injured, that blight was not caused by sulphur gas; it is, however, conceded that the amount of blight or bleaching is materially affected by the condi-

tions of light, moisture and atmosphere, from which it would seem to follow that we cannot say that, because in exactly similar atmospheric conditions one kind of crop is more susceptible to blight and bleaching than another, all parts of a farm or field over which the sulphur gas passes must necessarily be affected according to the table of susceptibility to injury. One part of the crop smoked may have been on high dry land lying to the sun, while another part of the crop in the same field may have been on low land or on a slope lying away from the sunlight, resulting in different conditions of light, moisture, and atmosphere; therefore, while of the opinion that the scientific evidence affords a basis for the appellants' argument, I do not think that it establishes it—in this conclusion I think I am in agreement with Mr. Justice Middleton; for, while he says that "one would expect that the injurious gas would reach all in one plot alike," he does not go so far as to say that this is necessarily so.

The appellants' further objection to the finding is that the description of the colouring or shading of the colours establishes that the foliar markings described were the result of disease and not of bleaching from sulphur gas. No doubt the crops of the plaintiffs were affected by disease, and such disease is largely responsible for the crop failure complained of, but I cannot say that there was no evidence to support the learned trial Judge in his conclusion that "the crops of these several plaintiffs were smoked and gassed by smoke and gas from the roast-beds of these defendants, and that . . . blight therefrom was immediately visible after," or in his finding "that the sulphur smoke stream (gas) did reach these lands as described by those who say that they saw them, and also that the plaintiffs in each case suffered damage."

The diseased crops would not be benefited from gas visitations, and the question remains, how much were they damaged? The learned trial Judge has taken into account, as best he could, the disease, and materially reduced what he terms the unreasonable claims of the plaintiffs.

[Quotation from the reasons for judgment of the District Court Judge.]

The learned trial Judge seems to me to have taken into his consideration every item which should have been considered in

ONT.

S. C.

CANADIAN COPPER CO. v. LINDALA.

fixing the damages and in reducing the plaintiffs' several claims. I cannot say that he has erred in principle, and see no reason for disturbing the results.

I would, for these reasons, dismiss the appeals with costs.

Appeals dismissed.

ALTA.

S. C.

McKINLEY v. ACCOUNTING MACHINE Co.

RUSSELL v. TOOMBS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. April 21, 1920.

APPEAL (§ I—1)—MASTER IN CHAMBERS—DISTRICT COURT ACTION—ORDER—DISTRICT COURTS ACT, SEC. 24—JUDICATURE ORDINANCE, SEC. 27.

By sec. 24 of the District Courts Act (Alberta) the Master in Chambers was given certain jurisdiction in District Court actions. The right of appeal from his order is governed by the Judicature Ordinance, sec. 27; and since the passing of the District Courts Act (Alta.) 1907, ch. 4, the provisions for appeal have not been changed, and have been automatically extended to include the Judge of the same Court in which the Master was sitting in Chambers.

Statement.

APPEAL in the first case from an order of Winter, D.C.J., and in the second case from Walsh, J., and from the Master, in actions brought in the District Court.

H. H. Gilchrist, for McKinley.

A. McL. Sinclair, for Accounting Machine Co.

J. R. Paul, for Russell.

C. F. Adams, K.C., for Toombs.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—In each of the above actions, both in the District Court, the Master in Chambers at Calgary made an order under the authority of sec. 24a of the District Courts Act (1907), ch. 4, which provides that in District Court actions: "A Master in Chambers shall have power and 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 by a Judge of a District Court sitting in Chambers."

In the first case an appeal was taken to Winter, J., the Judge of the District Court in whose district the action was pending. In the second case an appeal was taken to Walsh, J., as a Judge of the Supreme Court in Chambers.

Winter, D.C.J., held that there was no appeal to him and referred the appeal to a Supreme Court Judge. Walsh, J., also held that there was no appeal to him as a Supreme Court Judge

in Chambers and that as it was brought before him in that capacity and not as acting for a District Court Judge he would not consider his jurisdiction in the latter aspect . . . In the former case the appeal is from the order of Winter, D.C.J., in the latter from Walsh, J., and from the Master.

In my opinion the whole question is settled by section 27 of the Judicature Ordinance.

That section was passed in 1913 (4 Geo. V. (Alta.), ch. 9, sec. 37), and authorized the appointment of a Master in Chambers and provided that "subject to Rules of Court an appeal shall lie from the decision of a Master in Chambers to a Judge in Chambers." This section authorizes the appeal and specifies the Appellate Tribunal leaving it to the Rules of Court to settle the procedure.

At the time the section was passed the Master in Chambers had jurisdiction only in the Supreme Court and under the section he was declared to be an officer of the Supreme Court with jurisdiction as defined by Rules of Court. At that time, therefore, a Judge of the Supreme Court was the only Judge who could be sitting in Chambers in the Court in which the Master was acting and would, therefore, be the Appellate Tribunal. Sec. 24a of the District Courts Act was passed a year later and by it the Master was given a jurisdiction in District Court actions which might be more or less than that conferred on him by Rules of Court in Supreme Court actions, but the provision for an appeal from him was not changed and it then automatically extended to include the Judge of the Court in which the Master was sitting in Chambers.

When the Act speaks of a Master in Chambers and a Judge in Chambers without more it would seem most unreasonable to consider that it meant anything but Chambers in the same Court. Then there is another consideration pointing to the same conclusion. By sec. 48 of the District Courts Act, appeals from a Judge of the District Court in Chambers are, speaking generally, limited to orders that are final and not interlocutory. In other words the Judge of the District Court is the final authority upon interlocutory matters. It scarcely seems reasonable that the Legislature after making this rule could have intended by a side step to give to a Supreme Court Judge and the Appellate

ALTA.

S. C.

McKINLEY v. ACCOUNTING MACHINE CO.

Harvey, C.J.

Tribunal from him the authority which it had before reposed in the District Court Judge. If so we would have the situation perhaps of this Appellate Division giving a decision which the District Court Judge could ignore with impunity and which if he followed he would follow out of courtesy and not because he was bound by it or because his contrary opinion could be reversed. But for the terms of sec. 27 of the Judicature Ordinance there might perhaps be no appeal but that section is general and appears to give an appeal in all cases.

I would, therefore, dismiss the appeal in the second case and allow the appeal in the first case and refer the appeal from the Master back to the District Court to be dealt with on the merits. Counsel have agreed that there shall be no costs of appeal in either case. *Judgment accordingly.*

ONT.

S. C.

GRAND TRUNK R. CO. v. DIXON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. February 4, 1920.

AUTOMOBILES (§ C—315)—HIRING OF CAR—OPERATED BY ONE AS SERVANT OR AGENT OF OTHERS—CONTROL OF CAR—COLLISION—CONTRIBUTORY NEGLIGENCE—DAMAGES.

Where a number of men, being desirous of taking a drive in a motor car, arrange with one of their number to hire a car from a garage and drive the car for the party, the person driving the car acts as agent or servant of his companions; all the men in the car are the persons in control of it, and one of the number who is injured in a collision cannot recover in face of a finding by a jury of contributory negligence. The rule as to non-identification of passenger with driver does not apply.

[*Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1, distinguished.]

Statement.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant from the judgment of the County Court of the County of Brant, dated the 7th October, 1919, which was directed to be entered on the findings of the jury at the trial, which took place on the 12th June, 1919.

The action is brought to recover damages for personal injuries which were sustained by the respondent owing to a collision between a motor-car in which he was and a train of the appellant, which was backing across a highway in the city of Brantford.

The respondent and four other young men, being desirous of taking a drive in a motor-car, arranged that one of them, Frank

Scott by name, should procure the car, which he did by hiring it from Pitcher's garage. Scott appears to have been the only one of the party who knew how to drive the car, and he drove it. The members of the party entered the car at the garage and proceeded to drive around the town. Nothing untoward occurred until, when driving down Market street, the car collided with a car of the backing train, causing the injuries to the respondent of which he complains.

The respondent's case was that the collision was caused by the failure of those in charge of the train to obey the statutory requirements as to the ringing of the engine-bell, the sounding of the whistle, and the stationing of a man on the rear of the car that was in front of the backing train. This was denied by the appellant, and it was contended that the accident was caused by the failure of those in the motor-car to take proper precautions before crossing the railway track and driving at an immoderate rate of speed down Market street, where the street slopes towards the track, to the track.

Questions were submitted to the jury. The questions and the jury's answers to them are as follows:—

Q. 1. Was the whistle sounded within 80 yards of the Market street crossing and was the bell being sounded continuously? A. We believe the whistle was sounded. We do not believe the bell was being sounded continuously.

Q. 2. Was a person stationed on the foremost part of the train? A. No.*

Q. 3. Could the accident have been avoided by proper care by those in charge of the auto? A. Yes.

Q. 4. What, in your opinion, was the primary cause of the accident? A. Negligence in not ringing the bell.

And questions and answers as to damages.

*The following provisions of the Railway Act, R.S.C. 1906, ch. 37, are applicable:—

274. When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least 80 rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

276. Whenever in any city, town or village, any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender if that is in front, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway.

ONT.

S. C.

GRAND TRUNK R. CO. v. DIXON.

Meredith, C.J.O.

Judgment was entered for the plaintiff for $381.20 and costs.

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

J. Harley, K.C., for respondent.

The judgment of the Court was read by

MEREDITH, C.J.O. (after setting out the facts as above):—It was contended by Mr. McCarthy that, upon the answers of the jury, the judgment should have been entered for the appellant, and it was argued by Mr. Harley that the principle of the *Bernina* case, (1888), 13, App. Cas. 1, was applicable: that Scott was the person in charge of the motor-car; and that the respondent's claim to recover was not affected by Scott's negligence.

The view of the learned County Court Judge was that the *Bernina* case was applicable, basing that opinion upon the proposition that the respondent "never had control" of the motor-car, "was not capable of taking control, knowing nothing about the operation of a motor-car, and trusted solely to Scott to do the driving."

If this were the correct view of the facts, I would agree with the conclusion of the learned Judge, but is it a correct view? I think not. My view is that the five men had the control of the motor-car. It was hired by them, although Scott was the one who acted for his companions as well as himself in hiring it. It was they who entrusted the driving to Scott.

In my opinion, the *Bernina* case has no application if Scott in driving the motor-car was acting as the agent or servant of his companions. That he was acting as their agent is clear, I think, because it is also clear that he was entrusted by them with the duty of driving the car. The five men in the motor-car were, in my opinion, the persons having the control of it, and I am inclined to think that that is what the jury thought, for their answer to the 3rd question is, that the negligence mentioned in the answer to the 4th question was by "those in charge of the auto," which is inconsistent with their view being that Scott alone was in charge of it.

I would, for these reasons, allow the appeal with costs, reverse the judgment, and substitute for it judgment dismissing the action with costs.

Appeal allowed.

RAWLINGS AND BALL v. GALIBERT.

CAN.

S. C.

Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 22, 1919.

PRINCIPAL AND SURETY (§ II—15)—ACCOMMODATION NOTES—REPRESENTATIONS BY PAYEE TO MAKER—ONE NOTE USED AS COLLATERAL TO ANOTHER—LIABILITY OF INDORSERS OF SECOND NOTE—ARTS. 1233 (1) AND 1955 C.C.

The indorsers of a promissory note given by a company to a bank for $15,000, who indorsed such note at the request of the company's president, and on the understanding that a second note for $10,000 would be pledged as collateral, thus making them liable for $5,000 only, are not co-sureties with the maker of the second note for $10,000, but sureties to the bank, and sole sureties for $5,000 only. The maker of the second note having given his note without placing any limitation on its use, gave authority to the company to use it as collateral for any purpose whatever, and this authority was lawfully exercised in imposing on the maker the obligation of indemnifying the indorsers against their indorsement to the extent of $10,000.

[*Dering* v. *Earl of Winchelsea* (1787), 1 Cox. 318; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160; *Duncan, Fox & Co.* v. *North & South Wales Bank* (1880), 6 App. Cas. 1, referred to.]

Statement.

APPEAL from a judgment of the Superior Court sitting in review at Montreal (1918), 55 Que. S.C. 516, affirming the judgment of the trial Judge, 55 Que. S.C. 516, at 518, and maintaining the respondent's action in warranty.

A. Falconer, K.C., and *C. G. Ogden*, K.C., for appellant.

J. L. Perron, K.C., and *A. Vallée*, K.C., for the respondent.

Idington, J.

IDINGTON, J.:—This action was brought by respondent to recover from appellants contribution as alleged co-securities with him for a debt due by Star Film Limited, a corporation carrying on a moving picture show in Montreal.

Appellants and respondent were respectively shareholders in said company. The respondent by reason of his holding of shares for a much larger amount than either of the others, as well as by reason of liabilities he had undertaken on behalf of the company prior to that now in question, was far more deeply interested in the company's success than either of the appellants, or indeed both together.

The pith of his story as to the transaction in question is told in the following passage from his evidence:—

Mr. Lubin wished first to discount a note of $20,000. I went to the office of the company along with Mr. Ecrèmont and another person. He wanted me to endorse the note. I refused. I said "I will never endorse the note. What I am prepared to do to help the company is this: I am prepared to give a note as collateral security to the bank, will you pledge your note for $10,000 to the bank?" I said "To help the business I will do that"

CAN.

S. C.

RAWLINGS AND BALL v. GALIBERT.

Idington, J.

We had at the bank the $150,000 of debentures and I thought myself perfectly secured.

At another part of his story he speaks as follows:—

Q. You have already stated in your examination on discovery that you did not see either Mr. Ball, or Mr. Rawlings in connection with this transaction? A. I never saw them. Q. You also stated in your examination on discovery that you had received $150,000 worth of the capital stock of the Star Films, Ltd., in consideration of lending the company your name to the extent of $10,000? A. I received $10,000 of bonds first of all, and 1,500 shares of the company's stock. Q. That is $150,000 worth of the capital stock of the company? A. Yes.

By the Court. Q. You obtained $10,000 worth of bonds? A. Yes.

By the Court. Q. How many shares? A. Fifteen hundred shares, amounting to par value $150,000 which I took as collateral to guarantee me in signing the note.

By defendant's counsel. Q. Did you not get that stock in consideration of indorsing this note? A. Yes. Q. But you were not to give those shares back to Mr. Lubin if the company paid its notes? A. No. Q. You were to keep the shares? A. Yes. Q. Did you receive those shares previous to the discount of the company's note of March 4, 1916? A. Yes, I had some shares of the Allied Features and some shares of the Star Film Co., Ltd., and Mr. Lubin bonded them all in one certificate of 1,500 shares. Q. You had already 1,833 shares? A. Yes. Q. Of which 1,500 shares came to you on this transaction? A. I had some before. Q. You had 1,833 before? A. Yes. Q. Fifteen hundred came to you from this transaction under your letter exhibit D-4 on discovery? A. Yes. Q. According to that letter you were to get 1,500 on account of this transaction? A. Yes, but I still maintain that those 1,500 shares comprised previous shares, but my book-keeper can tell you that. Q. Anyway, some of the 1,500 shares came to you in connection with this transaction? A. Yes, most of them. Q. Were those shares delivered to you before March 4, 1916? A. I could not say. I do not remember that. Q. In any event you obtained them? A. Yes. Q. Did not you get those shares delivered to you almost immediately after you signed the note? A. I do not remember, but I know I got bonds and these shares came after, as far as I can remember. In fact I attached very little importance to those shares as I knew the company was on the rocks, if we did not help them along. Q. That money you gave them to help them along? A. Yes. Q. And you got consideration for doing so? A. Yes, as they were insolvent.

Lubin was president and general manager of the company. He having thus got the $10,000 note which reads as follows

Montreal, Feb. 17th, 1916.

$10,000.

Four months after date I promise to pay to order of Star Films Limited, Ten Thousand Dollars at 26 Wellington Street, Montreal. Value received.

PAUL GALIBERT.

from respondent, moved by said several considerations to give same, approached each of the appellants and by shewing them said $10,000 note of respondent, a man well able to pay it, and

assuring them that it was given for good consideration and would stand between them and loss to the extent of $10,000, induced them to agree to indorse, merely as sureties, a $15,000 note of the company.

Both notes were used at the bank to obtain the desired loan.

The parties hereto never met each other, nor did any of them go to the banker who discounted said note, until at a later date when the company failed and the bank looked, of necessity, to these parties hereto for payment. As none of them seemed prepared to produce the cash, the bank dropped the company and took by way of renewals from the appellants their note for $15,000 and from respondent a renewal of his note concurrent therewith. And so the business was continued till appellants had paid the $5,000, which they had agreed to go surety for, and refused to pay more as the respondent's turn had come to meet the balance. Of course that could have been no answer in law to the bank.

The bank, however, no doubt recognizing from its knowledge of the transaction, and as I should say any business man would from looking at the fact of the transaction, and noting the original dates and being told how all these parties came to be co-sureties for $15,000, the justice of the appellant's contention, demanded payment from the respondent who refused until sued by the bank. Then he paid up and claimed to recover from the appellant.

The trial Judge allowed such recovery to the extent of one-third of $8,000 from each of the appellants.

In that regard he was upheld by the Court of Review. From that this appeal was taken and, I think, should be allowed.

I cannot understand upon what principle the judgment is founded.

The Judge, who writes the only notes of reasons appearing in the case, quotes largely from English authorities and indeed cites no other except art. 1955 of the Civil Code of Quebec.

I have no doubt that the law is identical, whether English law or French law as presented in said article is proceeded upon and that both are derivable from the same source.

The first puzzle is: Why, if the doctrine of common suretyship for the same debt (which was one of $15,000) is to prevail in enforcing contributions, the judgment did not proceed upon the recognition of these men becoming surety for the same debt, and

CAN.

S. C.

RAWLINGS AND BALL v. GALIBERT.

Idington, J.

why that debt was not assumed to be as it is contended the facts demonstrate a debt of $15,000, and each allotted an equal share of the burden to be borne which would have resulted in each being called upon to contribute $5,000?

Instead of that the result of the judgment appealed from is that whilst appellants each pay $5,166, the respondent only pays the sum of $4,666.33 of which he had got out of the said original joint transaction, $2,000, by being relieved to that extent of $20,000 for which he had become liable, long before appellants had anything to do with the liabilities of the company, save indirectly as shareholders.

That $2,000 item, and all involved therein, presents us with our next puzzle. As between the parties hereto it was respondents' debt, existent when they became indirectly in appearance concurrent sureties for the $15,000. The theory of concurrent suretyship for the payment of the said $2,000 part thereof is indefensible, if good faith is to be observed, and it should be eliminated. Then the debt for which each must be held to have become, though separately liable, yet joint sureties, would be $13,000.

In any event, on that theory of the total being the same debt, the third of $13,000 would be what each should have borne, and the respondent, have paid $3,333.33 and become entitled to call upon each of the appellants for the like sum.

But they had each by paying their share of the $5,000 already discharged their respective shares of the whole debt to the extent of $2,500 as against respondent's nothing.

The Courts below appropriate that $2,000 in the reduction of $10,000 which they seem to assume was "the same debt" for which in the language of the Code all the parties had become liable.

But why so assume? For surely "the debt of the same debtor" was $15,000, if anything is clear in this case. Of course the reply is: Oh, no, for respondent only agreed to go surety for $10,000.

Quite so; and appellant only agreed to go surety for $15,000 if and when, or so far as, the respondent should fail to meet the $10,000 he had agreed for good consideration prior to their assuming any responsibility to pay.

As the old saying has it: That is a poor rule that won't work both ways.

If the Court can examine the facts behind the appearances and take upon itself to appropriate that $2,000 to do justice in one way of looking at the situation, I most respectfully submit, it must go further and examine all the facts and thus find that the real situation involved not only the appropriation of that $2,000, but the application of the entire actual facts, and they demonstrate beyond peradventure that the parties never in fact intended to become or were sureties for the same debts of the same debtor but that the respondent was surety previously for $10,000 of the debt incurred and the appellants for $5,000 of it and no more unless and until he had failed to meet his prior obligation.

Moreover, when we bear in mind that Lubin had induced the appellants, by shewing them the note which respondent had given, and assuring them it was for good consideration, and their protection against the payment of more than $5,000, I fail to understand why the man who put the power in Lubin's hands of so misleading them, can thus be permitted to escape from the natural consequences of his placing it in Lubin's power to so mislead these others.

It seems to me respondent was thereby estopped from claiming relief against those his conduct had so misled.

This is in effect a suit to recover, at the call of him who had so misled, from those he induced to incur a responsibility; which, as regards him, they were assured he had assumed and would bear for himself.

It seems to me, with due respect to others, a very plain violation of the principles of justice which are what constitute the relevant law governing parties so concerned.

Article 1955 of the Quebec Civil Code relied upon is as follows:—

1955. When several persons become sureties for the same debtor and the same debt, the surety who discharges the debt has his remedy against the other sureties, each for an equal share.

But he can only exercise this remedy when his payment has been made in one of the cases specified in article 1953.

The obvious intention of each set of sureties was that respondent should be surety for the ten thousand and appellants for the balance of five thousand which they have discharged leaving respondent to bear that burden he faced and was paid for facing.

In other words, I repeat that on the true interpretation of the facts, these parties never were to become sureties for the same

CAN.

S. C.

RAWLINGS AND BALL v. GALIBERT.

Idington, J.

debt, and hence the claim does not fall within the provisions in said article.

I fail to see how the case of *The Oriental Financial Corporation* v. *Overend, Gurney & Co.* (1871), 7 Ch. App. 142, which decided only the question of a surety being discharged by an agreement to give time, can help herein.

Possibly it was argued before the Court below that because the surety was paid for his suretyship that he had not the ordinary rights of a surety to contribution.

To prevent misapprehension I may say that in my opinion the fact of being paid to act as surety does not of itself necessarily so affect the rights of the surety. But when we have to determine whether or not the sureties were such jointly for the same debt or only each to bear a relative part of the total debt, then it becomes a very weighty matter in order to ascertain clearly whether or not the sureties stood upon the same footing, to learn all that passed.

In this case the incidents of payment and other advantages which the prior surety had, and especially the significant fact that there was given respondent a corresponding amount of bonds equivalent to the sum guaranteed, ought, I submit, to go a long way in supporting the conclusion of facts I have reached. That is that as between the sureties respondent became alone surety for the last $10,000, and appellants alone co-sureties for the balance of the total of $15,000.

As I read Lord Blackburn's judgment in *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, at 19, cited by the Judge below, I think it supports what I have been urging against the non-observance of the principle there enunciated that "each shall bear no more than its due proportion." What was the due proportion? Certainly not what has been allotted to each herein.

Moreover, the partner there, as the shareholder here, deposited security to answer the debt. And the consequences of such act, in Lord Blackburn's view, appear on page 20, where he says:—

> And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of these bills, it seems quite clear that Samuel Collins Radford could not have come on the indorsers to repay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to pay the whole.

It seems to me that the bank having chosen to call upon respondent on his general security up to the sum of $10,000 and make him pay, he has no more recourse than said Samuel Collins Radford in Lord Blackburn's opinion might have had.

It has been clear ever since *Dering* v. *Earl of Winchelsea* (1787), 1 Cox 318, that the sureties whether known to each other or not are in equity bound to contribute and it has been equally clear ever since *Craythorne* v. *Swinburne* (1807), 14 Ves. 160, that a surety may contract himself out of such a liability by limiting his share.

The doctrine in each case rests not upon contract but upon the equities of the case.

Here it is quite clear upon the facts that it would be most inequitable to permit the respondent to call upon the appellants for that which they distinctly contracted against.

The cases upon the liabilities of co-sureties are collected in the notes to the *Dering* case, in White & Tudor's Leading Cases in Equity, vol. 1, part 1, and on this branch now in question at page 123 *et seq.* of the American edition in 1888.

The principle in its application to suretyship arising from accommodation indorsement presumes that the first of such indorsers has no recourse over against the later indorsers. And why? Simply that the acts of the persons so indorsing shew the relation they stand without any oral evidence.

The English law permits oral evidence in other cases to shew what the parties intended. Here the written evidence properly read shews that.

Of course it goes without saying that the relation as established at the origin of the transaction is what must govern and cannot be affected by what happens later unless there is an express contract changing the relationship for which latter case there is no foundation herein.

I think, notwithstanding second argument, the appeal should be allowed with costs and the respondent's action in warranty dismissed with costs.

ANGLIN, J.:—While they appear to have acceded to the admissibility of the parol testimony given at the hearing of this action and to have credited it, the trial Judge and the Judges of the Court of Review seem to me, with great respect, to have

Anglin, J.

CAN.

S. C.

RAWLINGS AND BALL v. GALIBERT.

Anglin, J.

failed to give effect to it. The respondent objected at the trial to the reception of the oral evidence given by the appellants as to the understanding in regard to the respondent's liability upon which their endorsement of the company's note for $15,000 was procured, and he now strenuously contests its admissibility. That evidence had relation to the respective obligations *inter se* of the appellants and the respondent. It was, in my opinion, testimony upon "facts concerning a commercial matter" admissible under article 1233 (1) C.C. It is neither contradictory of, nor inconsistent with, the obligations which the signatures of the parties to the promissory notes in question evidence, but is merely explanatory of the relations which existed between them, on which their respective rights and obligations depend. It established the authority given by Galibert, the maker of a promissory note for $10,000 in favour of Star Films Limited, to one Lubin, the president of the company, in regard to the use to be made of that note; and it shewed what took place between Lubin—both in his capacity of president of Star Films and as the quasi-mandatory of Galibert—and the appellants, Rawlings and Ball (indorsers of a note of the company for $15,000, for which the $10,000 note was pledged as collateral on its discount with the Provincial Bank) in regard to the manner in which the Galibert note would be dealt with and as to the rights and liabilities *inter se* of Galibert and of Rawlings and Ball.

So far as it goes to establish the nature and the scope of Lubin's authority from Galibert and what he did in execution of it, *Forget* v. *Baxter*, [1900] A.C. 467 at pp. 476 *et seq.*, would seem to afford conclusive authority for its admissibility. See, too, *Desrosiers* v. *Brown* (1907), 17 Que. K.B. 55. Although the civil contract of suretyship is, no doubt, the subject matter of the testimony in question, yet since it concerns liability on promissory notes discounted with a bank in the carrying out of what was undoubtedly a commercial transaction of a company engaged in commerce (Une entreprise de spectacles publics; 6 Mignault, Droit Civil, page 64), I cannot entertain any doubt of its admissibility. *Ibid*, note (e): *Ville de Maisonneuve* v. *Chartier* (1901), 20 Que. S.C. 518; *Hamilton* v. *Perry* (1894), 5 Que. S.C. 76; *Hibert* v. *Poirier* (1911), 40 Que. S.C. 405; *Banque d'Hochelaga* v. *Macduff* (1902), 14 Que. K.B. 390; *Scott* v. *Turnbull* (1883), 6 Leg. News 397.

What does the testimony establish? In the first place it shews that having refused to indorse Star Films' note for the $20,000, Galibert, for certain valuable consideration, gave to Lubin his own note for $10,000, made payable to that company, to be used "to help them (the company) finance the note of $20,000 (afterwards reduced by agreement with Galibert to $15,000), to help discount Star Films' note."

These are Galibert's admissions on discovery. There was no limitation placed on the use that Lubin might make of the Galibert note for the purpose indicated, except that Galibert's liability was to be collateral to that of the company.

Armed with this authority, Lubin approached the appellants (who had likewise refused to endorse the company's note for $20,000), informed them that the company held Galibert's note for $10,000 for valuable consideration, assured them that it was good for this amount, and agreed with them that, if they would indorse Star Films' note for $15,000 to enable him to discount it with the bank, he would pledge the Galibert note as Galibert's note would protect them as to the other $10,000. On this footing the appellants agreed to indorse the company's note which was duly discounted by the Provincial Bank, Galibert's note being pledged as collateral. While the appellants no doubt assumed liability for the entire $15,000 to the bank, the basis of their obligation as between themselves and Galibert was that, on Star Films' default, he should pay $10,000 and they $5,000. It was within the scope not merely of the ostensible, but of the actual, authority given by Galibert to Lubin that the latter might so use the $10,000 note as to commit Galibert to such an engagement and what took place between Lubin and the appellants should, I think, be regarded as having effected a contract between Galibert and them that he would indemnify them against their indorsement of the company's $15,000 note to the extent of $10,000. That I take to be within the intendment of the 7th paragraph of the plea of the defendants in warranty. If not, the facts having been fully gone into at the trial, I would allow whatever amendment may be necessary to raise that defence formally as equity would seem to require. Supreme Court Act, secs. 54, 55. This arrangement of the sureties' liability *inter se* in my opinion takes the present case entirely out of article

CAN.

S. C.

RAWLINGS AND BALL v. GALIBERT.

Anglin, J.

1955 C.C. They did not "become sureties for the same debtor and the same debt." As to $5,000 the appellants were sole sureties. As to the other $10,000 they were sureties to the bank, but not co-sureties with Galibert. They were rather sureties to the bank for him, *i.e.*, their obligation was to pay the bank on his default, while his obligation was to pay the bank in the first instance on the default of Star Films and to indemnify Rawlings and Ball should they be compelled to do so. This also accords with the English law applicable to a case such as this. See *Craythorne* v. *Swinburne*, 14 Ves. Jun. 160; *Re Denton's Estate*, [1904] 2 Ch. 178; *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733.

The Courts below, with respect, would seem to have overlooked the unlimited scope of the authority given by Galibert to Lubin to use the $10,000 note as collateral in any manner he might find necessary or deem advisable to enable the company to obtain the discount of its $15,000 note and the fact that the authority was lawfully exercised by Lubin to impose on Galibert the obligation of indemnifying Rawlings and Ball against their endorsement to the extent of $10,000.

What took place subsequent to the commencement of the liquidation of Star Films was not intended to alter or affect the existing rights and liabilities of the appellants and respondent *inter se*. Rawlings and Ball did not by signing the renewal note then required by the bank assume the position of principal debtors or otherwise increase their liability.

These were my views after the first argument of this appeal. Nothing advanced on the re-hearing, in my opinion, warrants modification of them.

I would allow the appeal with costs here and in the Court of Review and would dismiss the action in warranty with costs to be paid by the plaintiff to the defendants.

Davies, C.J.
Duff, J.
Brodeur, J.
Mignault, J.

DAVIES, C.J., and DUFF, J., concurred with ANGLIN, J.

BRODEUR and MIGNAULT, JJ., dissented.

Appeal allowed.

Re BAILEY COBALT MINES Ltd.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, J.A., Middleton and Lennox, JJ. January 19, 1920.

COMPANIES (§ VI—313)—WINDING-UP—WINDING-UP ACT, R.S.C. 1906, CH. 144—OFFER TO PURCHASE ASSETS—CONSIDERATION—PAYMENT OF CREDITORS' CLAIMS AND ALLOTMENT OF SHARES IN NEW COMPANY TO SHAREHOLDERS OF INSOLVENT COMPANY—POWER OF COURT TO SANCTION ACCEPTANCE OF OFFER—SEC. 34 (c) AND (h) OF ACT—APPROVAL OF LARGE MAJORITY OF SHAREHOLDERS—RIGHTS OF MINORITY—APPROVAL OF COURT.

Under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 34 (*c*) and (*h*), the Court has power, in the case of the compulsory liquidation of a company under that Act, to sanction the acceptance by the liquidator of an offer for the purchase of the assets of the company for a consideration other than a money payment and it is the duty of the Court to give effect to the wishes of the large majority of the shareholders by sanctioning the acceptance of the offer.

[*Re Cambrian Mining Co.* (1882), 48 L.T.R. 114, applied and followed.]

Statement

AN order having been made under the Dominion Winding-up Act for the winding-up of the affairs of the above-named company, and a reference for that purpose directed to the Master in Ordinary, an offer to purchase the assets of the company was made by one Alfred J. Young. The Master, on the 26th May, 1919, reported that he had refused to authorise the acceptance of the offer. There was an appeal from the report, and the appeal was dismissed by SUTHERLAND, J., on the 30th June, 1919: see *Re Bailey Cobalt Mines Limited* (1919), 16 O.W.N. 342.

On the 11th October, 1919, a further written offer was made by Alfred J. Young for the purchase of the assets; and that offer was approved by Mr. F. J. Roche, Assistant Master in Ordinary *pro tem.*, who had assumed the burden of the reference during the illness of the Master. Mr. Roche made a report, dated the 17th October, 1919, setting forth his approval of the offer. Certain shareholders of the company appealed from the report; and the liquidators moved for an order confirming the report or for a direction to them to accept the offer and carry out the sale; they also asked to have the order of reference amended by making the reference to Mr. Roche instead of to the Master in Ordinary.

November 19, 1919. The appeal and motions were heard by SUTHERLAND, J., in the Weekly Court, Toronto.

William Laidlaw, K.C., for the appellant shareholders.

R. S. Robertson, for the liquidators.

J. A. Macintosh, for the liquidator Langley personally.

G. H. Sedgewick, for creditors.

Frank Arnoldi, K.C., for a body of shareholders.

ONT.

S. C.

RE BAILEY COBALT MINES LTD.

Glyn Osler, for the Penn Canadian Mines Limited, a creditor, and for a body of shareholders.

T. J. Agar, for a body of shareholders.

C. W. Kerr, for a body of shareholders.

W. R. Sweeney (of New York), a shareholder and creditor, in person.

G. W. Adams, for A. J. Young, the maker of the offer.

December 8, 1919. SUTHERLAND, J.:—Since the judgment delivered by me herein on the 30th June, 1919 (16 O.W.N. 342), a further written offer has been made by A. J. Young, bearing date the 11th October, 1919, for the purchase of "all the assets of every kind and description of the Bailey Cobalt Mines Limited," the company in liquidation.

It is provided by the Judicature Act, R.S.O. 1914, ch. 56, sec. 76, sub-secs. 7 and 8, as follows:—

"(7) Subject to any order made by the Lieutenant-Governor in Council, the duties to be performed in the Supreme Court or in either Division of it or in a Divisional Court or in Chambers, in connection with the business therein, other than those to be performed by the Judges, shall be assigned to such officer as may be directed by the Rules and shall be performed by him.

"(8) Duties may be assigned to an officer in respect of business in either of the Divisions or in both of them, and every officer shall perform the duties assigned to him by the Rules, whether or not they appertain to the office which he holds."

It is also provided by sec. 77 of the said Act that:—

"(1) Every officer hereafter appointed shall, before entering upon the duties of his office, take and subscribe" an oath in a form therein set out.

Rule 759 is as follows:—

"All officers shall be auxiliary to one another for promoting the correct, convenient, and speedy administration of business."

And Rule 760:—

"In case of the absence or illness of any officer to whom any special duty is assigned (or of the office being vacant), the duty may be performed by such other officer as may be designated for that purpose by the Chief Justice of Ontario."

By an order of the Lieutenant-Governor in Council, bearing date the 11th December, 1915, provision was made for an Assistant

Master in Ordinary, and Rufus S. Neville, Chief Clerk and Accountant in the Master's office, was appointed Assistant Master pursuant thereto. He had been in ill-health in the fall of 1918, and by an order in council made on the 13th December, 1918, Mr. Roche, Clerk of the Non-jury Sittings, was appointed Assistant Master in Ordinary *pro tem.* during the illness of Mr. Neville. He continued to act in that capacity until the latter's death a short time ago. The Master in Ordinary had been in ill-health in the spring of this year, and in consequence Sir William Meredith, C.J.O., had on the 3rd May, 1919, given a written direction to the effect that "during the illness of Mr. Alcorn, Master in Ordinary, Mr. F. J. Roche is directed to perform his duties."

While it is no doubt the fact, and may be assumed, that Mr. Roche took the oath of office prescribed for all officers prior to their assuming office, he did not, it is admitted, take the same oath again before entering upon the duties of Assistant Master in Ordinary *pro tem.* It was suggested that this was obligatory, and his right to act at all was questioned before me. Instead of it being obligatory for him to take the oath again, I would regard it as a work of supererogation, and would attach no weight to this objection.

Under these circumstances, the offer of Mr. Young, upon notice, came up for consideration before Mr. Roche as "Assistant Master in Ordinary *pro tem.*, sitting for and at the request of the Master in Ordinary, and under Rule 760, on Friday the 17th October, 1919."

According to the record of the proceedings, the new offer varies from that previously made by Mr. Young, in that he, instead of the liquidators, is to incorporate the new company contemplated to be incorporated, which is to take over the assets of the company in liquidation and certain property of the Northern Customs Concentrator Limited referred to in the offer. The offer is also what is termed a firm offer as compared to the previous one.

Upon the reference it was urged on behalf of certain shareholders opposed to the acceptance of the offer, that the assets of the company should be put up for sale rather than that this or any offer of a similar kind be considered. This had already been the subject of discussion and divided opinion on previous occasions among the shareholders.

ONT.

S. C.

RE BAILEY COBALT MINES LTD.

The liquidators are "The Trusts and Guarantee Company and J. P. Langley." They had, on the 17th October, 1919, made a written recommendation to the effect that they had considered the offer in question, and the terms thereof, and had come to the conclusion that, "having in view the fact that it will, when accepted and the terms thereof carried out, provide for the satisfying of the claims of the creditors as well as the expenses of the liquidation, and of maintaining the property during the liquidation, and will also further preserve some interest in the property to the shareholders, and having further in mind the result of the vote of the shareholders at the meeting held for the purpose of considering a proposed agreement with the said A. J. Young for similar purposes, and the expression of opinion of the creditors at the meeting, the liquidators consider and recommend that the said offer should be accepted."

A request was made on behalf of the opposing shareholders that the liquidators should be examined for their reasons for making the said recommendation. The Assistant Master in Ordinary came to the conclusion, after, as he stated, "very careful consideration, that there had been ample opportunity to investigate, and that he could not see his way to permit further delay."

It had been represented to him that, though the Master had authorised the liquidators to raise money on a bond or debenture for $1,000, they had been unable to do so, and that they had no money to pay the wages of the caretaker of the property of the company in liquidation, and the payment of the insurance thereon. It was also said that the taxes were in arrear. The Assistant Master accordingly, on the 17th October, 1919, approved of the acceptance of the offer and directed the liquidators to carry it out, making a written order or report to that effect. It was duly filed. Thereupon, on the 23rd October, 1919, a motion was launched by a solicitor acting for certain shareholders opposing the acceptance of the offer, and purporting to act also for the liquidators by way of appeal from the said order or report. On the 27th October, 1919, a motion was also instituted by the solicitors for the liquidators to confirm the said order or report, or in the alternative for an order directing the liquidators to accept and carry out the offer.

By special leave, a further notice of motion was served by the solicitors for the liquidators for "an order amending the order

of reference made herein by referring this matter to the Assistant Master in Ordinary, instead of the Master in Ordinary, or for such other order as the Court may deem fit in the premises, on the ground that the Master in Ordinary is absent on leave."

After some enlargements these motions came on to be heard before me on the 19th day of November. At first, in view of the terms of the notice of motion by way of appeal from the said order or report, and the reference therein to my former judgment, I was disposed to think it would be better if I did not hear the motions, but enlarge them to be heard by the Judge who would be sitting next week. It appeared, however, that, owing to some connection he had had with the company in liquidation before his elevation to the Bench, it was not deemed appropriate for him to hear the motions. I then suggested that some other Judge, not otherwise occupied, might immediately be found who would hear the motions, and a short adjournment was made to endeavour to find one. Another Judge was found who consented to hear the motions, but objection was taken on the part of counsel for the shareholders appealing from the order or report in question, on the ground that such Judge was not the Judge to take the Weekly Court for this week. On this objection being taken, he declined to hear the motions. Such an objection appeared to me to be plainly one based on a desire to delay the hearing and disposition of the motions. Under these circumstances, and it appearing that there was no valid objection to my hearing the motions, I came to the conclusion that I should not decline to do so, but proceed to hear them. There can be but little doubt that great delay has already occurred in connection with the liquidation proceedings. There can be no question, either, that the matter is assuming a somewhat critical condition. No offer has been made by those opposing the acceptance of the present offer, though several months have elapsed since the former offer was dealt with and disposed of. It is said that meantime an offer was submitted, but it was made without prejudice and subsequently withdrawn.

I am of opinion that, in the new and different circumstances, and having regard to the variations in the terms and conditions of the present offer, it is in the interest of all parties that it should be accepted. I would be of the opinion that the Assistant Master

ONT.

S. C.

RE BAILEY COBALT MINES LTD.

in Ordinary had power to consider and deal with the offer, or that, if it was not properly brought before him, it could and should be referred back to cure any informality.

If I had come to a different conclusion, and were to deal with the matter as upon a substantive motion, and could otherwise see my way to do so, I would have felt disposed to make an order directing the liquidators to accept and carry out the offer. It was suggested upon the argument, however, that there was no authority in the Winding-up Act or otherwise for empowering a sale of the assets of a company in liquidation to be made, which involved the compulsory acceptance by even a minority of shareholders in the company of stock in a new company contemplated to be created, and to take over the assets of the company in liquidation, rather than receive their share, if any, of the proceeds of an out and out sale of the assets of the company.

Upon consideration I have come to the conclusion that this point is not so free from reasonable doubt as to warrant me in determining that the Assistant Master in Ordinary could properly approve of the acceptance of the offer in question or direct the liquidators to carry it out, or that I can make an order to that effect.

The winding-up proceedings began by an application under the Winding-up Act, R.S.C. 1906, ch. 144, for an order to wind up the company in question, which is one incorporated under an Act of the Province of Ontario. The application was granted and the order duly made. The proceedings have all gone on under the said order. Admittedly, there is no such provision in the said Act as was to be found in the Companies Act, 1862, in England, secs. 161 and 162, with respect to the powers of liquidators in the case of a winding-up altogether voluntary, and which provision is found also later in the Companies (Consolidation) Act, 1908, sec. 192, sub-secs. 1, 2, 3. The said section 161 provided that in voluntary winding-up proceedings the liquidator could, with the sanction of a special resolution of the company, receive shares in compensation in whole or part in another company to which the whole or part of the assets of the company in process of being wound up was proposed to be sold.

Section 162 provided a way by which dissentient shareholders might require the liquidator to abstain from carrying out the

resolution or purchase their interests at a price to be determined by agreement or arbitration.

It is argued that the Bailey Cobalt Mines Limited is a company incorporated under the laws of the Province of Ontario, and that the provisions of the Ontario Companies Act, R.S.O. 1914, ch. 178, apply, and that among these is that found in sec. 184 (1) and (2), taken from and similar to the said mentioned English Act, with respect to the power of liquidators to accept shares as a consideration for the sale of the property of the company to another company. It may be remarked that the offer in the present instance is by an individual who is to incorporate a company to take over the assets of the one in process of being wound up.

It was held in England, under sec. 95 of the Companies Act, 1862, when it was in force, that, where a company was being wound up not voluntarily but under the supervision of the Court, the Court, without any special resolution of shareholders, could sanction an arrangement which in case of a voluntary winding-up could only be given effect to with the sanction of a special resolution under sec. 161. The Court, however, gave to the dissentient shareholders the alternative of selling their shares as provided by secs. 161 and 162: *Re Cambrian Mining Co.* (1882), 48 L.T.R. 114; *In re Imperial Mercantile Credit Association* (1871), L.R. 12 Eq. 504; *In re Agra and Masterman's Bank* (1866), *ibid.* 509, note; Emden's Winding-up of Companies, 8th ed. (1909), p. 325.

Section 95 of the said Act empowered the liquidator "to do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets."

Kay, J., in the *Cambrian Mining Company* case said (p. 116): "I am not at all inclined to limit the generality of those words. The power is controlled by requiring the sanction of the Court, and it seems to me expedient, looking at the many complications that may arise in winding up the affairs of a company, to read this section as giving to the liquidator with the sanction of the Court, power to do anything that may be thought expedient with reference to the assets of the company;" and at p. 117: "If the company were being wound up altogether voluntarily, such an agreement could only be made subject to the conditions imposed by the 161st section. It seems to me that the Court,

ONT.
S. C.
RE BAILEY COBALT MINES LTD.

being called upon to sanction such an agreement under sec. 95, should impose upon the company, who are vendors asking for the sanction of the Court, the obligation of giving to dissentient shareholders the alternative of selling their shares in manner provided by that section, as was done in *In re Imperial Mercantile Credit Association*, L.R. 12 Eq. 504, and *In re Marine Investment Co., Ex p. Poole's Executors* (1873), L.R. 8 Ch. 702."

It is argued that, as the Winding-up Act, R.S.C. 1906, ch. 144, also contains a provision, namely, sec. 34, clause (*h*), authorising the liquidator, with the approval of the Court, to "do and execute all such other things as are necessary for winding up the affairs of the company and distributing its assets," and as the provisions of the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 184 (1), (2), should be held to apply to this company, and the two Acts read together and treated as supplemental for the purpose of these proceedings, the Court should have power to sanction the acceptance of the offer in question and to direct the liquidators to carry it out.

In the English Act under which the *Cambrian Mining Company* case was decided, the several provisions were contained in the one Act. I am unable to come to the conclusion that it is clear that under the order made under the Dominion Winding-up Act the provisions of the Ontario Act can be said necessarily to apply. There should be clear statutory authority to compel minority shareholders to accept shares in another company in place of a share in the proceeds of a sale for cash.

I am of opinion, therefore, not without some doubt and difficulty, that the offer in its present form cannot properly be accepted by the liquidators; that the Assistant Master in Ordinary could not properly approve of its acceptance or direct the liquidators to carry out its terms. I am also of opinion that I cannot make such an order.

The appeal from the order or report of the Assistant Master in Ordinary is therefore allowed, and the motion to confirm said order or report or refer it back to the Assistant Master in Ordinary for his consideration, in place of the Master in Ordinary, to whom the reference was originally made, and the motion to treat the matter as a substantive motion, are dismissed.

I think, under all the circumstances, I will make no order as to costs.

The liquidators moved for leave to appeal from the order of SUTHERLAND, J.

December 11. The motion was heard by LENNOX, J., in the Weekly Court, Toronto.

Sedgewick, for the liquidators.

Arnoldi, K.C., in the same interest, for certain shareholders.

Laidlaw, K.C., for the successful appellants before SUTHERLAND, J.

G. R. Munnoch, in the same interest, for the Penn Canadian Mines Limited, a creditor, and for a body of shareholders.

December 12. LENNOX, J.:—The proceedings are under the Winding-up Act, R.S.C. 1906, ch. 144. The motion is by the liquidators for leave to appeal from an order or decision of Mr. Justice Sutherland of the 8th December instant, setting aside or disallowing the report of the Assistant Master in Ordinary *pro tem.* as to the disposal of the assets of the company.

Mr. Laidlaw insisted upon arguing at very great length as to the inadvisability and impropriety of the proposed disposal of assets, and that it is identical with an earlier proposal which the Court at that time refused to sanction. I am satisfied that it is not identical, nor substantially the same. The Master in Ordinary reported against acceptance of the first offer, and this was affirmed. Of the three objections urged when the order now sought to be appealed was made, this was not one, as it would certainly have been had it been open to the then appellants—an objection going to the root of the whole matter. Summarised the objections on the 8th December instant were:—

(a) That Mr. Roche, the acting Master in Ordinary, had no jurisdiction. The decision of Mr. Justice Sutherland was that Mr. Roche had jurisdiction.

(b) That the Act does not authorise the disposal of the property in the way proposed. With some hesitation, as I interpret his judgment, Mr. Justice Sutherland came to the conclusion that the Act gives no authority to sell or dispose of the assets in the way proposed.

(c) The objection so persistently dwelt upon to-day, namely, the improvidence and impropriety of the proposed transaction. Mr. Justice Sutherland came to the conclusion that it was not an improvident transaction; on the contrary, he regarded it as

ONT.

S. C.

RE BAILEY COBALT MINES LTD.

a provident arrangement *per se*, and, owing to the complete lack of money, even for payment of taxes, practically imperative. This finding is not impeached, and in the decision I shall come to this question does not arise.

My jurisdiction is purely statutory, and is to be exercised under the provisions of Rule 507 or sec. 101 of the Winding-up Act, or the two combined. If Rule 507 applies to the present application, either alone or conjointly with sec. 101, I must not allow an appeal unless, in addition to the importance of the questions raised, there is, in my opinion, good cause to doubt the correctness of the order or decision of the learned Judge. I cannot say that there is. In my opinion, it is decidedly a debatable question—uncertainty is not in this case the exact equivalent of doubt—and, although I think it eminently desirable that the question involved in the judgment should be definitely set at rest at an early date, by the decision of an appellate Court or by legislation, an opinion in which I know my brother Sutherland distinctly concurs, I cannot of course allow this feeling to influence me in deciding the motion. Counsel were not able to refer me to any authority as to the exact source of my jurisdiction, and I know of none governing the case I have here. I have therefore to rely on my own interpretation of the two provisions. Rule 507 provides only for appeals from the decision of a Judge in Chambers—this is the decision of a Judge sitting in Weekly Court, and the Rule excepts cases where a right of appeal is specially conferred. I am of opinion that it does not apply either alone or conjointly with sec. 101, and that I have power to grant leave under that section. "Court" means (i) in the Province of Ontario, the High Court of Justice, by sec. 2. Section 101 says:—

"Except in the Northwest Territories, any person dissatisfied with an order or decision of the Court or a single Judge in any proceeding under this Act may,—

"(*a*) If the question to be raised on the appeal involves future rights; or,

"(*b*) If the order or decision is likely to affect other cases of a similar nature in winding-up proceedings; or,

"(*c*) If the amount involved in the appeal exceeds five hundred dollars;

by leave of a Judge of the Court, appeal therefrom."

These provisions are disjunctive.

Mr. Sedgewick referred me to *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 32 D.L.R. 441, 38 O.L.R. 3, as to the meaning of "future rights." Clauses (*b*) and (*c*) clearly apply. I have already referred to the importance of the question, and there can be no doubt as to the decision affecting similar cases likely to arise under the Winding-up Act.

An order will go for leave to appeal, with costs to the successful party upon the appeal, unless the Court of Appeal otherwise orders.

The liquidators' appeal was set down, pursuant to the leave given by LENNOX, J.

R. S. Robertson, for appellants.

J. A. Macintosh, for the liquidator Langley personally.

G. H. Sedgewick, for creditors.

Arnoldi, K.C., for a body of shareholders.

T. J. Agar, for a body of shareholders.

C. W. Kerr, for a body of shareholders.

Laidlaw, K.C., for the respondent shareholders supporting the order of SUTHERLAND, J.

Munnoch, for a creditor and certain shareholders, in the same interest as the principal respondents.

The judgment of the Court was delivered by

MIDDLETON, J.:—Appeal by the liquidators from the order of Mr. Justice Sutherland, pronounced on the 8th December, 1919, allowing an appeal by certain shareholders represented by Mr. Laidlaw from an order or report of the acting Assistant Master in Ordinary, accepting an offer dated the 11th October, 1919, by A. J. Young, to acquire the assets of the company upon the terms therein set out, and dismissing an application made by the liquidators for an order to the like effect. Middleton, J.

Much discussion in the Court below was directed to the regularity of the appointment and action of the Assistant Master in Ordinary, and a substantive motion was made to obviate any technical difficulty that might thus arise. These matters are satisfactorily dealt with by the judgment in review, and were not argued before us.

The sole question argued was the power of the Court to deal with the assets of the company in the manner proposed and the desirability of accepting the offer.

ONT.

S. C.

RE BAILEY COBALT MINES LTD.

Middleton, J.

Under the provisions of the Winding-up Act (R.S.C. 1906, ch. 144, sec. 34), the liquidator may with the approval of the Court "(c) sell the real and personal and heritable and movable property effects and choses in action of the company by public auction or private contract and transfer the whole thereof to any person or company or sell the same in parcels. . . .

"(h) do and execute all such other things as are necessary for winding up the affairs of the company and distributing its assets."

These clauses, save immaterial and very trifling verbal differences, are identical with the provisions of sec. 95 of the Companies Act, 1862, considered by Mr. Justice Kay in *Re Cambrian Mining Co.*, 48 L.T.R. 114.

It was there contended, as has been argued before us, that the liquidator was only empowered to sell for cash, and that in a compulsory liquidation the majority shareholders could not compel the dissentient minority to accept a scheme or arrangement by which the assets of the company in liquidation were to be turned over to a new company in consideration of shares in the latter.

Mr. Justice Kay, after quoting the provision of sec. 95, similar to these quoted from our statute, said:—

"I am not at all inclined to limit the generality of those words. The power is controlled by requiring the sanction of the Court, and it seems to me expedient, looking at the many complications that may arise in winding up the affairs of a company, to read this section as giving to the liquidator with the sanction of the Court, power to do anything that may be thought expedient with reference to the assets of the company."

In the English Act there were provisions which related only to a voluntary winding-up that required a majority seeking to impose its will upon a minority to purchase the shares of the minority at a valuation, and it was thought proper to impose similar terms in the case then in hand.

This decision has never been questioned, and is referred to in text-books of high authority as establishing the practice, and I think may be taken as justifying the view that the Court has power to sanction the offer under consideration.

It remains to consider whether the offer should be accepted. In substance it provides for the turning over of all the assets to

a new company; this company will pay the creditors in full, the largest creditor limiting his claim to a fixed amount; shares in the new company will then be given to the shareholders of this company. The creditors welcome the offer, as it procures them payment in full when they expected a loss. The shareholders —save the few represented by Mr. Laidlaw—are anxious to accept, for in this they see their only chance to obtain anything. The minority—putting the matter bluntly—seek to prolong litigation in the hope that some one may be forced to buy them off or may be induced to do so for the sake of peace. This is not presented nakedly, but under a thin cloak of optimism and many charges of fraud and misfeasance against those having the largest claim as creditors, for here truth could not appear naked and remain unashamed.

The other creditors and shareholders prefer the speedier and more certain solution proposed to the prospect of long drawn out and highly problematical litigation. The attacked creditors make some concession in reducing their claim, perhaps not as much as, in the opinion of some, they ought to do, but they will go no further. Mr. Laidlaw's clients propose no alternative save a cash settlement with them. They can procure no better offer, and ask the Court to compel the great majority of those concerned to throw away the substance in an attempt to grasp that which seems very like a shadow—though called a hope and an expectation.

I adapt the words found in the judgment already referred to, and think that when a very large majority of the shareholders desire that the offer should be accepted, it is the duty of the Court to give effect to their wishes.

Then should terms be imposed? There is nothing in our statute analogous to the provisions which guided Mr. Justice Kay—on the contrary, there is the provision in the Ontario Companies Act, under which the company was incorporated, by which the company has power to "sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of the company," if authorised by the vote of two-thirds of the shareholders of the company: sec. 23 (*m*).

ONT.

S. C.

RE BAILEY COBALT MINES LTD.

Middleton, J.

This ought to be the guide, if there is to be any guidance by analogy, rather than a provision in an English Act not found in our own.

But I would go further and would determine that the shares were always subject to this control by the majority, and that the liquidation did not destroy this charter provision, but made it subject to the approval of this Court and the superior rights of the creditors.

The appeal should be allowed, and the matter should be referred back to the Master to carry out the sale. The liquidators should have their costs out of the assets. No other order should be made as to costs. *Appeal allowed.*

ALTA.

S. C.

DUGGAN v. FRANCO-BELGIAN INVESTMENT Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Beck, Ives, and Hyndman, JJ. March 5, 1920.

VENDOR AND PURCHASER (§ I C—13)—SALE OF LANDS—NO EXCEPTION OF MINERAL RIGHTS—OBJECTION TAKEN TO TITLE BY PURCHASERS—SUIT FOR SPECIFIC PERFORMANCE—REFERENCE TO MASTER—COMPENSATION.

Where the vendor seeks to enforce his contract, for the sale of land, he must make a *bonâ fide* effort to acquire any outstanding interest before he is in a position to force the purchaser to accept compensation by way of an abatement in the purchase money.

[*Innis* v. *Costello* (1917), 33 D.L.R. 602, 11 Alta. L.R. 109 at 115; *Crump* v. *McNeill* (1918), 14 Alta. L.R. 206, referred to.]

Statement.

APPEAL by defendants from the trial judgment which decreed specific performance with abatement of purchase price and ordered a reference to ascertain the amount of compensation. Affirmed with certain modifications.

A. U. G. Bury, for appellant; *S. W. Field*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Beck in his disposition of these appeals and in the main with his reasons but desire to add a few words. In *Greer* v. *Clark* (1916), 27 D.L.R. 699, 9 Alta. L.R. 535, and *Pugh* v. *Knott* (1917), 36 D.L.R. 52, 12 Alta. L.R. 399, referred, to the vendor, was in a position before judgment was given, to convey all he had agreed to convey. In the present case the plaintiff is not even now in such a position but in other respects this case is also quite different. The purchasers have accepted the title to a considerable portion of the property and are therefore not in a position to repudiate and obtain rescission. The title of the remainder is in exactly the same condition as of

that which was accepted as a full performance of the contract *pro tanto* without any exception being taken. It is not, therefore, in my opinion competent to the purchaser now to maintain that the defect is one of substance for which compensation cannot be made, but that has been their whole defence to the plaintiff's claim.

The land in question consists of 88 scattered lots in some suburban subdivision. Of these 18 have been transferred to the defendants or their appointees by 3 different transfers and the defendants have entered into 19 agreements with other persons for the sale of 23 other lots. It is apparent, therefore, that by reason of the defendants' conduct there can be no rescission nor, without prejudice to the rights of third parties, cancellation in any other form. Thus while the plaintiff or rather the person through whom it claims is at fault the defendants have deprived themselves of the right to take full advantage of that fault. Their counsel admits that the minerals, if any exist, are of value to the defendants only as support and this seems almost self evident. He dwells however at great length on the detriment to the land by reason of the right of some one else to take away this support.

This is the sort of value referred to by Fry on Specific Performance of Contracts, (4th ed.), page 525, par. 1219 where it is stated:

> In some cases a part of the estate contracted for may be material because, if any one else were to possess it, it would probably be turned to some purpose prejudicial to the enjoyment of the estate . . . But the nuisance thus apprehended must be probable, and not merely distant, fanciful, and conjectural.

This would raise a doubt whether even if the defendants had done nothing to prevent them restoring the property they could come within the principle of *Innis* v. *Costello* (1917), 33 D.L.R. 602, 11 Alta. L.R. 109, at 115, where the land was of such a character that the minerals were deemed to be a material part of the property bargained for. But as I have said in my opinion the defendants by their own acts have deprived themselves of the right to escape from the obligations of the contract but they can require the plaintiff to convey what was agreed to be conveyed or make compensation for any deficiency.

The chief objection to the Master's report was that he put on the defendants the burden of shewing how much compensation they were entitled to. It appears to me that that ought to be looked at rather as a privilege than as a burden. If they are not

ALTA.

S. C.

DUGGAN v. FRANCO-BELGIAN INVESTMENT CO.

Harvey, C.J.

interested in making it of some consequence certainly no one else is and I fail to see that the plaintiff could be expected to shew that the minerals were of any value. It would no doubt be quite ready to admit that they had no value.

The case of *Powell* v. *Elliott* (1875), 10 Ch. App. 424, 33 L.T. 110, is interesting in this regard and somewhat instructive. The action was for specific performance, the defence was misrepresentation and there was a cross-action for rescission. The misrepresentation was established before the Vice-Chancellor who on account of the great difficulty of laying down any principle for estimating compensation thought the contract should be avoided though appreciating that by reason of the defendant having taken possession and worked the property difficult investigation would be necessary.

On a re-hearing the Lord Chancellor held that if the purchasers were entitled to anything it was not rescission but compensation. The Court of Appeal upheld him and fixed the compensation though it was by no means a simple matter to estimate. The compensation for the loss or depreciation of the minerals however is a comparatively simple matter. In the ordinary case it would be their value, in other words, what it would cost to acquire them or the right to them if they exist.

Beck, J.

BECK, J.:—I would affirm the decision of Stuart, J., with a modification and set aside the order of the Master.

Several of the recent cases decided by this Appellate Division regarding the rights of vendor and purchaser under instalment agreements were referred to in the course of argument. *Innis* v. *Costello*, 33 D.L.R. 602, 11 Alta. L.R. 109, at 115, must I think be taken to be the statement of a general proposition which this Court has consistently adhered to and which was considered to be applicable without exception to the facts there appearing. That there might be exceptions to that general rule under exceptional circumstances was asserted by this Court in *Universal Land Security Co.* v. *Jackson* (1917), 33 D.L.R. 764, 11 Alta. L.R. 483; *Pugh* v. *Knott*, 36 D.L.R. 52, 12 Alta. L.R. 399, and an earlier case *Greer* v. *Clark*, 27 D.L.R. 699, 9 Alta. L.R. 535, are instances in which the same Court gave effect to exceptions. *Crump* v. *McNeill*, 14 Alta. L.R. 206, [1919] 1 W.W.R. 52, which the trial Judge followed, expressly follows all the cases just cited. There is no inconsistency between them.

This last case was specially referred to in the course of the argument. The head note so far as material to what is in question in this action correctly expresses the law as follows:

"If a vendor agrees to sell land without excepting the coal therein which is not included in his title, the purchaser, in the absence of waiver, is entitled to the coal or its value, and if he cannot ask for rescission by reason of the impossibility of *restitutio in integrum* he is entitled to compensation.

Purchasers of land were held entitled to compensation for the absence of title to coal under some of the lands sold to them. As to certain lots, included in the agreement of sale, which, under arrangement, had been transferred by the registered owner to sub-purchasers, the purchasers were held to have accepted title and not to be entitled to compensation."

Crump v. *McNeill*, *supra*, was a case of a vendor seeking specific performance and of a purchaser who did not ask for rescission owing to defects in the plaintiff's title but only for compensation by way of abatement of the price; but it is quite clear from the cases already referred to and to numerous other English and Canadian authorities that a plaintiff vendor may, in such cases as are pointed to in *Pugh* v. *Knott*, *supra*, be entitled to enforce specific performance, if he submits to an abatement or better still removes the defect in title, notwithstanding an attempted repudiation by the purchaser.

This being so the case of *Crump* v. *McNeill* is applicable to the present case.

I think therefore the decision of Stuart, J., was substantially right. He directed however a reference to fix the compensation which the purchasers should be entitled to set off against the unpaid portion of the purchase money.

The Master found that the defendants (the purchasers) had failed to prove that there was coal underlying the land in question or any portion of it and therefore held that there was no amount of compensation payable to the defendants. The Master held the onus of proof to be upon the purchasers. The reasons given by the Master would indicate to me that the evidence shewed that there was in fact coal under the land, but that its value for operating purposes was incapable of ascertainment without expensive boring operations.

ALTA.

S. C.

DUGGAN v. FRANCO-BELGIAN INVESTMENT CO.

Beck, J.

It is to be remembered that counsel for the purchasers in dealing with the question of compensation urge that it is not a question of compensation for not getting the mining rights as being valuable to them for commercial purposes but a question of a serious defect of title inasmuch as the mining rights may some time be found to have commercial value and consequently be worked with danger not to the soil in its natural state—for that would it seems not be within the rights of the owners of the mining rights—but to any buildings which might be erected upon the lands in question, which in fact have been subdivided into lots and blocks.

It appeared on the argument before us that the mining rights can probably be acquired at a price quite small in comparison with the purchase price of the land.

As was pointed out in *Pugh* v. *Knott, supra*, getting in the title to the interest in respect of which compensation is claimed is of course the best means of meeting the purchaser's objection.

In such a case as the present, where it is to be especially remarked that it is a case of a vendor seeking to enforce his contract while he himself is at fault, I think the Court should impose upon the vendor an obligation to make a *bonâ fide* effort to acquire the outstanding interest before being in a position to force the purchaser to accept compensation by way of an abatement in the purchase money especially where as here the value of the interest can be ascertained only at great expense and at the risk of loss of the expenses of investigation.

If the vendors can acquire the title to the mining rights at a reasonable figure I think they ought to be compelled to do so. If after a *bonâ fide* effort to do so they cannot acquire them at a reasonable figure whether or not it is owing to the owner of those rights "holding them up," then the Master if driven to fix compensation should take what has occurred in relation to the attempted purchase as some evidence on the question of the value of the mining rights.

I would therefore modify the judgment by directing the Master to find the proper amount of compensation to be allowed to the purchasers only after the vendors have shewn that after *bonâ fide* efforts they have failed to acquire the mining rights at a reasonable price and that in case he has ultimately to find the amount of

compensation he shall in doing so take into account all evidence relating to the negotiations for the acquiring of the mining rights.

This in a sense at least will throw the onus of proving the proper amount of compensation upon the vendor, especially where, as here, he is asking for specific performance, that is, of a contract in which he admittedly is at fault.

In most cases, if the principles above suggested are invoked it is likely it seems to me that the parties will themselves adjust the difficulty, and in case they do not do so the duty of the Court or a Referee will be comparatively easy to discharge.

In the result the judgment appealed from should be affirmed with the modification above indicated, and the Master's order should be set aside. There should I think be no costs of the appeal. The appellants should have the costs already incurred before the Master. All costs should be made items of account between the parties.

Ives, J.

IVES, J. (dissenting):—The plaintiff's action is for specific performance of an agreement for sale of lands. The defendants deny the right to the remedy claimed, they do not in turn ask for any relief whatsoever.

The agreement sued upon is dated July 7, 1912. Wm. J. McNamara is the vendor and the defendants are the purchasers. The subject matter of the sale consists of some (80 or 90) building lots scattered about in what is known as the Belvedere subdivision of the City of Edmonton. The purchase price is stated as $17,800. It contains a provision whereby the vendors undertake to give transfer to the purchasers for any lot or number of lots upon the payment of $200 per lot.

On August 15, 1913, McNamara assigned all his interests as vendor to these plaintiffs. The agreement of sale contains no exceptions to or reservations of the title except as contained in the original grant from the Crown. The original Crown grant did not reserve the coal. Admissions are filed wherein plaintiffs admit that neither they nor McNamara now have or ever had the coal or any part of it and that neither they nor McNamara are able to convey the coal and have no right to acquire it.

The defendants have paid some $11,000 of the purchase price and have received transfers for some 18 lots. On March 28, 1918, they repudiated the agreement.

ALTA.

S. C.

DUGGAN v. FRANCO-BELGIAN INVESTMENT CO.

Ives, J.

In view of the terms of the agreement sued upon, and plaintiff's admission they are clearly not entitled to a decree of specific performance. Are they so entitled if compensation to defendants is adjudged? And it must be borne in mind that it is not the purchasers who are asking this. The cases dealing with the right granted here clearly distinguish between the rights of a vendor and a purchaser where the vendor cannot perform by reason of the defect in title but the purchaser may insist upon performance with compensation.

It would seem to me that the language used by the trial Judge when he wrote the judgment of this Court in the case of *Innis* v. *Costello*, (1916), 27 D.L.R. 711, 11 Alta. L.R. 109, is exactly applicable here.

In that case the purchasers had repudiated on the ground that the vendors had not title to the coal, the vendors got in the title however, and then brought an action for specific performance. Hyndman, J., ordered specific performance but in the course of his judgment said that in the absence of title to the coal it was a case where specific performance with compensation should be adjudged. The judgment was reversed, 33 D.L.R. 602, 11 Alta. L.R. at 115, and this Court says, 33 D.L.R. at 603:—

> It is well settled—too well settled in this Court to re-open the question now—that a purchaser who discovers that his vendor has not the title which he agreed to convey, and has no right to demand it from any third person, may, if he acts promptly, repudiate the contract, and demand back and recover in the Court the money he has paid.

And the Judge of appeal continues throughout in language exactly applicable in the present case. I apprehend that the only exception that can be taken to my statement is upon the question of waiver urged in the present case. Upon that issue it need only be said that the only waiver which the trial Judge finds is in connection with the lots actually transferred, and for the purpose of this appeal, I think it necessary to argue the correctness of that finding. In order that waiver may enable the plaintiff to succeed here it must be held to be a general waiver applicable to the unconveyed lots, and this the trial Judge—very properly, I think—refused to do upon the evidence.

In reading the judgment of the trial Judge it would seem that at the time he had it in mind that inasmuch as it was a case where rescission could not be granted the agreement should be performed

with compensation. But the effect of such a judgment, in the absence of a general waiver, forces the defendants to accept what they never contracted to buy. The vendor must be held responsible for the description of the subject he owns and contracts to sell. If when the time comes he cannot deliver, the Courts will not permit him to substitute. They will overcome an immaterial inaccuracy by compensation, which is very different.

Ives, J.

Nor do I see that the principle adopted where a partial benefit under a contract has been accepted is applicable here, because this contract is a divisible one. It comes exactly within the language used in the case of *Wilkinson* v. *Clements* (1872), 8 Ch. App. 96, 27 L.T. 834.

By the terms of the contract defendants' right to have transfers of individual lots depended only on conditions that have been fulfilled without assuming obligations under the entire contract. Clearly the contract itself contains a provision for its piecemeal execution.

As to the appeal from the Master in Chambers who ruled upon the reference ordered that the burden of proving the existence of coal and its value was upon the defendants, I think such ruling was wrong and for reasons clearly expressed in *Innis* v. *Costello*.

I would allow the appeal with costs and dismiss the action with costs. The agreement sued upon should be cancelled as to the unconveyed lands. The plaintiffs should also pay the costs of the reference.

HYNDMAN, J., concurs with HARVEY, C.J.

Hyndman, J.

Appeal dismissed.

BREHAUT v. CITY OF NORTH BATTLEFORD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, and Lamont, JJ.A. March 30, 1920.

TAXES (§ II D—137)—JOINT INTEREST—ASSESSED FOR GREATER OR OTHER THAN REAL INTEREST—PROCEDURE.

Where a person has a taxable interest in property assessed, but is assessed for a greater interest than or different from his real interest, or where he is entitled to have the name of some other person joined with his own in the assessment, his proper course is to appear before the Court of Revision, and if he fails to do so, the roll as finally passed will be binding on him. But the city cannot by assessing property to a person who has no interest therein make it obligatory on that person to appeal to the Court of Revision.

[The City Act (1915), Sask. Stats., ch. 16, secs. 393 (3), 387(7) and 406, discussed.]

SASK.

C. A.

BREHAUT v. CITY OF NORTH BATTLEFORD.

Lamont, J.

APPEAL from a judgment of the District Court Judge, holding that the defendant was liable for certain business taxes levied against him by the plaintiff corporation. Affirmed.

P. H. Gordon, for appellant; *L. L. Dawson*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The defendant is a lawyer, and in 1917 practised his profession alone until May 11, when one F. R. Conroy became his partner. In that year the defendant was assessed for a business tax levied in respect of the office occupied by himself prior to May 11, and afterwards by himself and partner. The assessment roll for that year shews that there was endorsed on the roll covering the defendant's assessment the words: "Assessment notice mailed April 31st, 1917," although the tax was not actually levied until later. In 1918 the roll shews that the assessment notice was mailed January 14, 1918. The endorsement on the roll shewing the date of mailing does not appear to have been initialled by the officer sending out the notices so as to make it *primâ facie* evidence of the mailing of the notice. The defendant did not pay the tax levied in either of these years, nor did he appeal at the Court of Revision against the assessment.

The city brought this action to recover the amount of the taxes. The defendant filed a dispute note, in which he set up that the plaintiff did not levy a business tax in either of these years; also he denied that he became indebted to the city in respect of a business tax, and pleaded the benefit and protection of the City Act, 1915, Sask., ch. 16. At the close of the plaintiff's action the defendant moved for a dismissal of the action, on the ground that there was no allegation in the statement of claim that the defendant carried on business in 1917, and that there was no evidence establishing such to be the fact. His motion was refused. He then called his partner, Conroy, who testified that after May 11, 1917, he and the defendant practised their profession in partnership. The defendant himself did not give evidence. The Judge held the defendant liable, and the defendant now appeals.

Two grounds are set up in the notice of appeal: 1. That there is no evidence that notice of the assessment was sent to or served on the defendant. 2. That there is no evidence that the defendant was a person liable to be assessed for business tax.

To the first of these there are two answers: (1) That as the statute requires the assessor to transmit to the person assessed

a notice of assessment, and as the defendant did not deny either in his dispute note or at the trial the receipt by him of such assessment notice, the maxim *omnia præsumuntur rite esse acte* applies, and it will be presumed that the notice was duly transmitted until the contrary is shewn. Patterson, J., in *O'Brien* v. *Cogswell* (1890), 17 Can. S.C.R. 420, at 472; *Clive School District* v. *Northern Crown Bank* (1917), 34 D.L.R. 16, 12 Alta. L.R. 344.

The other answer is that, even if the assessment notice had not been transmitted at all, that would not affect the validity of the assessment.

Sec. 393, sub-sec. (3), of the City Act, 1915, Sask., ch. 16, reads as follows:—

(3) No assessment shall be invalidated by any error in the assessment slip transmitted as aforesaid or by reason of the non-transmission or non-receipt thereof by the person to whom it was addressed.

The argument on the other ground of appeal was, that the assessment in question was invalid because it was made in the name of the defendant alone, instead of in the name of himself and his partner, and sec. 387 (7) was relied upon.

That subsection reads:—

(7) Whenever two or more persons are, as business partners, joint tenants, tenants in common or by any other kind of joint interest, the owners or occupants of any land or of any building liable to taxation hereunder, the name of each of such persons shall be entered on the assessment roll in respect of his interest or share of or in such land or building.

The assessment roll shews that this section was not complied with.

For the city it was argued that, as the defendant was one of the occupants of the office in respect of which the business tax was levied, he had a taxable interest therein, and that, in such a case, his remedy was to apply to the Court of Revision to have the name of his partner added, and that, in any event, sec. 406 covered the omission.

Speaking generally, the provisions of statutes relating to assessment and taxation are to be treated as mandatory so far as they relate to the imposition of the tax, and rather as directory so far as they relate to its realisation.

In *O'Brien* v. *Cogswell*, 17 Can. S.C.R. at 424, Strong, J., said:—

The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes

SASK.

C. A.

BREHAUT v. CITY OF NORTH BATTLEFORD.

Lamont, J. A.

are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject. Further, all steps prescribed by the statute to be taken in the process either of imposing or levying the tax are to be considered essential and indispensable unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is explicitly declared.

In 37 Cyc., page 1006, par. (*f*), the law is stated as follows:—

The property of a co-partnership should be assessed to it in the firm-name. Real property belonging to several persons as joint tenants or tenants in common should be assessed to them jointly, giving the names of all; and an assessment to one of the joint owners by name, with or without the addition "*et al.*," is generally insufficient.

Unless, therefore, it is provided in the statute that the assessment shall be valid notwithstanding the fact that there has been a failure to comply with sec. 387 (7), such non-compliance would appear to be fatal to the validity of the assessment.

Has such provision been made? Section 394 provides that if any person named in the said roll thinks that he, or any other person, has been assessed too low or too high, or that his name or the name of any other person has been wrongly inserted in or omitted from the roll, he may appeal to the Court of Revision to correct the said error; and sec. 406, (1915), ch. 16, which is relied upon by the city, reads as follows:—

406. The roll, as finally passed by the Court of Revision and certified by the assessor as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in the notice required by sec. 393 or any omission to deliver or to transmit such notice.

A section similar to our sec. 406 came before the Supreme Court of Canada in *London* v. *Watt & Sons* (1893), 22 Can. S.C.R. 300. In that case, Strong, C.J., at page 302, said:—

I agree with the Court of Appeal (19 A.R. (Ont.) 675), in holding that the 65th section of the Ontario Assessment Act, R.S.O. 1887, ch. 193, does not make the roll, as finally passed by the Court of Revision, conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.

And this statement as to the effect of the section was approved by the Privy Council in *Toronto R. Co.* v. *Toronto Corporation*, [1904] A.C. 809 at 816.

If therefore the defendant had no taxable interest in the property for which he was assessed, sec. 406 would not avail to render him liable for the tax, although he took no appeal against the assessment to the Court of Revision. The city cannot by assessing property to a person who has no interest therein make it obligatory on that person to appeal to the Court of Revision, on pain of being liable for the tax if he fails so to do. But where a person has a taxable interest in the property assessed, but is assessed for an interest greater than or different from his real interest, or where he is entitled to have the name of some other person joined with his own in the assessment, his proper course is to appeal to the Court of Revision, and, if he fails to avail himself of that remedy, the roll, as finally passed, will be binding on him.

In *Canadian Northern Express Co.* v. *Town of Rosthern*, 23 D.L.R. 64, 8 S.L.R. 285, the Court *en banc*, at 67, said:—

> The town had, therefore, the right to assess both appellant companies for the business tax. Whether the assessment should have been a joint or a separate assessment, or whether either company was assessed for too large a floor space, we need not consider; if the appellants had any complaints in these respects they could have appealed against the assessment. Where the town has, under the Act, the right to impose the tax, which, in fact, it did impose, and the person assessed in respect thereof does not appeal against the *quantum* of the assessment, he cannot in an action to recover the taxes which he was compelled to pay, be heard to say that he was over-assessed.

In *Hislop* v. *City of Stratford* (1917), 34 D.L.R. 31, 38 O.L.R. 470, an action was brought to have it declared that certain assessments of the plaintiff's land made by the city were invalid. One objection was that the assessor had not complied with certain provisions of the Act in making the assessment. In reference to this objection, Meredith, C.J.C.P., at page 37, said:—

> But these first-mentioned matters are things over which the Courts of Revision of assessments, provided for in the Assessment Act, now have complete control, with full power to make all such changes, and give all such relief, as the nature of the case may require, if any; and so they are not the proper subject of an action in this Court, as they might be if the case were one in which there was no power in the municipality to tax; or one with which the Courts of Revision have not power to deal properly.

See also *Foster* v. *Township of St. Joseph* (1917), 39 O.L.R. 114, where, at 118, Latchford, J., said:—

> This is simply an application of the principle that when a statute confers a right—in this case a right of appeal against assessment—and also gives a

SASK.

C. A.

BREHAUT v. CITY OF NORTH BATTLEFORD.

Lamont, J.A.

remedy—as the Act here provides—that remedy is *primâ facie* the only one: *St. Pancras Vestry* v. *Batterbury* (1857), 2 C.B. (N.S.) 477.

This decision was affirmed (1917), 37 D.L.R. 283, 39 O.L.R. 525. See also 37 Cyc., page 1079.

The defendant had an assessable interest in the property in respect of which the taxes sued for were levied. He was entitled to have his partner's name entered on the roll as well as his own in respect of the assessment. That not being done by the assessor, the defendant had the right to appeal to the Court of Revision and have the omission rectified. This right he did not exercise. Having failed to avail himself of the remedy provided by the statute, he cannot now on that ground be heard to question the validity of the assessment.

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

Appeal dismissed.

ALTA.

S. C.

SECURITY TRUST Co. v. WISHART.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. April 22, 1920.

EXECUTORS AND ADMINISTRATORS (§ II A—24)—CONTRACTS MADE RELATING TO MANAGEMENT OF ESTATE—NOT AN OBLIGATION OF THE TESTATOR —PERSONAL LIABILITY OF THE EXECUTORS.

Executors are personally liable on their contracts as long as they have no relation to some obligation of the testator.

Where the executors seek to escape a personal liability, which ordinarily the law would place upon them, by adding a special clause to the contract providing explicitly for personal liability for an uncertain amount of the whole debt, this clause should not be treated as raising an implied release by the other party contracting of any other personal liability, or an implied undertaking to look to the estate and it alone for the balance. [*Farhall* v. *Farhall*, (1871), 7 Ch. App. 123; *Williams on Executors*, 10th ed., page 1412, referred to.]

Statement.

APPEAL by plaintiff from a judgment of Walsh, J., in an action to determine the right of the plaintiff company to recover certain sums for services rendered by it as attorney for the defendants. Reversed.

A. A. McGillivray, K.C., for appellant.

C. T. Jones, K.C., for respondent Wishart; *W. P. Taylor*, for respondent Breckenridge; *M. B. Peacock*, for executors.

Stuart, J.

STUART, J.:—The rule is that an executor is personally liable on his contracts as long as they have no relation to some obligation of the testator. See Williams on Executors, 10th ed., page 1412 *et seq.*, as explained by Mellish, L.J., in *Farhall* v. *Farhall* (1871), 7 Ch. App. 123. See also *Barry* v. *Rush* (1787), 1 Term Rep.

691; *Jennings* v. *Newman* (1791), 4 Term Rep. 347; *Brigden* v. *Parkes* (1801), 2 Bos. & P. 424; *Hawkes* v. *Saunders* (1782), 1 Cowp. 289; *Wigley* v. *Ashton* (1819), 3 B. & Ald. 101; *Campbell* v. *Bell* (1869), 16 Gr. 115; 14 Hals. 314.

There cannot be judgment and execution *de bonis testatoris*. And this is so even though the executor describes himself as such in the agreement, *Childs* v. *Monins* (1821), 2 Brod. & Bing. 460.

It seems to me from all the circumstances that there was in the minds of the parties, at least if all the executors had signed, a mistaken idea that there would be no personal responsibility but only a right to look to the estate. This, of course, is an error. As Story, J., said in *Duvall* v. *Craig* (1817), 2 Wheat (U.S.) 45, the executor has no principal whom he can bind. It is one thing that an executor should be able by a contract to bind the estate and the estate alone, and it is quite another thing that he should be permitted by the Court to employ another to assist him in details of management, and allowed out of the estate as part of his own remuneration such sums as he may have properly paid or become personally bound to pay for this assistance. And further, it is still different even though the assistant be allowed to be subrogated in respect of his claim against the executor personally to the right of the executor to be allowed a remuneration. But this allowance to the executor is not something he sues for. He merely asks for it on the passing of the accounts.

My point is that there never was any possibility of the plaintiff company being able to sue the estate in an action for their services. Even if the reference to "personal" liability which is found in the agreement had never been there at all and even if Roach had signed and although they were all described as executors the plaintiff company could have sued the executors personally, and them alone, for their agreed remuneration.

The consequence of this is, as I view the matter, that the clauses providing that the two executors who signed should be personally liable for a certain indefinite portion of the remuneration are simply useless in so far as the plaintiffs are concerned. Without that clause the two signing executors would be personally liable for the whole of it. All the clauses say is that in a certain contingency they shall be liable for a certain indefinite portion of it. But the clauses do not say that they shall be liable for that

ALTA.

S. C.

SECURITY TRUST CO. v. WISHART.

Stuart, J.

amount and no more. Perhaps that is the implication. Perhaps that should be taken as the true meaning of the agreement. Nevertheless it does not explicitly say that the executors shall not be personally liable for more than a certain sum.

And in the circumstances of this case where the signing executors are attempting to escape a personal liability which ordinarily the law would place upon them and upon them alone I do not think that the addition of a special clause providing explicitly for personal liability for an uncertain portion of the whole debt should be treated as raising an implied release by the employee of any other personal liability or an implied undertaking by him to look to the estate and the estate alone for the balance. Especially do I think this is the rule which should be adopted where the determination of the amount of the specified so-called personal liability has been delayed entirely by the action of the executors. It was in their power and possibly it was their duty to have passed the accounts long before the commencement of this action. Owing to the difficulty in realizing on the estate and to its unexpected and great depreciation in value there no doubt was a reason for delay in some respects but it did not justify the defendants in a long delay where the obvious consequence of the delay, if their contention is correct, was to postpone the payment of their employee's claim. The executors never could directly have put in a claim on behalf of the plaintiffs for remuneration. It could only be for their own remuneration in fixing which no doubt the propriety of the agreement with the plaintiffs would have come up for examination and decision. But because the two executors never made any request to be allowed remuneration and delayed whether rightly or wrongly the passing of accounts seems to me to furnish no reason why they should be even partially relieved from their liability to the plaintiffs.

If a man employs a contractor and the contractor does the work and completes it and the contract specifies that the employer is to pay him after he, the employer for example, has made a trip to Toronto and back, surely the employer cannot escape his liability by long delay in making the trip and by saying merely "I have not yet gone to Toronto and back," particularly—to pursue the analogy—where it was obviously fully expected by

both when the agreement was made that the trip to Toronto would be made at an early date.

I have drifted, of course, into another reason for my opinion. But to return, the considerations I have advanced do seem to me to strengthen very much the argument presented by Mr. McGillivray that the use of the word "personally" was intended to refer to the position of the executors *inter se*. Roach was obviously intended to sign. Mrs. Wishart agreed in certain contingencies "to be personally liable for such proportion or amount of the said Trust Company's remuneration as may be disallowed by the Court on the passing of the accounts of the estate." And she "convenanted and agreed (obviously with the defendant William Breckenridge) to indemnify the said William Breckenridge from the payment of the same to the Security Trust Co.," subject to the clause which provided that if William Breckenridge should receive as legacy over $5,000 he should to the extent of the excess contribute in equal shares with Mrs. Wishart to the plaintiff's remuneration.

My opinion is that this reference to an "indemnity" clearly shews that the parties recognized a personal liability in the executors to the plaintiffs for the full remuneration and that the reference to the "passing of the accounts" was merely for the purpose of fixing the time for adjusting matters as between the different executors.

The parties all thought the estate was not only solvent but very rich. Hence the idea of much personal liability was not very prominently in their minds. Mrs. Wishart agreed that what she had indemnified William Breckenridge against would come out of her share of the estate. They were really all thinking that everything would come eventually out of the estate or someone's very large legacy from it.

I, therefore, think that we ought not to discover any implied undertaking of the plaintiff to look to the estate and the estate alone for the major portion of its remuneration.

There is nothing in the agreement specifically relieving the two signing executors from their ordinary personal liability, covering the whole amount agreed to be paid—the uncertain amount left after a fixed remuneration had been decided on for

ALTA.

S. C.

SECURITY TRUST CO. v. WISHART.

Stuart, J.

the two executors as well as the amount which might be allowed to them, *i.e.*, the executors as such remuneration. And I think, therefore, the ordinary rule of full personal liability should apply.

The appeal should be allowed with costs, the judgment below set aside and judgment entered for the plaintiffs against the defendants Wishart and Breckenridge for $15,000, and costs of the action, so far as these are not covered by the consent judgment in respect of the other claims.

The plaintiff should also, I think, be declared entitled to a charge for this amount upon any sum that may be allowed on the passing of the accounts as a remuneration to the defendants Wishart and Breckenridge for their services as executors. That will be the proper time to consider to what extent the plaintiff's services should be allowed to be charged against the estate.

Harvey, C.J.
Ives, J.
Beck, J.

HARVEY, C.J., and IVES, J., concur with STUART, J.

BECK, J. (dissenting):—This is an appeal by the plaintiff company from a judgment of Walsh, J., at trial.

The action was brought with the view of determining a number of questions but at the conclusion of the plaintiff's case, judgment was agreed to in respect of some of these matters. What was left for the decision of the trial Judge was the right, claimed by the plaintiff company, to be paid the sum of $15,000 for services rendered by it as attorney in fact for the defendants Mrs. Wishart and William Breckenridge, two of the three executors of the will of John Breckenridge, the defendant Roach being the third executor. The question—paid by whom and when?—will have to be discussed. The power of attorney from Mrs. Wishart and Breckenridge to the plaintiff company is dated February 25, 1914. Nothing turns for the moment, at least, upon its terms. An instrument of the same date was drawn up. It is expressed to be an agreement between Irene Breckenridge (widow of John Breckenridge, deceased, who since became Mrs. Wishart), and William Breckenridge of the first part; the plaintiff company of the second part and Irene Breckenridge, William Breckenridge and Thomas Roach, executors of the last will and testament of John Breckenridge, deceased, of the third part. It recites that Irene Breckenridge and William Breckenridge may from time to time be absent from the jurisdiction, that they have deemed it advisable to appoint and have by power of attorney appointed

the plaintiff company to act as their agent and attorney to attend to such matters as they themselves (as executors) may from time to time be unable to attend to; that the compensation of the plaintiff company in respect of their services as aforesaid has been agreed upon at the sum of $250 per month; and that some question might thereafter arise as to what extent the said compensation might be chargeable against the estate of the deceased. The agreement then "witnessed" that in consideration of the sum of $250 per month to be paid by the executors to the Trust Company the Trust Company covenated with the executors and the said Irene Breckenridge and William Breckenridge to well and faithfully perform such duties and services as it might be called upon to exercise by reason of its appointment as aforesaid or imposed upon the Trust Company by the said executors and that the Trust Company should when and at such times as the executors may require furnish the executors with such statements, vouchers or accountings as they, the executors, should see fit to demand. The agreement then continues:—

And I, said Irene Breckenridge, in consideration of the services to be so rendered by the said Trust Company, do hereby covenant and agree that in the event of the estate of the said John Breckenridge failing to yield sufficient to pay me as one-half thereof the sum of $300,000.00 and Altha Etna Breckenridge, the daughter of the deceased, the sum of $75,000.00 as in said will provided, or in the event of any of the other legacies in said will suffering a total or partial abatement by reason of the compensation of the said Trust Company being paid out of the estate, to be personally liable for such proportion or amount of the said Trust Company's remuneration as may be disallowed by the Court on the passing of the accounts of the said estate.

And in such case, I, the said Irene Breckenridge do hereby agree that the executors shall be entitled to deduct from my share of the estate, so much of the said compensation as shall in passing of the accounts of the said estate be disallowed by the Court.

And I, the said Irene Breckenridge, hereby further covenant and agree in the event of any such disallowance to indemnify the said William Breckenridge from payment of the same to the Security Trust Company, Ltd. (subject, however, to the provisions of the paragraph next following), as well as from any claim which might be made by any legatee under the said will resulting from there being insufficient to pay all the said legacies in full, or by reason of the remuneration of the said Trust Company being paid out of the estate.

Provided, however, and notwithstanding anything hereinbefore contained that in the event of the said William Breckenridge receiving under the said will an amount in excess of $5,000.00, he shall, to the extent of such excess, contribute in equal shares with the said Irene Breckenridge to such remuneration of the said Trust Company as may, on the passing of the executors' accounts be disallowed by the Court.

ALTA.

S. C.

SECURITY TRUST CO. v. WISHART.

Beck, J.

> And I, the said William Breckenridge, do hereby agree that the executors shall, in such case, be at liberty to deduct such amount from my share of the said estate.

The agreement is executed by the company and by two of the executors, Mrs. Breckenridge and William Breckenridge, but not by Roach the third executor.

The will of the deceased gave his widow his home house and furniture and provided for the payment to his widow of one-half of his net estate provided that his net estate was not sufficient to give to his widow as one-half of his estate $300,000: and to give to his daughter $75,000; all the subsequently mentioned legacies should be void. These subsequent legacies were:—to William Breckenridge $50,000; to the deceased's sister $25,000; to another sister $25,000; to his brother Thomas, $25,000; to his brother Mathew $25,000; to an aunt by marriage $5,000 and to each of her daughters $5,000;—all these legacies were to abate *pro rata* in case of an insufficiency of assets to pay them all in full. I have stated the amounts of the legacies merely to indicate what the deceased considered the value of his estate to be when he made his will—on December 30, 1911. He died on May 28, 1913.

The will made express provisions with reference to the remuneration to the executors as follows:

> As to the remuneration of my executors and trustees I am by this will making legacies in favour of my wife Irene Breckenridge and my brother William Breckenridge and the services rendered by them in the performance of their duties as executors and trustees I consider will be amply compensated by the legacies which will be payable to them hereunder and with respect to my executor and trustee Thomas Roach, I expect that he will look after all detail matters in connection with my estate conversion thereof and keeping the records and otherwise carrying out the provisions of this will under the direction and with the co-operation of his co-executors, and will give to such matters that sufficient time, care and work as will be necessary to see to the careful and correct carrying out of all the provisions of this my will and for the services to be rendered by him in that connection I will and bequeath to him the sum of $250.00 per month for each and every month he is engaged on the work, which shall be payable to him monthly as a salary and in consideration of which salary he shall monthly, quarterly or otherwise as his co-executors may require furnish detailed statements of all matters, transactions and things which pass through his hands and of which he is cognizant . . .
> In the event of my brother William Breckenridge not receiving any legacy under this my will by reason of my estate being depleted so that the legacy to him becomes void under the provisions herein contained it is my will and I direct that he do receive from my estate remuneration for his services as executor and trustee the sum of $25,000.00 as a portion of my testamentary expenses.

Upon the affairs of the estate being looked into for the purposes of probate it was thought by Roach that there would probably be a surplus after payment of debts of about $100,000. Subsequently it appeared as it now appears that it is doubtful whether there will be sufficient to pay the debts in full. None of the legacies have been paid.

The agreement with the Trust Company was never executed by Roach. The moneys of the estate seem as a rule to have been deposited in a chartered bank and to have been drawn upon by cheques signed both by the Trust Company and Roach.

No payments were made to the Trust Company on account of the $250 a month to be paid to them under the agreement. Roach, who was considered and acted as the "managing executor" was paid $250 a month (in accordance with the terms of the will) as his remuneration.

As I have already pointed out what was in question before the trial Judge was the claim of the Trust Company for $15,000, being accumulations of the monthly item of $250 under the agreement. Under the law of England an executor is not entitled to any remuneration for his time and trouble in transacting the business of the estate unless the will authorizes such remuneration. (Hals. vol. 14, tit. "Executors and Administrators", page 320, pars. 748 and 754), but our Trustee Ordinance (ch. 11, N.W.T. 1903, 2nd Sess.), expressly provides (secs. 49-54), that he shall be entitled to such fair and reasonable allowance for his care, pains and trouble and his time expended in and about the estate as may be allowed by the Supreme Court or a Judge thereof, or by any clerk thereof to whom the matter may be referred.

It is true that sec. 53 says that nothing in the next preceding 4 sections shall apply in a case in which the allowance is *fixed* by the will. These statutory provisions are identical in substance with the provisions of the Ontario statute—The Trustee Act, R.S.O. 1914, ch. 121, sec. 67, sub-secs. (1) to (5). A number of cases decided under that statute are noted in Kingsford's Executors and Administrators, 2nd ed., pages 435 *et seq.*

Our Rules (which have been confirmed by statute), provide (Rules 951 and 958), for a Judge giving directions as to the remuneration of executors, etc.

I think that in this jurisdiction an executor is entitled as of right to compensation for his care, time and trouble in the per-

ALTA.

S. C.

SECURITY TRUST CO. v. WISHART.

Beck, J.

formance of his duties whether provision is made in the will or not; and that his compensation in either case is an item of the costs of administration to which he is entitled in priority to the creditors (*McCullough* v. *Marsden* (1919), 45 D.L.R. 645), and that the fact that a legacy is given as compensation to the executor does not destroy this right of the executor to priority for the amount of compensation fixed by the Court at all events where the amount so fixed is not greater than the amount of the legacy: See *Denison* v. *Denison* (1870), 17 Gr. 306; *Williams* v. *Roy* (1885), 9 O.R. 534.

It is not shewn by the evidence that Roach the managing executor ever assented to the agreement with the Trust Company. He may perhaps have known only of the power of attorney and it is a fact as I have already said that the Trust Company was never paid by retention or direct payment the monthly sum fixed by the agreement.

If the agreement were binding upon the executors as such so as to bind the estate in the first instance to pay the Trust Company subject to the executors' right to look to Mrs. Wishart and William Breckenridge to be indemnified against what might eventually be found to be an over payment, the Trust Company would now I think be entitled in respect of the moneys owing to it to a judgment for the amount claimed—a judgment personally against the 3 executors and not merely for payment out of the assets of the estate in due course of administration, the decision of this Court in *Northern Crown Bank* v. *Woodcrafts Ltd.* (1919), 46 D.L.R. 428, 14 Alta. L.R. 473, being applicable only to actions against executors in respect of liabilities contracted by the deceased. In the absence of evidence making it clear that Roach although not having executed the agreement with the Trust Company became in some way bound by it in his capacity as executor and thus that the agreement became the agreement of all three executors and, therefore, binding upon the estate it seems clear that the rights of the Trust Company under the agreement are against Mrs. Wishart and William Breckenridge only—though they may in some circumstances and at some points of time have some rights against the estate by way of subrogation. The conclusions so far reached bring us to a consideration of the Trust Company's right in this action against Mrs. Wishart and William Breckenridge.

The terms of the agreement so far as they relate to their personal liability seem clearly to mean that they are to be personally responsible only for so much of the amount paid or payable to the Trust Company as exceeds the amount of compensation ultimately fixed by the Court as an allowance to them as executors.

Until that compensation has been fixed by the Court in accordance with the practice of the Court the amount of the liability personally of these two executors remains undetermined and may perhaps ultimately turn out to be nothing. The plaintiff company is, therefore, in this action entitled to no judgment, either against the three executors or against the two—Mrs. Wishart and William Breckenridge. The position in which the company now finds itself is obviously owing to their own want of care and foresight, first in not having the agreement made binding upon the estate and, secondly, in not obtaining payment month by month of the $250 a month. The power to prevent any undue delay in the winding-up of the estate so as to bring affairs to the point where the accounts could be passed and the executors' compensation fixed by the Court, was in the Trust Company's hands either directly as the attorney in fact of the two executors or indirectly by compelling them to fulfil their implied agreement to do these things when the proper time had arrived. A judicial trustee having recently been appointed and these matters being now out of the hands of the executors, the Court has sufficiently full jurisdiction over him to prevent undue delay and on appropriate representations by any one interested to bring about in due course and in due time the condition of things which will enable the Trust Company's rights to be definitively settled and satisfied (Trustee Ordinance, sec. 56).

The conclusions which I have reached make it unnecessary, I think, to consider any other questions raised and must result in the affirmance of the decision of the Judge of first instance. I would, therefore, dismiss the appeal with costs.

I have read the reasons for judgment of my brother Stuart. I have not changed my opinion as above expressed.

The cases collected and discussed in Williams on Executors, 10th ed., pages 1412 *et seq.*, shew clearly that in some cases a contract to pay by an executor *as such* does not charge the executor personally but as executor only. It is clearly a question of the

ALTA.

S. C.

SECURITY TRUST CO. v. WISHART.

Beck, J.

terms, nature and purpose of the contract. The contract in question to my mind clearly shews that the draftsman intended it to be executed by all the executors and that then it should be binding upon them not personally but *as executors* and that the personal liability of the two executors, Mrs. Wishart and Breckenridge, was to be a contingent liability only. The case of *Farhall* v. *Farhall*, 7 Ch. App. 123, does not discuss that kind of a contract. The Court there was talking of "debts contracted by the executor" which "on a contrary decision might come into competition with the debts contracted by the testator in respect of them being paid out of the assets." This contract is a contract which relates to a liability which by law takes precedence of all debts of the testator and merely fixes provisionally its amount and terms of payment.

Appeal allowed.

CAN.

EX. C.

THE KING v. LONDON GUARANTEE AND ACCIDENT Co. Ltd. AND GORBOVITSKY.

Exchequer Court of Canada, Audette, J. February 21, 1920.

GUARANTY (§ II—10)—CANADA GRAIN ACT—COUNTRY ELEVATORS—TRACK BUYER—BONDS, INTERPRETATION THEREOF—INTERPRETATION OF STATUTE—PENALTY OR LIQUIDATED DAMAGES.

The defendant G., having applied for a license, subsequently granted, to operate a country elevator under the Canada Grain Act, 2 Geo. V., 1912, ch. 27, the company defendant gave a bond in favour of plaintiff for the due and faithful compliance by him with all enactments and requirements of the said Act and to secure the payment of any penalties to which he might become liable under the Act.

By giving a warehouse storage receipt in compliance with sec. 157 of the Act at the time of delivery of the grain the licensee discharged all statutory duties as such licensee and complied with the requirements of the statute, and the purchase of the grain by him subsequently, not being done under the license, but in the exercise of his common law right, the bond in question did not cover such purchases, and the surety could not be held liable on the bond.

A track buyer, being by sub-sec. 2 of sec. 219 and sec. 2, sub-sec. "S" of the Act, 2 Geo. V., 1912, ch. 27, defined as one who buys in car lots on track, his act in purchasing grain which is not in car lots on track, but in a terminal elevator or other elevator or warehouse is not one within the scope of his license as such.

Where a bond is given for the due performance of statutory duties, of various kinds and importance, some of a certain nature and amount, some of uncertain nature and amount, and only one large amount is mentioned in the bond, the bond cannot be but a penalty bond, because as the amount mentioned in the bond cannot be regarded as liquidated damages in respect of some of the stipulations, it ought not to be so regarded in respect of the others.

Statement.

AN information, exhibited by the Attorney-General of Canada, seeking to recover from the defendant company under the bonds furnished by them under the Canada Grain Act.

E. L. Taylor, K.C., for plaintiff.

J. B. Coyne, K.C., and *R. K. Elliott*, for defendant—The London Guarantee and Accident Company.

AUDETTE, J.:—This is an information, exhibited by the Attorney-General of Canada, whereby it is sought to recover the full amount of three bonds given, under the Canada Grain Act, 2 Geo. V., 1912, ch. 27, in the circumstances hereinafter mentioned.

The plaintiff has already, on November 16, 1919, obtained judgment by default against the defendant Joseph Gorbovitsky, for the full amount of the bonds, namely the sum of $19,200, and costs.

Therefore, the issue in the present controversy is limited exclusively as between the plaintiff and the defendant the London Guarantee and Accident Company, Ltd., hereinafter, for brevity, called "the insurance company."

No oral evidence was offered at trial, but by consent of both parties, the case was submitted upon the admissions then filed, and which are too voluminous to be here set out in full.

It is averred and admitted by the pleadings that Gorbovitsky on August 17, 1916, made an application to the Board of Grain Commissioners of Canada in compliance with sec. 153 of the Canada Grain Act, for a license to operate for the crop of 1916-1917, a country elevator at Edenwold, Sask., and in compliance with sec. 155, gave the bond required thereby through the above-mentioned defendant insurance company in the sum of $6,600, and a license was issued as requested.

And in a like manner Gorbovitsky, on August 9, 1916, made a similar application to operate a country elevator at Zehner, Sask. gave the required bond of $6,600, and a similar license was issued to him.

Then on or about July 28, 1916, the defendant Gorbovitsky made an application to the Board of Grain Commissioners for a license to operate, for the crop of 1916-1917, as a track buyer of grain, and in compliance with sec. 218, gave the required bond in the sum of $6,600, and a license as such issued to him on September 1, 1916.

Three cardinal questions arise in the present case: 1. Whether the Crown, if entitled to recover under the bonds, should recover

CAN.

EX. C.

THE KING v. LONDON GUARANTEE AND ACCIDENT CO. LTD. AND GORBOVITSKY.

Audette, J.

the full amount thereof, or only the amount of loss actually shewn. 2. Whether, under the provisions of secs. 157 and 180, in the case where the operator of a country elevator, at the time of delivery of any grain thereat, has issued a warehouse storage receipt, is bound when about a month or two after such delivery when purchasing such grain, still in his elevator, to give therefor a cash purchase ticket, or whether at that date he had discharged all statutory duties as such licensee to run a country elevator and is at large on his common law rights and can buy like any other individual not under such license? 3. What constitutes a track buyer under the statute?

Dealing first with the question of the two bonds respecting the operation of the two country elevators, it must be said both the bonds and the licenses issued thereunder are absolutely identical, and that all that is said in relation to one applies respectively to the other.

This bond is what is termed (Hals., vol. 3, page 80, par. 160) a double or conditional bond, in that it consists of two parts: first, the obligation and secondly the condition, which parts read as follows:

Form B. 315
No. 439

Country Elevator

Know all men by these presents that we, Joseph Gorbovitsky, of Regina, in the Dominion of Canada and Province of Saskatchewan, hereinafter called the Principal and the London Guarantee and Accident Company, Limited, of London, England, hereinafter called the Surety, are respectively held and firmly bound unto Our Sovereign Lord the King, his heirs and successors, in the respective penal sums following, that is to say: The Principal in the sum of Sixty-six hundred dollars of lawful money of Canada, and the Surety in the sum of Sixty-six hundred dollars of like lawful money to be paid to Our Sovereign Lord the King, His heirs and successors, for which said payment well and faithfully to be made we severally and not jointly or each for the other, bind ourselves and our respective heirs, executors, administrators, successors and assigns firmly by these presents, sealed with our respective seals, dated the first day of September, in the year of our Lord one thousand nine hundred and sixteen, and in the 7th year of His Majesty's reign.

Whereas the Principal has applied for one country elevator license under the hand and seal of the Board of Grain Commissioners for Canada, by which, when issued, the Principal will be authorized and empowered to carry on the business of a country warehouseman at such place or places as are set forth in the Schedule written on the back of this sheet which is made a part of this Bond, from the first day of September, 1916, to the thirty-first day of August, 1917, both days inclusive.

And this bond is given in pursuance of the Canada Grain Act, and amendments thereto.

Now the condition of this obligation is such that if upon the granting of such license the Principal shall duly keep books and accounts, insure grain, issue and deliver receipts and tickets, keep, store and deliver grain, render all accounts, inventories, statements and returns prescribed by law, pay all penalties which the Principal is or may become liable to pay under the provisions of the said Act, and of such other Act or Acts as may hereafter be in this behalf enacted by the Parliament of Canada, and shall well, truly, faithfully and unreservedly comply with all the enactments and requirements of the said Act, or of any Act or Acts, as aforesaid, and of any Order-in-Council, departmental or other regulation made by competent authority according to their true intent and meaning as well with regard to such books, accounts, insurance, delivery of receipts and tickets and the keeping, storing, delivering of grain, the rendering of accounts, inventories, statements, returns and payment of penalties as to all other matters and things whatsoever referred to or required of the Principal by the said Act or Acts and Orders-in-Council and regulations whatsoever, then this obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

Then a license was issued in the following terms:

The Department of Trade and Commerce Form B. 322
Western Inspection Division.

License No. 892.

License to operate a country elevator or warehouse.

To whom it may concern:

Application having been made as required by the Statute herein cited Joseph Gorbovitsky, of Regina, Saskatchewan, is hereby licensed to operate a country elevator at Edenwold, Sask., as described in the said application, he having filed the necessary bonds, and paid the License Fee of Five Dollars under the provisions of the Canada Grain Act, and amendments thereto, on the following conditions:

1st. This License shall expire on the thirty-first day of August, 1917.

2nd. If any elevator or warehouse is operated in violation or in disregard of the Law, the License shall, upon due proof thereof after proper hearing, and notice to the Licensee, be revoked by the Board.

Issued at Fort William, Ont., this 2nd day of September, 1916.

C. BIRKETT,
(SEAL) Secretary, Board of Grain Commissioners.

This License is not transferable.

As a prelude to answering the first question it must be found whether or not the sum mentioned in the bond to be paid, on a breach, is a penalty or liquidated damages, and on this distinction between liquidated damages and penalty reference should be had to Hals., vol. 3, page 96, and vol. 10, page 328, *et seq.*

Both the bond and the Act (sec. 155) make use of the adjective *penal* in qualifying the sum mentioned in the bond. However, as laid down by 3 Hals., page 96, par. 198:

CAN.

EX. C.

THE KING v. LONDON GUARANTEE AND ACCIDENT CO. LTD. AND GORBOVITSKY.

Audette, J.

The fact that the sum is described as a penalty or as liquidated damages is not conclusive. Indeed it is almost immaterial.

and also at page 329, par. 605, vol. 10:

(2) But though the parties themselves call the sum to be paid liquidated damages, and even if they go so far as to state in the contract that it is not a penalty, this will not prevent the Court in a proper case from holding that it is in fact a penalty. (And) (1) Where the parties themselves call the sum made payable a penalty; the onus lies on those who seek to shew that it is liquidated damages to shew that such was the intention.

There is in this case no such evidence. And again as said in Halsbury "whether the sum is a penalty or liquidated damages in any given case is a question of construction for the Judge alone."

Having disposed of the effect of the word "penal" used in the description of the bond, it is now of importance to find the rule to decide as to whether or not the bond is in the nature of a penalty or liquidated damages. See Hals., vol. 3, page 96:

(2) Where the condition depends upon the performance of one act or the happening of one event only, and the sum in which the obligor is bound is not largely in excess of the possible damages which may be sustained by the breach, it is *primâ facie* liquidated damages. (3) Where the amount of the damages sustained by breach of the condition must necessarily be small in proportion to the sum in which the obligor is bound, the sum is a penalty. (4) Where the condition is for the performance of several acts, or happening of several events, some of which are of serious and others of trifling or less serious importance, the sum in the obligatory part of the bond is a penalty.

See also Hals., vol. 10, page 330, *et seq.*

Approaching in that light the consideration of the bond in question, it is quite manifest that the conditions of the bond consist in the performance of many acts, of which some may be of great, while others are of trifling importance. If, for instance, the warehouseman had been condemned, upon summary conviction, to pay the sum of $10 or $25 as provided by some of the sections (secs. 236 to 245) of the Act, it could not be contended—especially when the bond itself provides specifically for the payment of "all penalties which the Principal is or may become liable to pay under the provisions of the said Act"—that he should in addition thereto or in satisfaction of the said sum of $10 or $25, as the case may be, for the breach of which he was condemned under summary conviction, pay the total amount of the bond. It must be consonant with the loss suffered.

The defendants under the bond are liable for all the penalties determined upon summary conviction, and any loss sustained,

by the breach of any of the conditions therein mentioned, and not for the full amount of the bond in the case of a breach of trifling importance.

The bond was given by the obligor, with the Principal, to the obligee for the due performance of the statutory duties attaching to the warehouseman of a country elevator, and these duties being of various kinds and importance, some of a *certain* nature and amount, some of *uncertain* nature and amount, and only one large amount is mentioned in the bond, the bond can not be but a penalty bond, because as the amount mentioned in the bond cannot be regarded as liquidated damages in respect of some of the stipulations, it ought not to be so regarded in respect of the others.

Therefore the bond is a penalty bond. In a case of a breach of trifling importance, only the actual loss is recoverable, and not the full amount of the bond. The liability will be the loss in respect of the breach, which must not be extended beyond its legal operation: *Pollard* v. *Porter* (1855), 69 Mass. (3 Gray) 312; *U. S.* v. *Gurney et al.* (1808), 4 Cranch's R. 332; *Pond* v. *Merrifield* (1853), 66 Mass. (Cush.) 181; *Mure* v. *Wilyes* (1810), Pyke's R. 61; *Patterson* v. *Farran* (1811), 2 R. J. R. (Que.) 180; *Kemble* v. *Farren* (1829), 6 Bing. 141.

That brings us to the second question submitted.

In all of the 13 cases coming under this head, and mentioned in the admissions above referred to, in compliance with sec. 157 of the Canada Grain Act, at the time of the delivery of the grain, at the country elevator, the warehouseman issued a warehouse storage receipt for the same. In no case was there either a "cash purchase ticket" or a storage receipt for special binned grain issued at such time. Therefore the question, which was discussed at trial, with respect to the redeeming a "cash purchase ticket" as provided by sec. 160, does not arise.

A brief summary of these cases may be given, as follows:

Kennedy—Delivery of grain in January and February, 1917, storage receipt did not shew *gross weight*, *grade* and dockage. Sold in May following to Gorbovitsky, and received a cheque, which was afterwards dishonoured, in payment of unpaid balance claimed herein.

CAN.

EX. C.

THE KING v. LONDON GUARANTEE AND ACCIDENT CO. LTD. AND GORBOVITSKY.

Audette, J.

J. W. Hubick—Delivery in February, 1917. No *gross* weight and dockage shewn on storage receipt. Sold in July following for which he received a cheque, which was afterwards dishonoured, in payment of unpaid balance claimed herein.

C. Hubick—Delivery in November, 1916. Storage certificate did not shew gross weight or dockage. Received a cheque, which was afterwards dishonoured, in payment of unpaid balance claimed herein.

Wilson—Delivery in November, 1916. Storage certificate did not shew gross weight, dockage or grade. Gorbovitsky paid $1,681 on account of $1,957, and told him he could not give a cheque at that time for the balance which is still unpaid and for which claim is made herein.

Redgrave—Delivery of grain in March, 1917. Storage receipt does not shew gross weight, dockage, or grade. Grain sold to Gorbovitsky in June following for $655.20, upon which he paid $544, and said he could not then give him cheque for unpaid balance which is herein claimed.

Bennett—Delivery in March, 1917. Storage certificate does not disclose gross weight, dockage or grade. Sold in May following for $1,179.75, upon which $1,074 was paid, leaving an unpaid balance for which claim is made herein.

Boulding—Delivery in April and May, 1917. Sold at end of May or beginning of June for $2,774.60, upon which $1,100 was paid, and was told at time of sale a cheque could not be given, and it was agreed the unpaid balance claimed herein, was to be remitted at some subsequent date.

Gelhorne—Delivery in November and December, 1916, and May, 1917. Sold in June, 1917, for $2,795.37, upon which he received $1,000, leaving a balance of $1,795.37, which was to be paid in two or three weeks, and a cheque, which was afterwards dishonoured, was given in July for the unpaid balance claimed herein.

Hoffmann—Delivery during May, 1917. Sold on the 30th May, and a cheque which was afterwards dishonoured issued for unpaid balance claimed herein.

Tiefenbach—Delivery during May, 1917. Sold on 26th May, and was given a cheque which was afterwards dishonoured, in payment of the purchase price claimed herein.

Moss—Delivery prior to June, 1917. Sold on 20th June, 1917, and received a cheque, which was afterwards dishonoured, for small unpaid balance claimed herein.

Mang—Delivery during February and March, 1917. Sold about 23rd May, 1917, and received cheque for unpaid balance when told to keep cheque for a little while, that there was no money to pay the cheque, but that funds were expected shortly. The cheque was subsequently dishonoured and this unpaid balance is claimed herein.

Frombach—Delivery during March and April, 1917. Sold some time in May and received a cheque, which was afterwards dishonoured, in payment of unpaid balance claimed herein.

It has already been said that a warehouse storage receipt was in every case issued at the time of the delivery.

One must also bear in mind it was stated, in the course of the argument of Mr. Taylor, that there was no question arising about the grade, that it was admitted, they all knew it.

Then there remains this small charge that in some cases the storage receipt did not disclose the gross weight and the dockage. While that is recited in the admission, it does not appear that any of the claimants quarrelled with the quantity of dockage, and their claim is made without any complaint in that respect—they impliedly admit the correctness of the same, and no loss or damage was suffered thereby. Moreover, that would appear to be *de minimis*, especially when the statutory forms were used and when you have the net weight in each storage certificate—and there are cases when there would be no dockage. No evidence has been adduced that there should be dockage in the cases where complaint is made, the evidence being silent on that question.

I must find, under the circumstances and the evidence, that the defendant Gorbovitsky in all of those 13 transactions, complied with the requirements of the statute, issuing at the time of the delivery, as provided by 2 Geo. V. 1912, ch. 27, sec. 157, a warehouse storage certificate.

There is no inhibition placed by the statute upon the operator of a country warehouse whereby, after having issued such storage certificate in compliance with sec. 157, to prevent him from buying, as is the case of the operator of a terminal elevator whereby the latter is specifically forbidden to do so by sec. 123 of the Act.

CAN.

EX. C.

THE KING v. LONDON GUARANTEE AND ACCIDENT CO. LTD. AND GORBOVITSKY.

Audette, J.

It is quite plain, without indeed any shade of ambiguity, that no restriction exists in respect of buying or selling grain after its delivery, under the provisions of secs. 157 and 160, and it would be making a material addition to the statute to place such a construction upon these two sections. To insert this inhibition in the statute by implication, would not be construing the Act of Parliament, but it would be altering it and enlarging the provisions which the Legislature had thought fit to make with respect to the subject matter; Beal, Rules of Interpretation, 2nd ed., 335.

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense." *The Sussex Peerage* case (1844), 11 Cl. & F. 85, 143.

From the very significant fact, that the operator of a terminal elevator, which is indeed very different from a country elevator, is prevented by the Act itself from buying or selling grain, and that the Act is quite silent in that respect when dealing with the country elevator, it is quite obvious, under the maxim of "*Expressio unius est exclusio alterius*" that the Legislature had never the intention of placing a restriction upon the operation of a country elevator in that respect.

An ordinary grain dealer, outside of elevator operators, track-buyers, and commission merchants, who have special duties assigned to them under the Act, does not require a license or to be bonded to carry on his business.

The operator of a country elevator after discharging his statutory duties, as above mentioned, has always his common law rights subsisting to buy or sell, provided such rights are not in derogation of any of the provisions of the statute. Nothing short of legislation could take away these common law rights.

Therefore, I find that the bonds in question do not cover any of the purchases or sales above mentioned.

Coming now to the third question submitted in respect of the track operator, it will be convenient to set out in a summary manner the facts arising in that connection.

On or about July 28, 1916, the defendant Gorbovitsky made an application to the Board of Grain Commissioners, for a license to operate for the crop year of 1916-1917, under the provisions of sec. 218, of the Act, as a track-buyer of grain, and entered into

a bond of $6,000; whereupon, on September 1, 1916, a license was issued to him to carry on the business as such track-buyer, the whole as more fully set forth in pars. 8, 9 and 10 of the information.

Now it might be casually said that the bond given by the track-buyer is very different from that given by the operator of a country elevator. The track-buyer gives security for the payment of the purchase money, while the operator of a country elevator gives security in the main to carry on his business in the manner mentioned by the statute, and the farmer receives no help from such a bond when he sells to the operator of the country elevator at any time after the delivery of his grain.

The main, and in the result the only question to be decided under this head is whether, in the case submitted, the grain in question was bought by a track-buyer in car lots on track.

In the month of April, 1917, A. W. Vanstone, who is the owner and operator of a grain elevator and flour mill in Regina, loaded two carloads of wheat from his elevator in cars Nos. 28,266 and 505,865, which cars were respectively unloaded into terminal elevators at Duluth and Superior on April 23 and May 1, and terminal warehouse receipts were issued therefor.

Vanstone sold these two carloads of wheat to Gorbovitsky on May 5 and May 9 respectively for the total price of $6,234.32, and received $6,000 on account and a cheque of $234.32 for the balance which still remains unpaid.

Now, under the evidence, which is part of the admission filed, Vanstone says that at the time of the sale of these two cars he "imagined the wheat was not unloaded, that it would be on the track, but he is not sure of that. He did not know that himself," and Gorbovitsky, in his testimony, supports and corroborates Vanstone's evidence, and adds he did not know whether these cars had been out-turned at Duluth when the sale took place.

It is well not to overlook that Vanstone who was the operator of a flour mill and the operator of an elevator who would be presumed to know all his rights under the Grain Act, did not ask from Gorbovitsky at the time of this sale, for the statutory "track-buyer's purchase note," and the inference would be he did not himself treat the transaction as that of a track purchase.

CAN.

EX. C.

THE KING v. LONDON GUARANTEE AND ACCIDENT CO. LTD. AND GORBOVITSKY.

Audette, J.

Upon this evidence, however, the Crown claims (and the insurance company contends to the contrary) that Gorbovitsky and Vanstone believed the grain was on the track at the time of the sale and that it should be treated as such.

I am unable to accede to this contention, since the sale was actually made at a time when the wheat was not in car lots on track; but actually turned into terminal elevators. Moreover, mutuality of mistake cannot enable the parties to change the nature of the transaction and much more so where it would affect the rights of third parties. *Non fatetur qui errat.*

Then during the month of May, Vanstone also sold to Gorbovitsky, besides the two above mentioned cars, a carload of feed wheat which was then in his elevator at Regina, and which he subsequently loaded in car No. 55,586, and for which Gorbovitsky gave his cheque.

These three cheques, as well as a draft for the same amount which was duly accepted by Gorbovitsky, were dishonoured, and these unpaid amounts are claimed herein.

This sale of wheat feed was made of grain actually in the elevator and not in car lots on track.

Now, we must find, what, under the statutes constitutes a "track-buyer." The sections of the Act which specifically deal with a track-buyer are sections 218, 219, 220 and sub-section (s) of sec. 2.

This sub-section (s), which is part of the interpretation section of the Act, defines a track-buyer, as follows: "(s) 'track-buyer' means any person, firm or company who buys grain in car lots on track." And sub-section (2) of sec. 219, as a prelude to defining the duties of a track-buyer, states as a condition precedent "Every person who buys grain on track in car lots."

Maxwell, on Statutes, 5th ed., at page 4, *et seq.*, lays down the rule of interpretation for a case like the present:

> The grammatical and ordinary sense of the words is to be adhered to . . . When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise, etc.

We have quite a long *catena* of decisions upon this preposition "on," as found in sec. 20 of the Exchequer Court Act, both by this Court and the Supreme Court of Canada. In *Chamberlin* v. *The King* (1909), 42 Can. S.C.R. 350, it was held that the words "on a public work," in sec. 20 of the Exchequer Court Act, R.S.C. 1906, ch. 140,

are descriptive of the locality, and to make the Crown liable, etc., . . . such property must be situated on the work when injured.

Sir Louis Davies, at page 353, says:

With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court the Act can easily be amended.

This decision has been endorsed and followed by the Supreme Court of Canada in several other cases. *Paul* v. *The King* (1906), 38 Can. S.C.R. 126; *The Hamburg American Packet Co.* v. *The King* (1902), 33 Can. S.C.R. 252; *Olmstead* v. *The King* (1916), 30 D.L.R. 345, 53 Can. S.C.R. 450; *Arsenault* v. *The King* (1916), 32 D.L.R. 622, 625, 16 Can. Ex. 271, 278, and other cases.

Accepting this method and manner of construction it must be found that the purchases in question, to come within the statute, must be made of "grain in car lots on track." In no one of the three cases under consideration did the track-buyer buy grain on track. On one occasion the grain of the two cars had already been discharged in terminal elevators, and in the last case the grain was in Vanstone's elevator at the time of the sale.

Therefore, the sale of these three cars of grain does not amount to the case of a track-buyer buying grain in car lots on track, as defined by the statute, and further does not come within the bond in question.

Here again it may be said, as was said with the 13 other cases, that a track-buyer after discharging his statutory duties, when buying grain in car lots on track, retains his common law rights, provided such rights are not in derogation of any of the statutory provisions.

Following the above mentioned decisions in respect of the words on a public work, I must find that the purchase in question was not of grain in car lots on track, and therefore that the purchase in question does not come within the ambit of the statute.

I have answered these three questions against the contentions of the Crown, although in the view I have ultimately taken of the case, it had become unnecessary to answer the first question.

Much as I feel like protecting the farmer who accepted these worthless cheques in good faith, the statute does not allow me to extend the relief sought. If Parliament intended to protect cases like those in question, legislation can be resorted to, if the legislator see fit to do so.

The action is dismissed with costs.

ONT.

S. C.

LAZARD BROS. & Co. v. UNION BANK OF CANADA.

Ontario Supreme Court, Middleton, J. February 3, 1920.

BANKS (§ IV C—114)—LIEN ON SHARES OF ITS OWN STOCK BY BANK STANDING IN NAME OF CUSTOMER—BANK ACT—EQUITABLE TITLE TO SHARES IN CREDITOR OF CUSTOMER—KNOWLEDGE OF BANK—FAILURE TO DISCLOSE—TITLE TO SHARES.

Failure on the part of the defendant bank to disclose to the plaintiffs, who made large advances to a customer of the bank, on the security of shares of the capital stock of the bank, which the plaintiffs supposed to be held for them by a trust company, but which in fact stood in the name of the customer, and on which the bank had a privileged lien, under sec. 77 of the Bank Act, for a debt due from the customer disentitled the bank from asserting this lien over the plaintiffs' title to the shares, there being a clear duty to disclose such facts.

[*Savage* v. *Foster* (1723), 9 Mod. 35; *Nicholson* v. *Hooper* (1838), 4 Myl. & Cr. 179, applied.]

Statement.

ACTION against the bank and G. T. Clarkson, administrator of the estate of E. E. A. DuVernet, deceased, to establish the claim of the plaintiffs to 200 shares of the capital stock of the defendant bank, standing in the name of DuVernet.

Glyn Osler and *G. R. Munnoch*, for the plaintiffs.

Hamilton Cassels, K.C., and *C. P. Wilson*, K.C., for the defendant bank.

D. W. Saunders, K.C., for the defendant Clarkson.

Middleton, J.

MIDDLETON, J.:—The action is brought for the purpose of establishing the claim of the plaintiffs to 200 shares of the capital stock of the defendant bank standing in the name of the late E. E. A. DuVernet. This stock DuVernet agreed to deposit with the Union Trust Company as trustees for the plaintiffs, as security for an advance, and, if the plaintiffs are entitled to succeed, the balance due exceeds the value of the stock.

There is no question as to the right of the plaintiffs as against DuVernet: the difficulty is occasioned by the assertion by the bank of its right to a lien for money due to it by DuVernet, under sec. 77 of the Bank Act (1913), 3 & 4 Geo. V. ch. 9 (Dom.), which enacts:—

"The bank shall have a privileged lien, for any debt or liability for any debt to the bank, on the shares of its own capital stock, and on any unpaid dividends of the debtor or person liable, and may decline to allow any transfer of the shares of such debtor or person until the debt is paid."

There is no doubt of the right of the bank, as against DuVernet, to a lien for an amount which is almost equal to if it does not exceed the value of the shares.

ONT.

S. C.

LAZARD BROS. & CO. v. UNION BANK OF CANADA.

Middleton, J.

The real question is whether the bank can assert its lien upon these shares against the plaintiffs, in view of the circumstances, which must be related in some detail.

Originally there were 500 shares, but 300 have been disposed of and are not now in dispute. At the trial some question was raised as to whether these shares now remaining are part of the original 500. I find that they are. DuVernet, dealing with the shares standing in his name, dealt with his own, and did not attempt to deal with those he had pledged to the plaintiffs.

Coming now to the details of the transaction. In August, 1911, an arrangement was made between DuVernet and the plaintiffs for their assistance in obtaining a loan of £30,000. The plaintiffs agreed to accept drafts drawn upon them by the Union Bank upon the strength of collateral security, consisting of 500 shares of the Union Bank and 500 shares of the Union Trust Company, to be deposited with the Union Trust Company for them. The arrangement was that drafts were to be made by the Union Bank on Lazard in sums not exceeding £5,000 each, and, upon Lazard accepting, the bills were to be sold on the London market, the proceeds to be available to DuVernet. The Union Bank was no party to the arrangement and under no obligation to make the drafts—DuVernet was a director of the bank and a customer and expected to be able to arrange this detail. The promise to accept is contained in Lazard's letter to DuVernet of the 28th August, 1911.

DuVernet was then in London, and, needing immediate funds, arranged that Lazard should advance to the Union Bank at London £20,000 upon deposit of a certain stock in the Ocean Falls Company. This was a temporary loan, to be repaid out of the proceeds of the £30,000 acceptances.

DuVernet almost immediately returned to Toronto and drew in his own name upon Lazard for £10,000, discounting this with the Union Bank at Toronto, depositing at the same time the certificates of the trust company stock to be held as security until the draft was accepted, and then to be held for Lazard.

Lazard declined to accept the £10,000 draft, and cabled DuVernet that all drafts must be by the Union Bank, and not exceeding £5,000. The £10,000 draft was recalled, and 6 drafts, £5,000 each, were then put through—the Union Trust Company

ONT.

S. C.

LAZARD BROS. & CO. v. UNION BANK OF CANADA.

Middleton, J.

giving the bank a letter stating that DuVernet had deposited with it, for Lazard, certificate No. 3014 issued by the Union Bank for 500 shares of Union Bank stock in the name of DuVernet with a power of attorney from him to transfer the stock, and a certificate for the Union Trust Company stock.

On the 2nd October, 1911, the bank advised Lazard of the recall of the earlier £10,000 draft and of the making of the new drafts, "against which there has been lodged with the Union Trust Company Ltd. for your account certificate 3014 for 500 shares of the Union Bank of Canada stock," etc., as indicated in the letter of the Union Trust Company, of which a copy was enclosed.

The drafts were accepted and sold, and the proceeds repaid the £20,000 due Lazard and £10,000 due the Union Bank, less a small sum representing charges, etc. The arrangement looked for a renewal of the bulk of the loan from time to time as the drafts matured and periodical reduction constituting a revolving credit. This was carried out to some extent, but in the end Lazard Bros. & Co. paid the bills, and since have received the proceeds of their collateral security, save the shares now in question. This leaves a balance of about £12,000 still due to them.

DuVernet was, at the time of this transaction, liable to the bank in respect of other transactions, and the bank then had a lien upon his shares, on which there is about $30,000 due at the present time.

As a matter of convenience, the bank, when it desires to assert the lien given it under the statute, records the lien in its stock transfer books, and so prevents any transaction on the stock. This lien was not recorded until some time after the transactions with Lazard. What the plaintiffs allege is that the bank, having allowed them to become liable upon the acceptances upon the strength of the supposed hypothecation of this stock, cannot now set up its lien to their prejudice. The bank's position is that it owed no duty to the plaintiffs, and was not under any obligation to disclose its lien unless information was directly asked.

Before discussing the law, I would point out that the certificate deposited with the Union Trust Company afforded no protection to the plaintiffs. It in no way represented the shares. It was a mere statement that at its date the shares were standing in the

name of DuVernet. The power of attorney would enable the holder to make a transfer on the books of the bank, but there was nothing to prevent DuVernet from dealing with the stock in the meantime. The production or surrender of the certificate was not necessary to the transfer of the stock, and there was nothing to prevent the issue of any number of certificates, each stating the same fact, that DuVernet's name appeared upon the register as the holder of so many shares.

While no affirmative evidence is given that the plaintiffs would not have made the advance save upon this security, the whole nature of the transaction shews that the advance was made upon the strength of the stock in question, and in reliance upon it being deposited with the Union Trust Company for the plaintiffs by an effectual mode of transfer under which the plaintiffs had the real title.

After the transaction had been carried out in the way indicated, some of the higher officials of the bank disapproved of the form it had taken. In their view the business was that of Mr. DuVernet, and it was not proper for the bank to appear as drawing the bills. The general manager of the bank wrote from Winnipeg, where the head office is, in October, 1911, a letter which I regard as significant as indicating an appreciation by him of one aspect of the situation. Addressing the manager at Toronto, Mr. Wilson, who was directly responsible for the transaction, he says:—

"I notice that Mr. DuVernet has lodged with the Union Trust Company certificates for 500 shares of Union Bank stock and 500 shares of Union Trust Company stock, to be held on account of Lazard Bros. You will observe that Lazard Bros.' letter to Mr DuVernet of the 28th August states that the shares are to be lodged with the Union Trust Company and not the certificates. It is possible that the certificates of the Union Trust Company are negotiable scrip certificates, transferable by endorsement, and that they therefore represent the shares, but the certificates for the Union Bank shares are not negotiable and are merely an intimation that upon a certain date a certain number of shares stand in that name on the books of the bank. The fact that the certificates for these shares are held by the Union Trust Company does not in any manner preclude Mr. DuVernet from transferring his shares at any time. The bank does not call for

ONT.

S. C.

LAZARD BROS. & CO. v. UNION BANK OF CANADA.

Middleton, J.

the surrender of the stock certificates when the owner of the stock is transferring his shares. I have no doubt at all that the transaction will be strictly carried out upon its understanding, but there is no doubt at all that, as far as Lazard Bros. are concerned, the Union Trust Company does not to-day hold any shares of the Union Bank stock as security for the credit granted by Lazard Bros. to Mr. DuVernet."

The reply to this letter was not produced. Its effect was the writing of a letter of the 28th October, 1911, to the plaintiffs: "I understand that the Union Trust Company are holding the securities for you, as it is of course understood that this bank has no responsibility in the matter whatever, and that the transaction is entirely one between your good selves, Mr. DuVernet, and Mr. Lester W. Davis." The statement that the trust company held the securities was untrue. The letter seems a mere attempt to create evidence.

The evidence of Mr. Wilson at the trial was most unsatisfactory, and I am convinced that there was a deliberate suppression of the real situation at the time of sending forward the drafts. Mr. Wilson was quite as well aware as the general manager that the supposed security was illusory and meant nothing. He knew what was apparently unknown to the general manager, that there was a lien in favour of the bank, and his large banking experience must have made it very plain to him that Lazards would never have entered into the transaction had they been aware of it. Yet he maintained silence, and now says that Lazards ought not to have been so ignorant of the situation and ought to have known what their rights were and ought to have made inquiry as to a lien. The bank owed no duty to disclose the situation. The Union Trust Company should have protected the plaintiffs. The plaintiffs need not have accepted the drafts if they were not satisfied with the statement of the trust company as to the securities it held. In short he in effect says, "Am I my brother's keeper?"

It is not surprising that later on, in discussing the matter with Mr. Perry, a representative of the plaintiffs, who was not familiar with the situation, he should take the position that the plaintiffs always knew of the bank's lien; nor that, on the other hand, he should write Mr. Clarkson, Mr. DuVernet's administrator, on the 10th March, 1916:—

"The bank certainly never had any knowledge of an assignment of the shares to Lazard Frères, and we had no idea that they were even interested in them until Mr. Perry, their representative, intimated this fact to us about a year ago."

In this case I have no hesitation in finding that there was a duty upon the part of the bank to disclose its lien, and that the failure to disclose was fraudulent, in the sense that it was intended to allow the plaintiffs to assume the liability incident to the acceptance of the bills without the security they thought they had. The real enormity of what was done was probably not apparent to the bank officials at the time, for they assumed that Mr. DuVernet could and would meet his obligations. The indignation of the general manager at the failure to disclose the true nature of the certificates was minimised by the pious hope that all would be well—"I have no doubt at all that the transaction will be strictly carried out on its understanding"—in other words, that Mr. DuVernet will not transfer to some one else in fraud of the plaintiffs. I cannot help thinking that at that time he would not have thought of setting up the bank's own claim to the plaintiffs' prejudice.

Mr. DuVernet's insolvency and death have now made it plain that one of the contending parties must lose; the bank asserts its statutory right to its lien; and I think that, under the circumstances, I should apply the principle stated by Lord Macclesfield in *Savage* v. *Foster* (1723), 9 Mod. 35: "Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser."

In *Nicholson* v. *Hooper* (1838), 4 Myl. & Cr. 179, Lord Cottenham says much the same thing (p. 186): "A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person although he derives no benefit from the transaction." Here the bank undoubtedly did derive substantial benefit from the transaction. Other cases to the same effect are collected by Mowat, V.-C., in *Re Shaver* (1871), 3 Ch. Chrs. 379.

ONT.

S. C.

LAZARD BROS. & CO. v. UNION BANK OF CANADA.

Middleton, J.

Since then there has been much discussion concerning estoppel by silence, but there cannot be any doubt as to the application of the principle when there is an interest in the carrying out of the transaction, a clear duty to speak, and a wilful maintaining of silence to the prejudice of the other. There must be a declaration of the plaintiffs' title to the shares and an order for payment over of the dividends retained by the bank and interest thereon. The bank should pay the costs of the plaintiffs. No order as to the costs of Clarkson.

B. C.

C. A.

LAIRD v. LAIRD.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. April 6, 1920.

APPEAL (§ I A—1)—INTERPLEADER—ARISING OUT OF DIVORCE ACTION.

An appeal lies to the Court of Appeal in an interpleader issue arising out of seizure by the sheriff on an execution issued in a divorce action, although there is no appeal from a decree in divorce.

Statement.

APPEAL by plaintiff from a judgment of Macdonald, J., in an interpleader issue arising out of a divorce action. A preliminary objection that there was right to appeal was overruled and the case set down for hearing.

J. A. Russell, for appellant.

I. I. Rubinowitz, for respondent.

The judgment of the Court was delivered by

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would over-rule the preliminary objection which is founded upon the fact that the judgment on which the execution was issued was a judgment in a divorce action. The submission in support of the objection is, that as there is no appeal to this Court from a decree in divorce there cannot be an appeal from the judgment in an interpleader issue arising out of seizure by the sheriff of the property of the co-respondent to answer an order against him for costs. That submission, I think, is unsound. The right given to the sheriff to interplead is quite independent of the character of the action in which the execution was issued, and the issue is quite distinct from the issues in such an action. The contest here has nothing to do with marital rights. It would be unfortunate if in a case like the present one, the party feeling aggrieved should have to go to the Privy Council for relief.

We have no Divorce Court corresponding to the English Divorce Court, the Supreme Court has jurisdiction in divorce as in all other causes. This Court has already heard an appeal precisely similar to this one, *Francis* v. *Wilkerson*, [1918] 2 W.W.R. 956.

It is true that the precise point here was not raised there, but the question of the jurisdiction of the Supreme Court generally was referred to by my brother Martin in his reasons in that case.

My view is not, I think, in conflict with the decision of the full Court in *Brown* v. *Brown* (1909), 14 B.C.R. 142. The order there appealed from was one granting interim alimony, a matter of marital rights, while here it is not such but merely one of execution, a matter of procedure on the recovery of a sum of money awarded with which the Divorce Act has nothing to do.

It is hardly necessary in this connection to refer to *Scott* v. *Scott*, (1891), 4 B.C.R. 316, as that was an appeal from the divorce decree itself, and anything said by the Court not applicable to the facts of the case may be treated as *obiter dicta*.

It is, I think, too late in the day to question the decisions which decide that an appeal will not lie to this Court from decrees of divorce and matters cognate thereto, but I am strongly of opinion that we ought not to restrict beyond the logical result of those cases the jurisdiction of this Court to hear appeals where the question in issue is not one of marriage or divorce, but is one which the Supreme Court may take cognizance of independently of any jurisdiction conferred upon it by the Divorce Act, and which without trenching on Dominion jurisdiction the Province may legislate upon.

The appeal should therefore be heard.

Re BEAVER WOOD FIBRE Co. Ltd. AND AMERICAN FOREST PRODUCTS CORPORATION.

ONT.
S. C.

Ontario Supreme Court, Rose, J. February 3, 1920.

ARBITRATION (§ IV—41)—SUBMISSION TO ARBITRATORS—SCOPE OF—JURISDICTION—EVIDENCE ON MATTERS BEYOND SCOPE—FAILURE TO OBJECT.

Parties may, by the use of appropriate language, agree to submit the question whether a particular dispute is within the terms of the submission; but, unless the question is submitted, the arbitrators cannot acquire jurisdiction by erroneously deciding that the fact which they affect to determine is within the submission.

ONT.

S. C.

RE BEAVER WOOD FIBRE CO. LTD. AND AMERICAN FOREST PRODUCTS CORPORATION.

Rose, J.

The parties seeking to set aside the award were not precluded from raising the point that the award dealt with a matter not submitted: the mere failure to protest against the reception of the inadmissible evidence did not deprive them of their right to attack the award as having been made without jurisdiction.

[Review of authorities.]

MOTION by the Beaver Wood Fibre Co. to enforce, and cross-motion by the American Forest Products Corporation to set aside, an award of arbitrators.

Peter White, K.C., and *A. Bristol*, for the Beaver Wood Fibre Company.

A. G. Slaght, for the American Forest Products Corporation.

ROSE, J.:—By an agreement in writing, dated the 27th March, 1916, the American Forest Products Corporation, hereinafter referred to as the sellers, agreed to sell, and the Beaver Wood Fibre Company Limited, hereinafter referred to as the buyers, agreed to buy, not less than 10,000 nor more than 15,000 cords of pulpwood, cut during the winter and spring of 1915-1916. Terms as to shipment, measurement, piling, etc., were set out; the contract was declared to be "made subject to strikes, fires, and contingencies beyond the control of either party;" and there was a provision that "in case of any disputes arising under this contract they" should be settled by a board of three arbitrators, one to be chosen by the sellers and one by the buyers and the third by the two first chosen, or by a Judge, if the two should fail to agree.

The sellers did not make deliveries at the times stipulated and did not deliver the full quantity of wood contracted for, and arbitrators were appointed, who have awarded that the sellers shall pay to the buyers $39,333.70, together with the costs of the reference and award.

The motions first came on to be heard upon affidavits. Those filed on behalf of the sellers in support of the motion to set aside the award produced the contract, the notice of arbitration, the appointment of the third arbitrator, the award, and a copy of an affidavit filed by the solicitors for the buyers upon the motion to enforce the award, in which it was said that the agreement of the 27th March, 1916, contained the submission to arbitration. In one of the sellers' affidavits it was also said "that, as recited in (the) award, a dispute arose between (the) parties, and that such dispute was as to whether or not the American Forest Products

Corporation had carried out an agreement dated 27th March, 1916 (also referred to in such award), having regard to the existing conditions; and no other dispute had arisen between the parties." The affidavits filed on behalf of the buyers produced the notice served by the buyers calling upon the sellers to name their arbitrator, as well as the letters between the parties which preceded the formal notice. There was no denial in these affidavits of the statement made on behalf of the sellers as to the nature of the dispute which had been referred to the arbitrators, but there was a statement that the dispute between the parties appeared from the evidence given on the arbitration and the exhibits filed with the arbitrators.

The notice by which the buyers called upon the sellers to name an arbitrator recited that a dispute had arisen under the contract, without saying what such dispute was. However, the letters produced by the buyers did shew that a dispute had arisen, and that it was as to whether "fires and contingencies beyond the control" of the sellers had prevented the fulfilment of the contract. In one of the letters there was a statement that the buyers had sustained and would sustain large damages by reason of the non-fulfilment of the contract; but that was put forward as a reason why the sellers ought to endeavour to make prompt deliveries; there was no demand for the payment of money, and there was no suggestion in the correspondence of a dispute as to the amount that would be payable in case the buyers were entitled to be paid anything. It appears to me, therefore, that, upon the materials originally before the Court, no conclusion could have been reached other than that the dispute which had arisen and had been referred was a dispute as to whether or not the sellers had, in the circumstances of the case, done all that the contract required them to do, or, if not all, what part, and that the awarding of damages for breach of the contract—if there was held to be a breach—was not something submitted to the arbitrators, even if the question as to the amount of damages recoverable for a breach can be a question arising under the contract, which point it is not necessary to discuss. If, then, the case had been disposed of upon the materials first presented, I should have thought that the award must be set aside: the judgment of the Court of Appeal in *Re Green and Balfour Arbitration* (1890), 63 L.T.R. 325, would have seemed to me to put the matter beyond controversy.

ONT.

S. C.

RE BEAVER WOOD FIBRE CO. LTD. AND AMERICAN FOREST PRODUCTS CORPORATION.

Rose, J.

The case, however, was not disposed of on the original materials, because Mr. White said that he thought the reporter's notes of the proceedings had before the arbitrators would shew that a dispute as to the damages payable upon a breach of the contract had arisen and had been referred, or, alternatively, that the sellers were precluded from setting up that no such dispute had been referred; and leave was given to him to put in a transcript of the notes. The transcript has now been put in, and the case has been re-argued, and it is necessary to consider what did take place upon the reference.

The proceedings were opened by a statement made by Mr. White as to what he conceived to be the issue between the parties. He said that the question from the point of view of the buyers was a very narrow and simple one: that the buyers said that the wood was not delivered and that they purchased elsewhere, and by reason of having to purchase at a time when prices had materially advanced they suffered a loss of $55,588.04. He then went on to prove his case, devoting considerable time to the question of damages. So far as appears, Mr. Slaght did not object to the evidence on the question of damages as being irrelevant, although he did strenuously object to some of it as being hearsay, and, so, inadmissible. He did, however, cross-examine the buyers' principal witness as to whether there had been any dispute as to damages, and got from him the statement that there had been no specific claim for damages, although, in discussions had at a time when the buyers were still trying to get delivery, and when the substitution of some other wood for that contracted for was debated, the "going price on peeled pulpwood" was stated, with the result, according to the witness, that the sellers "knew quite well the approximate amount of the damage." The sellers adduced no evidence as to damages, but directed their efforts to an attempt to shew that the non-delivery of the wood was due to fires and contingencies beyond their control, in that there had been at first a shortage of railway cars, and that in July, 1916, a great quantity of wood upon which they had counted had been destroyed by fire, and that one Clarke, with whom they had contracted for some 5,000 cords of wood, had, in breach of his contract, sold and delivered that wood to the buyers. All this evidence was objected to by Mr. White as being irrelevant, "the contract being simply for the supply of wood

without reference to whether it was wood then on hand, or whether it was then contracted for, or where it was to be got, or anything in regard to it, either locality, price, or anything else." Mr. Slaght answered: "Unless a world-conflagration occurred and burned up every stick of pulpwood in the world, then this clause does not mean anything, according to my friend. I say it meant something. It is for the Board to say what the effect is."

The award does not deal specifically with the issue thus presented by the sellers. What it recites is that there is an agreement for the sale and purchase of not less then 10,000 nor more than 15,000 cords of pulpwood at the price of $10.85 per cord, delivered f.o.b. cars at Thorold, which agreement provides for arbitration in case of any dispute arising under it; that "a dispute has arisen between the said parties under the said contract;" and that the arbitrators were appointed and have considered the several allegations of the parties; and what it awards is that the sellers shall pay to the buyers $39,333.70; that neither of the parties has any other demand, claim, or cause of action against the other "in respect of the matters referred as aforesaid and the matters aforesaid by us awarded upon;" and that the sellers shall pay the costs.

As regards the issue as to what disputes had arisen and had been referred, I do not find in the record of the proceedings anything which makes the buyers' case stronger in any respect than it was upon the affidavits and exhibits originally put in. It appears to me, therefore, that, unless what was done upon the reference had the effect of enlarging the submission or of depriving the sellers of the right to contend that the question as to damages was not referred, the award must be held to be upon a matter which was outside the scope of the reference. I proceed, then, to consider the effect of what was done.

It is said, in the first place, that it was for the arbitrators to find what was submitted, and that they have found that the question of damages was submitted, and that the sellers are bound by the finding. It must be assumed that if they had not thought that the question was submitted the arbitrators would not have passed upon it; but they did not expressly declare that it was submitted. However, I do not think that an express finding that the question had been submitted would have been binding upon the parties. Parties may, of course, by the use of appropriate

ONT.

S. C.

RE BEAVER WOOD FIBRE CO. LTD. AND AMERICAN FOREST PRODUCTS CORPORATION.

Rose, J.

language, agree to submit the question whether a particular dispute is within the terms of the submission; and if they do so agree they will be bound by the decision of the arbitrators upon that question, as upon any other question submitted: *Willesford* v. *Watson* (1873), L.R. 8 Ch. 473; Russell on Arbitration and Award, 10th ed. (1919), p. 94. But, except where such a question is submitted, the arbitrators cannot acquire jurisdiction by erroneously deciding that the fact which they affect to determine is within the submission: *Produce Brokers Co. Limited* v. *Olympia Oil and Cake Co. Limited*, [1916] 1 A.C. 314, *per* Lord Parker of Waddington, at p. 327, and Lord Sumner, at p. 329; *Re Hohenzollern Co. and City of London Contract Corporation Arbitration* (1886), 54 L.T.R. 596, *per* Lopes, L.J., at p. 597; *Piercy* v. *Young* (1879), 14 Ch. D. 200, particularly, *per* Jessel, M.R., at p. 208; *Sinidino Ralli & Co.* v. *Kitchen & Co.* (1884), 1 C. & E. 217; *Re Green and Balfour Arbitration*, 63 L.T.R. 325. The language of Fry, L.J., in the case last cited, is so apposite that I quote it. The learned Lord Justice said, in part (pp. 327, 328):—

"The first and most important question in this case is, What was the subject in dispute between the parties when this arbitration was had recourse to? That is a subject upon which, according to all the authorities, parol testimony may be received, and of course must be received, because otherwise arbitrators might be taking upon themselves to determine matters which had never been in any way submitted to them. Now the evidence of that seems to me to be mainly the letter of the 3rd April. That refers to the statement by one of the contracting parties to the agents of the other as to what was the matter in dispute. That merely went to the quality of the salmon which had been delivered. They said, 'We do not consider the tender equal to contract guarantee, and therefore insist upon arbitration.' That arbitration might be confined to the question of quality, or, of course, if the point was raised between the parties, it might have gone on further to determine what were the results of a defect in quality. Now, what would be the results of a defect in quality, if it existed, seems to me to be a question which was never in discussion between the parties . . . It appears to me that, although the appellants say that something more was submitted than the controversy raised by the letter of the 3rd April, there is not sufficient evidence to prove that

such further controversy was raised, and they entirely fail in satisfying me that there was any other point in dispute between the parties at that time than the quality. That being so, it appears to me that the arbitrators have by their award gone beyond the dispute submitted to them, and they have found what in their judgment ought, according to the contract before them, to be the results of such inferiority. That is a point which, in my judgment, was not submitted to them. I think the award travelled beyond the matter in dispute, and therefore was wrong."

In this case, the evidence seems to me to fail to shew that any controversy had been raised and had been submitted to the arbitrators, other than a controversy as to whether any failure to make deliveries was excused by fires or contingencies beyond the control of the sellers. I think, therefore, that, in awarding as to the consequences of such failure as there may have been, the arbitrators travelled beyond the matter in dispute, and that the award must be set aside unless there is something which precludes the sellers from questioning it. I am not overlooking the decision of Proudfoot, V.-C., in *Woodward* v. *McDonald* (1887), 13 O.R. 671; but all that was really decided in that case was that the parties had agreed to submit to arbitration the question whether the disputes between them were within the arbitration clause; and any apparent opinion of the Vice-Chancellor to the effect that the Court will not, in the case of an agreement such as we have here, decide whether a particular controversy had arisen and had been submitted, must yield to the later decisions in *Re Green and Balfour Arbitration, supra*, and *Produce Brokers Co. Limited* v. *Olympia Oil and Cake Co. Limited, supra*.

This brings me to the last point to be decided, viz.: Are the sellers precluded from raising the point that the award deals with a matter not submitted? It is said that they are precluded because they did not promptly contradict the opening statement of counsel for the buyers as to the matter to be determined, and did not raise the objection that evidence as to the damages was irrelevant, but, on the contrary, stood by, taking their chance of a favourable award. As I have said, there was no formal objection to evidence of damage as irrelevant, but merely a cross-examination directed to shewing that no contest as to damages had existed before the

ONT.

S. C.

RE BEAVER WOOD FIBRE CO. LTD. AND AMERICAN FOREST PRODUCTS CORPORATION.

Rose, J.

arbitration was entered upon. On the other hand, there is nothing to shew, as in *Thames Iron Works and Ship Building Co.* v. *The Queen* (1869), 10 B. & S. 33, that there had been a parol submission of the question of damages, and, as has been stated, the sellers did not adduce evidence upon that question, or, as far as I can see, do anything actively to make the question of the amount of the damages an issue. Is, then, their mere failure to object fatal to their right to raise the question of jurisdiction now? In my opinion, the answer to that question is, no. There are many cases in which it has been held that the right to object to irregularities in the mode of conducting an arbitration will be waived by continuing the proceedings with full knowledge and without protest: see Russell on Arbitration and Award, 10th ed., pp. 418 to 424; but, while there are cases, e.g., *Davies* v. *Price* (1862), 6 L.T.R. 713, affirmed (1864), 34 L.J.Q.B. 8, in which it has been held that the right to question the arbitrator's jurisdiction to deal with a particular question is not lost by continuing to attend before him after protesting against his receiving evidence directed to such question, no English or Canadian case was cited—nor have I found one—which decides that the right is lost by continuing to attend without protesting against the reception of such irrelevant evidence. To use the language of Blackburn, J., in *Ringland* v. *Lowndes* (1864), 33 L.J.C.P. 337—a case, it is true, of an irregularity and of a protest—"the question is not one of waiver or of estoppel, but of authority," and I cannot see why the rule to be applied where the question is as to an arbitrator's authority should differ from the rule which would be applied if the question was as to the jurisdiction of an inferior court. *Faviell* v. *Eastern Counties R.W. Co.* (1848), 2 Ex. 344, was cited as a case in which it was decided that a party who saw the arbitrator entertaining a question which had not been submitted, and who, nevertheless, went on with the case, instead of applying for leave to revoke the submission—nowadays it would be, without applying for a stated case: Halsbury's Laws of England, vol. 1, p. 450; *Thetford Corporation* v. *Norfolk County Council*, [1898] 1 Q.B. 141—had thereby forfeited his right to contend that the arbitrator had exceeded his jurisdiction. Alderson, B., in his judgment (2 Ex. at p. 350) does seem to lay that down as the law; but that is not what the Court decided. The plaintiff had brought an action of *debt*, in which he claimed an

unpaid portion of the contract-price of work done for the defendants, and also a sum for certain extra expenses incurred by him in the execution of the contract, by being, as he alleged, delayed by the defendants in getting possession of the land. By consent, an order was made referring to a legal arbitrator "the claims of the plaintiff in this action." Before the arbitrator, it was contended that the plaintiff was not entitled to recover, in the action of *debt*, the cost of the extra work, and that his only remedy was by action for *damages* for breach of the contract; but the arbitrator received evidence of the extra work and awarded that the plaintiff was entitled to recover a certain amount "in respect of his said claim." The defendants moved to set aside the award, but the Court held, as Pollock, C.B., put it, that the question was not whether the arbitrator had exceeded his jurisdiction, but whether he had decided the matter in dispute: that the question before the arbitrator was, whether the claim for extra work was a claim in the action, or mere damages: that, whether rightly or wrongly, he had decided that it was a claim in the action: and that his award was conclusive; or, as Rolfe, B., put it, if the sum in dispute was one of the plaintiff's claims in the action, the objection failed: the plaintiff claimed a sum for *debt*, which included the extra work, and the arbitrator had decided that the sum could be established as a debt. Alderson, B., said that "the extent of the arbitrator's jurisdiction is to be taken according to the plain words of the submission, namely, of the 'claims' which the plaintiff makes in the action, and this is one," but he also said that, when the defendants saw the arbitrator entertaining a question which he ought not to entertain, they ought to have applied for leave to revoke the submission, thus bringing before the Court the question as to the construction of the submission; that they did not do so, but made the question one for the arbitrator's determination, and he had determined it. Alderson, B., was the only member of the Court to refer to this question of "waiver," if that is the proper term (see Ewart, Waiver Distributed, p. 136), and it will be observed that his remarks were not necessary even to his decision that the arbitrator had jurisdiction, because the *claims* in the action had been referred, and the sum in question, whether it was rightly to be considered a debt or merely *damages*, was *claimed*.

The case, then, cannot be treated as a sufficient authority for holding that the sellers' failure to protest against the reception of

ONT.
S. C.
Rose, J.

the evidence as to damages deprived them of their right to attack the award as having been made without jurisdiction.

For these reasons, I am of the opinion that the motion made by American Forest Products Corporation must succeed and that the award must be set aside, and the matter remitted to the arbitrators so that they may make their award upon the question submitted to them. The Beaver Wood Fibre Company Limited must pay the costs of the motions.

MAN.
C. A.

THE KING v. RITCHIE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. March 15, 1920.

INTOXICATING LIQUORS (§ III D—74)—PHYSICIAN—PRESCRIPTION—ACTUAL NEED—MANITOBA TEMPERANCE ACT—CHARGE—DEFINITENESS—IDENTITY OF ACCUSATION.

A conviction under sec. 57 of the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112, that the accused on the 28th and 29th of November, 1919 . . . did . . . give prescriptions for intoxicating liquors "in cases where there was no actual need" does not shew any specific breach of the section and will be quashed. The charge must describe the offence with reasonable certainty and contain a statement of facts by which it is constituted so as to identify the accusation.

Statement.

MOTION to quash a conviction under the Manitoba Temperance Act (1916), 6 Geo. V. ch. 112. Conviction quashed.

E. R. Chapman, for appellant.

John Allen, for the Crown.

Perdue, C.J.M.

PERDUE, C.J.M.:—The accused, Dr. C. A. Ritchie, was charged, convicted and fined under sec. 57 of the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112. The alleged offence is stated in the conviction as follows:

> That he, the said Dr. C. A. Ritchie, on the 28th and 29th days of November, 1919, at the City of Winnipeg in the Province of Manitoba, unlawfully did, being a physician lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicating liquor in cases where there was no actual need.

This conviction does not shew any specific breach of the above section. It does not state the name of any person to whom a prescription was given. There must have been more than one offence, because two different dates are given—November 28 and 29. It appears to charge a course of conduct alleged to have been followed by the accused constituting a continuing breach of the Act on the days mentioned. Evidence was given by three witnesses who testified as to three separate and distinct offences

alleged to have been committed by the accused within that period of time, but the evidence in any one of the instances named did not apply to any other of the three. Only one witness gave evidence for the prosecution in respect of each alleged contravention. From the manner in which the prosecution was conducted and the form in which the conviction is stated, I think it is clear that the magistrate did not intend to convict the accused of having given a prescription for liquor to any particular patient, but to convict him of having, on the days mentioned, followed the practice of giving to patients prescriptions for liquor when there was no actual need of it. The information described the offence or offences in the same manner as stated in the conviction. Sec. 77 allows several charges of contravention of the Act committed by the same person to be included in one and the same information, provided that the information must contain the time and place of each contravention; but it is evident that the magistrate convicted the accused of a single offence, because he imposed only one fine. If he convicted for the three infringements he was bound to impose the penalty for each: sec. 110. If the conviction is for a single offence we have no means of ascertaining to which of the three contraventions alleged in the evidence the conviction was intended to apply. This Court could not, therefore, amend. In each case there was only the evidence of an informer as against the evidence of the accused, and each case had no connection with either of the others. Clearly, the evidence in one case could not be used in either of the others. It is urged on behalf of the prosecution that there is an offence described in the words of sec. 57 and that it is therefore sufficient under sec. 78. But a mere naming of an offence as "murder" or "theft" is not enough. The charge must describe the offence with reasonable certainty and contain a statement of facts by which it is constituted so as to identify the accusation: *Rex* v. *Bainbridge* (1918), 42 D.L.R. 493, 30 Can. Cr. Cas. 214, 42 O.L.R. 203.

I think the magistrate tried the accused on a charge stated in the loosely framed wording of sec. 57 and that he used the evidence of the three informers as to separate and distinct contraventions of the Act to support the charge that the accused did on the days mentioned "give prescriptions for intoxicating liquor in cases where there was no actual need." For the reasons

MAN.

C. A.

THE KING v. RITCHIE.

Cameron, J.A.

I have stated, I think this conviction is bad. It cannot be amended so that a charge may be framed which will be supported by the evidence.

The conviction should be quashed.

CAMERON, J.A.:—This is a motion to quash a conviction under the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112, on the grounds taken in the notice of motion for a writ of *certiorari* on the return of which, by consent, the merits were argued. The defendant is a practising physician. The conviction made by the magistrate, December 11, 1919, set forth that the defendant is convicted

for that he, the said Dr. C. A. Ritchie, on the 28th and 29th days of November, 1919, at the City of Winnipeg in the Province of Manitoba unlawfully did, being a physician lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicating liquor in cases where there was no actual need contrary to the provisions of the Manitoba Temperance Act, A. R. Walkey being informant, and I adjudge that said Dr. C. A. Ritchie for his said offence forfeit and pay the sum of $50, to be paid and applied according to law, and also that he pay to the said A. R. Walkey the sum of $9.50 for his costs in this behalf, and if the said several sums be not paid forthwith, then I adjudge the said Dr. C. A. Ritchie be imprisoned in the common jail for the Eastern Judicial District of Manitoba at Winnipeg and there be kept for the space of one month unless the said sums be sooner paid.

Three witnesses were called before the magistrate and gave evidence of three different alleged infractions of the Act by the defendant, one on November 28 and two on November 29.

Sec. 66 fixes the penalty for infractions of sec. 57. Under that section the person offending against sec. 57

shall be liable on summary conviction to a penalty for the first offence of not less than $50 nor more than $300, and in default of immediate payment to imprisonment for not less than two months nor more than four months, and for the second offence to a penalty of not less than $100 nor more than $500 and in default of immediate payment to imprisonment for a term of not less than four months nor more than eight months.

Sec. 110 of the Act provides that

No Judge, Magistrate, Justice or Inspector shall have any power or authority to remit, suspend or compromise any penalty or punishment inflicted under this Act; and every Judge, Magistrate and Justice is hereby required to make a return of the case and pay over all fines and money immediately on receiving the same to the Provincial Treasurer.

There may be on the face of the conviction uncertainty as to whether one or both of the alleged infractions on November 29 are intended to be included in the terms of the conviction. One of them at least must be. In any event, whether one or both of

the infractions of November 29 are to be included in the conviction it is plain that the magistrate has not complied with sec. 66, which requires the imposition of a penalty of not less than $50 for a first offence. I need not dwell for present purposes on what may be considered a second offence. It is clear, therefore, on the face of the conviction that the magistrate has remitted the fine in one, at least, of the cases mentioned in the conviction and has thereby done what he is expressly forbidden by the Act to do.

In England there was formerly no objection to joining two offences in one conviction. Paley on Summary Convictions, 8th ed., page 282. But such has not been the case since 11 & 12 Vict. 1848, ch. 43, sec. 10. "Every such complaint shall be for one matter of complaint only and not for two or more matters of complaint."

Under the former law it was held that when, if both offences could have been included in one conviction, the defendant should be convicted of both "A judgment for too little is as bad as a judgment for too much" *R.* v. *Salomon* (1786), 1 Term Rep. 249; Paley, page 291. See also Paley at page 298. Discretionary power to mitigate penalties exists only in cases where it is vested by statute and in the Temperance Act such discretionary power is expressly denied.

> A conviction . . . must be good in all its parts, and differs in this respect from an order. The judgment in particular being an entire act, cannot be severed: and therefore, if it be bad as to part, the whole is thereby vacated, although the several parts may be in their nature distinct. Paley on Summary Convictions, page 301.

It is to be noted that under sec. 100 no conviction is to be held invalid by reason of the punishment imposed being in excess of that which might have lawfully been imposed, provided it can be understood from such conviction that the same was made for an offence against some provision of the Act and provided that it can be understood from such conviction that the appropriate penalty or punishment for such offence was thereby adjudged. This is not a case where the punishment imposed is in excess of that which might have been lawfully imposed nor is it a case where the appropriate penalty has been adjudged. This is a case where the appropriate penalty for at least one offence has not been adjudged at all. There is only one offence for

MAN.

C. A.

THE KING v. RITCHIE.

Cameron, J.A.

which a penalty is adjudged by the conviction while there are at least two offences for which the defendant was convicted and there are three offences in respect of which evidence was given.

This conviction is, therefore, invalid and not within the jurisdiction of the magistrate who signed it and does not come within secs. 100 and 101 so as to be capable of amendment.

This objection was not raised in the notice of motion, but it is apparent and must be dealt with. In my opinion the conviction must be quashed.

Fullerton, J.A.

FULLERTON, J.A.:—The information charges that the applicant

on the 28th and 29th days of November, 1919, at Winnipeg, in the Province of Manitoba, unlawfully did, being a physician lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicating liquors, in cases where there was no actual need, contrary to the provisions of the Manitoba Temperance Act.

Counsel in support of the application contends that the information charges no offence in law.

Whether it does or not depends upon the construction to be placed on sec. 57 of the Act, 6 Geo. V. 1916, ch. 112.

That section provides:

57. (1) Any physician who is lawfully and regularly engaged in the practice of his profession, and who shall deem any intoxicating liquors necessary for the health of his patients, may give such patient or patients a written or printed prescription therefor . . . but no such prescription shall be given or liquors administered, except in cases of actual need, and when in the judgment of such physician the use of liquor is necessary. And every physician who shall give such prescription . . . in evasion or violation of this Act or who shall give to or write for any person a prescription for or including intoxicating liquor for the purpose of enabling or assisting any person to evade any of the provisions of this Act or for the purpose of enabling or assisting any person to obtain liquor for use as a beverage, or to be sold or disposed of in any manner in violation of the provisions of this Act, shall be guilty of an offence under this Act.

Is it sufficient under this section to charge a physician with giving a prescription "in cases where there is no actual need?"

The physician is authorised to give prescriptions in cases in which he deems intoxicating liquor necessary for the health of his patient. The words "except in cases of actual need and when in the judgment of such physician the use of liquor is necessary" in no way qualify or modify the earlier clause of the section. If the physician deem intoxicating liquor necessary for the health

of his patient it must follow that there is actual need in his opinion.

In *Rex* v. *Rankin* (1919), 31 Can. Cr. Cas. 275, 45 O.L.R. 96, Meredith, C.J.O., in dealing with the corresponding section of the Ontario Temperance Act, struggles with the difficulty of giving a meaning to the words "actual need." He says at page 281:—

> It is difficult to understand why the enactment was framed in the form in which it is drawn, and it seems strange that a physician should be authorised to prescribe liquor for a patient when in his judgment the use of liquor is necessary, and that at the same time he should be put in the position that, if there is in fact no need for prescribing liquor, he commits an offence against the Act. I have endeavoured to find some meaning for the words as to actual need which would not put a physician in that unfortunate position, and the only suggestion that has come to my mind is that the words were intended to apply to a case where the use of liquor was necessary for the patient, but he had no need of getting it because he had at the time in his possession all that he needed. The suggestion is not a very satisfactory one but, as I have said, it is the only one which has occurred to me. It may be that this is another instance of the ways of a Legislature being past finding out.

Ferguson, J.A., who dissented in this case, suggests the view that the words "no such prescription shall be given except in cases of actual need" were intended only as an expression of the definition the Legislature desired the physician to adopt as his guide or standard in arriving at his conclusion on the question submitted to him for decision: "Is intoxicating liquor necessary for the health of his patient?" (31 Can. Cr. Cas. at 284.)

Whatever object the Legislature had in using the words "actual need" my view is that it could never have been intended that a physician who prescribes in the honest belief that intoxicating liquor is necessary for the health of his patient is guilty of an offence, because in fact the liquor was not necessary in the particular case, either by reason of the condition of the patient's health or because he was already amply supplied with liquor.

If this is so, then clearly, charging a physician with giving a prescription "in cases where there is no actual need" is not an offence under the Act.

To so hold would be to render meaningless the portion of the section which authorises the physician to give a prescription in cases in which in his opinion the use of liquor is necessary.

Test it in another way. The Crown, on an information charging a physician with giving a prescription in a case where there

MAN.

C. A.

THE KING v. RITCHIE.

Fullerton, J.A.

was no actual need, satisfies the Magistrates that there was no actual need of prescribing liquor in the particular case, if the information shews an offence in law, the physician must be found guilty and the fact that he honestly believed the liquor necessary would be no answer. I cannot believe the Legislature ever intended such a result.

In the *Rankin* case, 31 Can. Cr. Cas. 275, 45 O.L.R. 96, no objection was taken to the sufficiency of the information, and the point was not considered by the Court.

On the argument counsel for the Crown referred to the case of *King* v. *Pazdrey*, decided by this Court on July 8, 1919, as being on all fours. I have looked up the papers in that case and find that the information charged Dr. Pazdrey with giving prescriptions to persons for liquor "for use as a beverage."

For the reasons which I have given, I think the information shews no offence in law and that the conviction must be quashed.

Dennistoun, J.A.

DENNISTOUN, J.A.:—The information in this case does not comply with the provisions of sec. 77 of the Manitoba Temperance Act, 6 Geo. V. 1916, ch. 112, in that several charges being included in one and the same information sufficient particulars of each contravention are not set forth.

The conviction is, in the words of the information, that the accused

on the 28th and 29th days of November, 1919, at the City of Winnipeg in the Province of Manitoba, unlawfully did, being a physician lawfully and regularly engaged in the practice of his profession, give prescriptions for intoxicating liquors in cases where there was no actual need contrary to the provisions of the Manitoba Temperance Act.

The accused is apparently found guilty of several offences which are not specified and one penalty of $50 and costs is imposed.

Evidence was given in respect to three prescriptions, one given on November 28 and two on November 29.

I have endeavoured to deal with this case on the merits and to amend the conviction in accordance with the evidence, but am unable to do so. The Magistrate apparently intended to convict for the prescription given on the 28th and for one or both of the prescriptions given on the 29th November. It cannot be determined which of them he had in mind, or which of the witnesses he believed.

MAN.

C. A.

THE KING v. RITCHIE.

Dennistoun, J.A.

Moreover, there being a conviction for more than one offence why was only one fine imposed and in respect to which offence was it imposed? It is impossible to tell.

In my opinion the conviction is bad for multiplicity and insufficiently describing the offences indicated, and cannot be upheld, even though the sweeping provisions of sec. 101 be invoked, nor can it be amended upon the evidence which has been taken for there is no means of knowing what portion of that evidence the Magistrate believed, or what, if any, he rejected. The evidence of stool pigeons cannot prevail against that of a reputable physician in the absence of any indication of the credence given to it by the Magistrate.

My brother Cameron has dealt in his reasons for judgment with another phase of the case with which I concur.

I refer to *Rex* v. *Leduc*, (1918), 30 Can. Cr. Cas. 246, 43 O.L.R. 290. *Rex* v. *Bainbridge*, 42 D.L.R. 493, at 501, 30 Can. Cr. Cas. 214, at 223; *Ex parte Simpson*; *Rex* v. *Keeper of Amherst Jail* (1918), 44 D.L.R. 136, 30 Can Cr. Cas. 334; *Ex rel Tidering-ton* v. *Rose* (1918), 30 Can. Cr. Cas. 405, 14 Alta. L.R. 118; *Rex* v. *Rankin*, 31 Can. Cr. Cas. 275, 45 O.L.R. 96.

I would quash the conviction.

Conviction quashed.

Re McKINLEY AND McCULLOUGH.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. December 19, 1919.

VENDOR AND PURCHASER (§ I C—17)—AGREEMENT FOR SALE OF LAND—OBJECTIONS TO TITLE—PREVIOUS CONVEYANCE "IN TRUST"—CONSTRUCTIVE NOTICE—ACTUAL NOTICE.

A purchaser for value without notice, whose conveyance is registered is not affected by constructive notice of any prior instrument affecting the land or any interest in the land unless the instrument is registered or he has actual notice of it or of the existence of the interest.

Statement.

AN application by a vendor of land, under the Vendors and Purchasers Act, for an order declaring invalid an objection to the title made by the purchaser. The motion was heard by MIDDLETON, J., and enlarged by him to be heard before a Divisional Court.

The order of MIDDLETON, J., is as follows:—

The objection to title in this case arises from the fact that William Cayley, the then owner of the land, on the 1st May,

ONT.
S. C.
RE McKINLEY AND McCULLOUGH.

1888, conveyed the lot in question to John Turner "in trust." The deed is in the ordinary statutory form, and contains no indication of any trust save the words "in trust" following the description of the grantee. The purchaser now requires evidence of the nature of the trust on which the property was held by Turner, and its terms, also evidence shewing that there was a right to sell, and, if any power of sale, that it was duly exercised.

I should have little trouble with this application were it not for the decision of Mr. Justice Kelly in *Re Thompson and Beer* (1919), 17 O.W.N. 4, where the circumstances are precisely similar. It is there said:—

"The use of the word 'trustee' after her name, in the conveyance to her, was notice to subsequent purchasers that she took in the capacity of trustee. A purchaser is entitled to proof of the nature and extent of the trusts on which she took, and who are the *cestuis que trust* or persons otherwise interested, and whether these trusts include a power to sell either by herself or with the consent of others or otherwise; and, if the terms of the trust confer a power of sale, he may insist on proof that it is properly exercised."

In an earlier case heard by me some two or three years ago, of which I can find no report, I had arrived at precisely the opposite conclusion. In my view, the Registry Act protects the registered owner against all unregistered equities, and in fact gives to the owner an absolute title, unless he has, before registration of the instrument under which he claims, actual notice of the adverse right.

Constructive notice is not enough to defeat the title of the registered owner: *Rose* v. *Peterkin* (1885), 13 Can. S.C.R. 677; *Tolton* v. *Canadian Pacific R.W. Co.* (1891), 22 O.R. 204.

Here all that the registered owner has notice of is the fact that Turner, who bought in 1888 and sold shortly thereafter, was in fact a trustee. He has no notice that anything that Turner did was in violation of his rights. The presumption is that the sale made so long ago was properly made. In the days when constructive notice was a factor, it might possibly have been held that once notice of trusteeship was brought home the person concerned was put upon inquiry to ascertain the nature of the trusteeship, and to ascertain whether what was done was authorised; but, in my opinion, this old law has now no application.

At one time the person paying money to a trustee was liable to see to its due application.

It may be that my learned brother might have come to a somewhat different conclusion had the case of *London and Canadian Loan and Agency Co.* v. *Duggan*, [1893] A.C. 506, been cited to him, and had his attention been drawn to the effect of the Registry Act.

Under these circumstances, I think the proper disposition of the motion is to act upon the provisions of sec. 32 (3) of the Judicature Act, and to enlarge the matter to be heard before a Divisional Court. I adopt this course rather than that of following the decision of my learned brother and leaving the parties to appeal, because it has been suggested that the mere fact that a Judge entertains an adverse opinion to a title is sufficient to render it so doubtful that it should not be forced upon a purchaser. The question is one of great practical importance, because, after the lapse of time, it is here impossible to obtain any information as to the facts surrounding the transaction.

Motion adjourned accordingly.

T. A. Gibson, for the vendor.

A. D. McKenzie, for the purchaser.

MEREDITH, C.J.O.:—This is an application under the Vendors and Purchasers Act, which was made before Middleton, J., and referred by him to a Divisional Court because of the decision of Kelly, J., in *Re Thompson and Beer*, 17 O.W.N. 4, and a previous decision of his own, in an unreported case, the two being in conflict. Meredith, C.J.O.

The question raised is as to the effect of the fact that in one of the conveyances forming a link in the chain of title, a conveyance dated the 1st May, 1888, from William Cayley to John Turner, the words "in trust" follow the name and description of the grantee, there being nothing in the conveyance and nothing registered to shew what the trust was, and the vendor being unable to furnish any evidence of what, if anything, it was.

It was held by Kelly, J., in the case decided by him, that the use of the word "trustee" after the name of a grantee in a registered conveyance was notice to subsequent purchasers that the grantee took in the capacity of trustee, and that a purchaser is entitled to proof of the extent and nature of the trust and of the

ONT.

S. C.

RE McKINLEY AND Mc-CULLOUGH.

Meredith, C.J.O.

persons who are the *cestuis que trust* or persons otherwise interested, and whether the trust includes a power to the grantee or with the consent of others or otherwise to sell, and that if a power of sale is conferred the purchaser may insist on proof that it was properly exercised.

My brother Middleton's view was that only actual notice will affect a purchaser whose conveyance is registered, and that the notice which the conveyance by the use of the words "in trust" gave was constructive notice only, and the subsequent registered owner was therefore not affected by it.

Section 71 (1) of the Registry Act, R.S.O. 1914, ch. 124, makes "every instrument affecting the land or any part thereof fraudulent and void" against subsequent purchasers and mortgagees for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims; and sec. 72 provides that "priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration."

Section 73 contains the sweeping provision that "no equitable lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same person, his heirs or assigns . . ."

The cases referred to by my brother Middleton, if any authority for the proposition were needed, establish that a purchaser for value without notice, whose conveyance is registered, is not affected by constructive notice of any prior instrument affecting the land or any interest in the land unless the instrument is registered or he has actual notice of it or of the existence of the interest.

That a person who has notice of an instrument has notice of its contents is undoubted, but it is only constructive notice.

In the case of a trust of land, the trust, at all events if it is an express trust, must be evidenced by an instrument in writing, and there being no such instrument registered it is to be adjudged fraudulent and void against subsequent purchasers and mortgagees for valuable consideration without actual notice.

Now the purchasers subsequent to the conveyance had actual notice, not of any instrument declaring or evidencing a trust,

ONT.

S. C.

RE MCKINLEY AND MCCULLOUGH.

Meredith, C.J.O.

but only, at the most, that the land was conveyed to the grantee in trust.

In *London and Canadian Loan and Agency Co.* v. *Duggan*, [1893] A.C. 506, referred to by my brother Middleton, the question was as to shares in a joint stock company which stood in the name of J. O. Buchanan in trust, and were transferred by him to James Turnbull, who added to his name the words "in trust." Turnbull was the manager of the loan and agency company, and the shares were transferred to him as security for a loan which a firm of brokers had obtained from it. The company sold the shares. They had been transferred to the brokers by the owner of the shares as security for a loan, and he claimed that the company had notice of the trust upon which the brokers held the shares and that he was entitled to redeem them on payment of his debt—his contention being that, as the shares were held by J. O. Buchanan, manager, in trust, the loan and agency company had notice of the trust upon which the shares were held by the brokers.

Stating the opinion of the Judicial Committee, Lord Watson, after saying that it was agreed on all hands that the loan and agency company had no intimation of a trust running with the shares other than was conveyed to them by the terms of their transferor's title as it stood on the books of the company, went on to say (p. 509):—

"They had a right to satisfy themselves . . . that J. O. Buchanan, as representing the bank of which he was manager, was *in titulo* to transfer to them; and, whether they inquired so far or not, they must be held to have done so. But they had no right, and were under no duty, to trace back the history of the shares, in the course of their transmission from the respondent" (i.e., the person who had transferred them to the brokers).

The case of a purchaser of land is, I think, having regard to the provisions of the Registry Act, stronger than that of the loan and agency company, for in its case what was contended was that it had constructive notice of the trust, while in the case of a registered title constructive notice is not enough; there must be actual notice.

All that the purchaser in this case had actual notice of was that the land was conveyed to the grantee "in trust," and but for the provisions of the Registry Act he would have been affected

ONT.

S. C.

RE McKINLEY AND Mc-CULLOUGH.

Meredith, C.J.O.

with notice, but only constructive notice, of fact and instruments, to a knowledge of which he would have been led by an inquiry for the instrument or other circumstances creating the trust; and such notice as that does not now affect the title of a purchaser for value whose conveyance is registered.

The injustice that would flow from holding that the present purchaser would be affected by notice of the trusts upon which the land was held, and the land in his hands be bound, is evident from what has transpired. Every effort has been made to find whether there is in existence anything to shew the nature of the trust, but without success. The conveyance was made in 1886, and the parties to it have long since died, and no one can be found who can throw any light upon the matter.

I agree with the view of my brother Middleton that after the lapse of so many years since the conveyance by Turner it should be presumed that the sale by him was properly made, especially as the possession of the land has been consistent with the registered title.

In my opinion, the objection of the purchaser is not entitled to prevail.

Maclaren, J.A. Hodgins, J.A. Ferguson, J.A.

MACLAREN, HODGINS, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

Magee, J.A.

MAGEE, J.A. (dissenting):—The vendor seeks to compel the purchaser to accept the title to a parcel of land in Toronto.

In 1888, one William Cayley, then owner, conveyed the land to one John Turner in fee, but in the deed of conveyance the words "in trust" follow the name and description of the grantee. The deed itself is not before the Court. I assume in the vendor's favour that it is expressed to be for valuable consideration paid by the grantee to the grantor, and that there is nothing but the words "in trust," occurring where they do, to indicate that the grantee did not become both legal and beneficial sole owner.

Subsequently Turner sold and conveyed the land, the deed from him giving no indication of what the trust was, and the title comes through intermediate grantees to the present owner.

The purchaser considers that the addition of those words "in trust" indicates that Turner was not beneficial owner, but only a trustee, and that it would not be safe for him (the purchaser) to accept the title without some evidence that, as trustee, Turner had a right to sell.

The matter must, I think, be looked at just in the same light as if Turner were now alive and as if he were now the vendor and seeking to force the title upon the purchaser without any explanation of the nature of the trust. The lapse of 30 years may render it improbable that any claim under the trust, whatever it was, exists, but it does not alter the law as to whether such a title could at any time be forced upon a purchaser without more.

There is some evidence that possession of the land has consistently accompanied the title, and that no adverse claim has been made; and a former solicitor for Mr. Cayley and his executors, who, however, does not say that he had anything to do with the conveyance to Turner, makes a declaration shewing that he does not believe the Cayley estate has any claim.

All this would be quite consistent with the existence of a very simple trust giving rise to no occasion for claim or question during the life of some one yet living—so that the absence of claim affords no assurance of the non-existence of a very substantial right. On the other hand, of course, the trust, if any, may have been a trust to sell.

The question really is, whether Turner's grantee or any subsequent grantee acquired a good title free from any trust; for, if any of them did so, then the present vendor and vendee would be entitled to the benefit of their rights.

In my view, it comes down to this: could Turner, without explanation, have forced this title on his purchaser, and told the latter that he had no right to inquire or have any proof that a sale was authorised by the trust, which by acceptance of the deed Turner himself admitted?

I confess I think he could not, and that no purchaser should be asked to run the risk of a claim at any time hereafter by some person whose right may have accrued only recently or may mature hereafter.

The purchaser has actual notice, not merely by virtue of registration, but also by actual inspection of the deed or a copy, that the words "in trust" are therein. Under the Registry Act in force in 1888, R.S.O. 1887, ch. 114, secs. 76, 80, 82, 83, now R.S.O. 1914, ch. 124, secs. 71, 72, 73, and 75, an instrument affecting the land shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration

ONT.

S. C.

RE McKINLEY AND McCULLOUGH.

Magee, J.A.

without actual notice unless registered before the registration of the subsequent deed or mortgage. And by sec. 80 of the Act of 1887, sec. 75 of the Act of 1914, the registration of an instrument shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to the registration; and by sec. 82 of the Act of 1887, sec. 72 of the Act of 1914, priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration; and by sec. 83 of the Act of 1887, sec. 73 of the Act of 1914, no equitable lien, charge, or interest affecting land shall be deemed valid as against a registered instrument executed by the same party, his heirs or assigns.

Read literally, this latter provision would make an equitable interest void even though it was declared upon the face of a registered instrument; and it was not, I venture to think, intended to and does not apply to an expressed trust, the existence of which was admitted on the registry—but would apply to such a claim as a vendor's lien for purchase-money or deposit of title-deeds; and in *Rose* v. *Peterkin*, (1885), 13 Can. S.C.R. 677, it was held not to apply where there was notice of the lien though created by parol.

Here it seems to me that to any one seeing the deed to Turner there was actual notice that he held the land in trust only—his trusteeship was express, and it should be shewn that the terms of the trust authorised the sale.

In the recent case of *Morse* v. *Kizer* (1919), 46 D.L.R. 607, 59 Can. S.C.R. 1, under the registry law of New Brunswick, one having notice is excluded from the benefit of the registry law as to priority—our Act requires actual notice: *Tolton* v. *Canadian Pacific R.W. Co.*, 22 O.R. 204, 205, 213, 215. where it is said, as to actual notice, that the plaintiff was not put upon inquiry by the existing facts upon the ground.

The effect of the words "in trust" is well shewn in *London and Canadian Loan and Agency Co.* v. *Duggan*, [1893] A.C. 506, which reversed the judgment of the Supreme Court of Canada, *Duggan* v. *London and Canadian Loan and Agency Co.* (1892), 20 Can. S.C.R. 481, and in effect restored the judgment of the Court of Appeal here, *Duggan* v. *London and Canadian Loan and Agency Co.* (1891), 18 A.R. (Ont.) 305. There shares in a company had been

transferred in 1881 by Duggan to his brokers, Scarth & Cochran, the assignments being expressed to be "in trust"—one assignment was to cover margins and another was to secure a loan from a company of which the brokers were managers—subsequently the brokers transferred the shares several times to other persons to secure advances by various banks and companies to them, the previous holder being paid off, and the transfer in each case being to a manager or officer in trust. In 1887 the shares, with other new ones allotted in respect of them, were so held for the Federal Bank in the name of J. O. Buchanan, manager, "in trust," and in 1887 the brokers borrowed from the appellant loan and agency company a sum in excess of what Duggan then owed the brokers, and paid the Federal Bank's claim, and the shares were transferred from the Federal Bank manager to the appellant company's manager. Duggan tendered to that company the amount he owed his brokers, and asked return of the shares, which was refused, and the company sold them. It is, I think, the effect of the judgment in the Privy Council, as it was in that of the Court of Appeal here, that, upon the evidence, and, as Lord Watson says (p. 509), "according to their natural construction," the words "manager in trust" meant that Buchanan, as an official of the bank, held in trust for his employers, and were not calculated to suggest that he stood in a fiduciary relation to any other person, and that therefore they did not import a trust in favour of Duggan. The nature of the shares and the fact of their not being numbered or identified are referred to. The point in that case which applies here is that their Lordships did hold the words to be notice of a trust for some one, but, in the circumstances, only for the bank of which Buchanan was manager. Had there been a transfer of the shares in fraud of the Federal Bank by its manager, it seems to me manifest that the transferee would have been held to have had notice of the bank's interest. Lord Watson, at p. 509, said it was not necessary to express an opinion whether the successive transferees intermediately between Scarth & Cochran and the Federal Bank were affected with notice of the relations of that firm with Duggan. That case I would consider a strong authority in favour of the purchaser here that there is notice that Turner held in trust for some one else, and that a purchaser is put upon inquiry as to his right to sell.

ONT.

S. C.

RE McKINLEY AND McCULLOUGH.

Magee, J.A.

In *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333, the bank had taken shares, as security from a money-lender, not marked "in trust," but which the Court held the bank had reason to believe he might be holding for his customers, and should have made inquiries, and the bank was held liable to account for them to the true owners.

In *American Trust and Banking Co.* v. *Boone* (1897), 102 Ga. 202, 204, where the bank had notice that it was dealing with a trustee, an administrator, it was not protected by his statement that he alone was entitled to the moneys deposited.

I recognise the difference between personal property and real property, but as to the effect of words as giving notice there should not be any distinction.

The same argument for the vendor might be used, under the Registry Act and otherwise, if the words had been "in trust as declared in the deed poll of this date made by the said John Turner," or "as declared in the indenture of this date between the said John Turner and John Smith," and the deed poll or indenture was unregistered. It would equally depend upon the truthfulness of John Turner or of Smith, as under the present words. Yet it would hardly be suggested that the purchaser could safely ignore such words.

In truth it is hardly a question of notice, but one of limitation of the estate or interest of Turner, who, by the instrument, does not take as owner, but as trustee.

In my opinion, the vendor has not made out a title which should be forced upon the purchaser. It is for him either to make more effort to obtain information or else he can apply to quiet his title or have it brought under the Land Titles Act.

Objection declared invalid.

B. C.

C. A.

CANADIAN PACIFIC R. Co. v. CLAMAN'S Ltd.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 6, 1920.

CARRIERS (§ III C—385)—LOSS OF GOODS—SPECIAL DAMAGES—CONTRACT—KNOWLEDGE OF SPECIAL TERMS.

In order to recover special damages against a carrier for loss of part of a consignment of goods there must not only be knowledge of the special terms of the contract on the part of the carrier but evidence that he accepted the contract with the special terms attached.

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. CLAMAN'S LTD.

Macdonald, C.J.A.

APPEAL by defendant from a County Court judgment, in an action to recover special damages for loss of part of a consignment of goods. Reversed.

J. E. McMullen for appellant; *R. M. Macdonald*, for respondent.

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

The plaintiffs' claim is that because six or seven shirts were stolen out of the consignment to them from Ontario, carried by the defendants, plaintiffs are entitled not alone to the value of the lost articles but to special damages because the line of shirts was broken.

It is said that shirts are ordered in lines of 59 in a range of sizes. Six of the shirts stolen were of size 15. The claim is that because of this break in the range of sizes, the balance of the shirts were depreciated in value. This is a refinement in the art of damage claiming which may excite admiration in some minds, but which I think ought not to be encouraged to the confusion of common carriers. Had the shirts been duly received and put in stock and a customer had come in on the same day offering to buy half a dozen of size 15, I can hardly conceive of the plaintiffs refusing to sell to him on the theory that to do so would cut down the value of the balance of the 59 shirts by 50 per cent., as they claim the loss of the stolen shirts did.

Something might be said also on the question of the remoteness of the claim, but I do not find it necessary to decide it.

Martin, J.A.

MARTIN, J.A. (dissenting), would dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.:—Apart from the written contract where the damages are limited and would not include the damages claimed for here, I do not find evidence to support any special contract.

While there is evidence of former shipments consigned to the plaintiffs reaching their destination over the defendants' line of railway having been tampered with and portions of them missing and that the defendants were aware of this, yet if it is sought to fix onerous consequences on the carrier there must not only be knowledge but evidence of assent to accept the contract on those terms.

In Horne v. *Midland R. Co.* (1873), L.R. 8 C.P. 131, Lush, J., at 145 says:

B. C.

C. A.

CANADIAN PACIFIC R. CO. v. CLAMAN'S LTD.

Galliher, J.A.

It seems to have been accepted as the law from the case of *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 23 L.J. (Ex.) 179, downwards that where notice is given to the carrier of the special circumstances and he consents nevertheless to carry the goods, without objection, he may be liable for the extraordinary damages arising out of such circumstances. I agree however with the suggestion that the notice in such case can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages. As Willes, J., says, in *British Columbia Saw Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499, at 509, "the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

The evidence here would not lead me to that conclusion, but if I were wrong in that, I would still say the plaintiffs have not on their own shewing made out a case for the damages claimed.

McPhillips, J.A.

McPHILLIPS, J.A. (dissenting):—I would dismiss the appeal.

It is plain to me on the special facts of this case that the carrier had express notice of the resultant damages that would ensue to the shipper in case there was loss or damage to the shipment. That being the situation, I have no difficulty in arriving at the same conclusion as Ruggles, Co. Ct. J., the trial Judge, as to the *quantum* of damages, *that* must always be a matter of some inexactitude. I cannot see that the damages as allowed are in any way excessive, the latitude accorded to the trial Judge in assessing damages is well defined by Lord Mou'ton at page 309, in *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299.

I cannot in the face of the evidence follow or agree with the argument of the counsel for the appellant, that at most the damages should not exceed the value of the articles of which there was failure to deliver. I can quite believe, and it is reasonable to believe—and it is supported by the evidence that shopkeepers must, to comply with the exigencies of trade, carry full not broken lines of goods, and to be without full lines would mean business loss and damage. It is idle to say that this cannot be, as at any time a customer might enter the shop and buy all the goods of a certain size—here the goods were shirts of the usual and customary sizes carried by haberdashers—that is not the experience in the trade—there is an average of demand and it is well known—and stock is kept up to meet this average. That a shopkeeper should be out of the sizes that are usually called for is a detriment to business and means the loss of business.

The carrier is an insurer of the goods shipped and the failure to safely carry the shipment, entails the payment of damages within the contemplation of the parties—and here there was express notice to the carrier of the damages that would ensue.

It cannot be admitted that the carrier has in all cases a complete answer by saying "it is true the shipment has been lost but here is the value of the articles missing, and more we will not pay," which is the stand taken by the carrier; that cannot be a complete answer in the present case.

Further it would mean that a business house might be destroyed in this way—a long distance from the source of supply, and the season's business lost as well as the goodwill of the business and its maintenance—as a going concern—this view of things does not comport with common sense nor is it the law, in my opinion.

The law must conform to the changed conditions (see *Lord Shaw, Attorney-General of Southern Nigeria* v. *Holt*, [1915] A.C. 599, at 617) and take notice of distances—of inability to replace goods when lost—notably on the Pacific Coast goods of the class in question in this action—were shipped at a point about 2,500 miles from Vancouver—and incapable of replacement at Vancouver or at any point possibly, save at the point of shipment—if even that were possible—as the season advanced—then there is the long delay of transit—with the likelihood of losing the value of the goods by lateness of arrival.

It will be seen that many considerations enter into the question of what should reasonably be allowed as damages.

It follows that in my view it has not been shewn that the trial Judge erred in the assessment of damages in the present case upon the special facts adduced at the trial, and they are not excessive or too remote. (See *Simpson* v. *L. & N. W. R. Co.* (1876), 1 Q.B.D. 274, at page 277; "*The Parana*" (1877), 2 P.D. 118, 36 L.T. 388; *Wilson* v. *Lancashire & Yorkshire R. Co.* (1861), 9 C.B. (N.S.) 632; *Jameson* v. *Midland R. Co.* (1884), 50 L.T. 426.)

EBERTS, J.A., would allow the appeal.

Eberts, J.A.

Appeal allowed.

MAN.

C. A.

THE KING ex rel. HAMMOND v. CAPPAN.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. April 6, 1920.

EVIDENCE (§ XI U—891)—ILLEGAL STILL—POSSESSION OF—PROOF—KNOWLEDGE—INLAND REVENUE.

In order to convict under sec. 180 (e) of the Inland Revenue Act, R.S.C. 1906, ch. 51, of having in his "possession" any still, worm, etc., it is necessary to prove knowledge by the accused of the existence of such still, worm, etc., upon his property. There cannot be possession without knowledge.

Statement.

CASE STATED by a Police Magistrate for Manitoba under the provisions of sec. 761 of the Criminal Code. The accused was prosecuted under The Inland Revenue Act for illegally having a still in his possession.

H. P. Blackwood, K.C., and *C. A. I. Fripp*, for Crown.

M. G. Macneil, for accused.

Perdue, C.J.M.

PERDUE, C.J.M.:—The accused was prosecuted under sec. 180, sub-sec. (e) of the Inland Revenue Act, R.S.C. 1906, ch. 51. That enactment declares that:

> Every person who without having a license under this Act, then in force,—(e) has in his possession, in any place, any such still, worm, rectifying or other apparatus, or any part or parts thereof, or any beer or wash suitable for the manufacture of spirits, without having given notice thereof as required by this Act, except in cases of duly registered chemical stills of capacity not exceeding three gallons each as hereinbefore provided for, or in whose place or upon whose premises such things are found; . . . is guilty of an indictable offence, and shall etc.

Then follows the punishment prescribed.

The charge is that the accused had in his possession a still suitable for the manufacture of spirits without first having obtained a license required by the Act, and without having given the notice thereof required by the Act.

It is incumbent upon the prosecutor to establish that the accused was in possession of the still. The still was found covered with a sack in a shed on the premises of the accused, not far from his house. The accused denied all knowledge of the still and also denied that he had ever manufactured liquor. The magistrate believed the accused and held that there must be knowledge by the accused of the existence of the still upon his property in order to constitute the offence as charged.

It is contended by counsel for the prosecutor that, under the above section of the statute, possession of the still created an irrebuttable presumption of the guilt of the accused and that

a *mens rea* need not be shewn. It is therefore of the greatest importance to ascertain what constitutes "possession" within the meaning of the Act.

"Possession" is dealt with in Stephen's Digest of Criminal Law, 6th ed., page 243, art. 306. The author says:

> A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

Now if, as is the finding of the magistrate in the present case, the accused had no knowledge of the existence of the still, he never could have assumed any mental attitude in regard to it. He never owned, received or accepted it. He never authorized any other person or persons to do anything in regard to it. He is in the position of an innocent man into whose pocket a thief has thrust a stolen article in order to avoid detection. I cannot believe that the statute intended to inflict heavy penalties upon persons who were not guilty of any act of omission or commission.

Counsel for the prosecutor cited *The King* v. *Brennan* (1902), 35 N.S.R. 106. That was a case where the accused had been convicted, under the Act, of unlawfully having a still in his possession. The objection taken on the motion before the Court was that no specific place where he had the possession of the still was mentioned in the conviction. The decision does not afford us any assistance in the present case. *The King* v. *Kennedy* (1902), 35 N.S.R. 266, was similar to the *Brennan* case.

Reg. v. *Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907, was much relied upon by the prosecution. There a dealer had purchased tobacco as genuine and had it in his possession. The tobacco had been adulterated. It was held that the dealer was liable under the Excise Regulation Act for having in his possession the adulterated tobacco. Pollock, C.B., in giving his judgment, said, at page 415:

> It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality.

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Perdue, C.J.M.

Alderson, B., said, at page 418:

He did not know that it was in an adulterated state, but he knew he had it in his possession; and the question of "knowingly," it appears to me, is involved in the word possession. That is, *a man has not in his possession that which he does not know to be about him. I am not in possession of any thing which a person has put into my stable without my knowledge.* It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned.

In 1917 a case involving the meaning of the word "possession" as used in sec. 356 of the Inland Revenue Act was decided by the Court of Appeal for British Columbia. That case is *Rex ex rel. Robinson* v. *Young* (1917), 30 Can. Cr. Cas. 137, 24 B.C.R. 482. The charge was that the accused had in his possession manufactured tobacco not put up in packages and stamped in accordance with the Act he not being a licensed tobacco manufacturer. The accused and two other Chinamen were found together in a room with a quantity of tobacco which was not in packages and stamped in accordance with the Act. They were engaged in handling the tobacco, cutting, weighing and putting it in packages. It appeared that the tobacco belonged to another Chinaman who was tenant of the premises and who employed one of the men found on the premises to cut the tobacco and put it in packages and permitted the men to occupy the premises. The police magistrate dismissed the charge on the ground that the accused was not "in possession" of tobacco contrary to sec. 356 of the Act. On a stated case the Court of Appeal unanimously upheld the decision.

Section 356 of the Act does not contain the word "knowingly" and is equally as positive in its enacting words as sec. 180.

Many cases were cited by counsel for the prosecution to establish that *scienter* or *mens rea* need not be shewn in order to render the accused liable under a positive statutory prohibition; but I cannot find any one of them which goes so far as to hold that where it is established as a fact, as it is in the present case, that the accused had no knowledge, either personally or through another acting for him, of the existence of the incriminating article, he was held to be in guilty possession of it.

The words in the last two lines of sub-sec. (e) of sec. 180, "or in whose place or upon whose premises such things are found" are, I think, intended to constitute an offence separate and dis-

tinct from that contained in the earlier part of the sub-section. The words quoted cannot be taken as merely explanatory of what goes before. They should be read with what precedes and what follows them in this connection: "Every person . . . . . in whose place or upon whose premises such things (that is, any still, worm &c.) are found . . . . is guilty of an indictable offence and shall, for a first offence, be liable &c." This is a different matter from having such things in his possession. They may be in his place or on his premises although in the possession of another person. But in a case where the incriminating things have merely been found in the place or upon the premises of the accused and he denies all knowledge of them, and the Magistrate believes him, the Magistrate would not be justified in convicting him.

I would answer the question by the Magistrate, "Was I right in so holding?" in the affirmative.

Cameron, J.A.

CAMERON, J.A. (dissenting)—This is a case stated by Police Magistrate R. M. Noble under the provisions of the Criminal Code. The information was laid January 15, 1920, against the accused for that he "did unlawfully have in his possession a still suitable for the manufacture of spirits without first having obtained the license required by the Inland Revenue Act, R.S.C. 1906, ch. 51, and without having given the notice thereof required by the Act." The Magistrate found the following facts:

It was shewn before me that,—1. The officers at Winnipeg of the Department of Inland Revenue found on the premises of the accused, Gustave Cappan in the Rural Municipality of Fort Garry in the Province of Manitoba on the 13th day of January, 1920, a portion of a still consisting of a condenser and worm suitable for the manufacture of spirits. 2. The accused was prosecuted under the provisions of the Inland Revenue Act, R.S.C. 1906, ch. 51, sec. 180, sub-sec. (e). 3. The accused had no license under The Inland Revenue Act and had not given the notice required by the Act. 4. The still was found covered with a sack in a shed situated upon the premises of the accused, not far from the house of the accused. 5. Close to the box was found a receptacle of cylindrical shape about two feet long and one foot in diameter, somewhat similar to an oil drum with one end removed, containing the remains of some coal and charcoal which could be used as a heater for the purpose of heating the contents of a boiler which was not found, but which would (if found?) contain the ingredients for the manufacture of spirits, and be placed between the heater and still. 6. This receptacle could also be used for the purpose of heating food for cattle. 7. The still smelt somewhat strongly of spirits and shewed signs of recent use. 8. The windows of the shed were broken and the door unlocked. The shed was used as a storage place for a

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Cameron, J.A.

reserve supply of coal and wood belonging to the accused, was situated on the property of the accused, and was under his sole control. 9. The accused denied all knowledge of the still and also denied that he ever manufactured liquor, and I believed him.

His conclusion is as follows:—

I hold that the mere finding of a still or portion of a still upon the property of the accused was not sufficient under the section and sub-section of the Inland Revenue Act referred to, to justify me in convicting the accused unless it is shewn that the accused had knowledge of its existence on his property, in other words, that possession without knowledge is not an offence under the section.

And the question submitted to this Court is "Was I right in so holding?"

The Inland Revenue Act, R.S.C. 1906, ch. 51, sec. 180, provides:

Every person who without having a license under this Act, then in force,—(e) has in his possession, in any place, any such still, worm, rectifying or other apparatus, or any part or parts thereof, or any beer or wash suitable for the manufacture of spirits, without having given notice thereof as required by this Act, except in cases of duly registered chemical stills of capacity not exceeding three gallons each as hereinbefore provided for, or in whose place or upon whose premises such things are found; . . . is guilty of an indictable offence, etc.

The question is whether a *mens rea* is a necessary ingredient of the offence under this sub-section.

In Craies' Statute Law, 2nd ed., commencing at page 463, there is a discussion of the subject here involved. Amongst the leading cases there referred to are *Reg.* v. *Tolson* (1889), 23 Q.B.D. 168; *Bank of N. S. W.* v. *Piper*, [1897] A.C. 383; *Coppen* v. *Moore*, (*No. 2.*), [1898] 2 Q.B. 306. The author points out at page 467, that the difficulty arises

in deciding whether the statute prohibits absolutely the acts defined as constituting an offence, or whether the prohibition is to be read with the common law qualification, [*i.e.*, with the qualification that there must be proved a guilty knowledge on the part of the accused.] The application must in every case turn on the wording of the particular enactment, or, in case of ambiguity, upon the governing intention of the Act in which it is contained.

Frequently the Legislature designates the mental element of the offence by the use of such words as "wilfully" or "knowingly" but not always or, indeed, generally, so.

"There are enactments," said Brett, J., in *Reg.* v. *Prince* (1875), L.R. 2 C.C.R. 163, "which by their form *seem* to constitute the prohibited acts into crimes, and by virtue of these enactments persons charged with the committal of the prohibited acts may be convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are enactments with regard to trespass in pursuit of game, or of piracy of literary or dramatic works or the statutes passed to protect the revenue." To these may be added

enactments relating to the sale of intoxicating liquors (*Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918; *Emary* v. *Nolloth*, [1903] 2 K.B. 269, 72 L.J.K.B. 620), food, (*Dyke* v. *Gower*, [1892] 1 Q.B. 220), and drugs (*Fitzpatrick* v. *Kelly* (1873), L.R. 8 Q.B. 337), fertilizers and feeding stuffs (*Laird* v. *Dobell*, [1906] 1 K.B. 131; *Korten* v. *West Sussex* (1903), 72 L.J. (K.B.) 514, 88 L.T. 466), and to weights and measures (*Great Western R. Co.* v. *Baillie* (1864), 5 B. & S. 929). (Craies' Statute Law, 2nd ed., page 468.)

Mr. Stroud in his work on Mens Rea treats of the subject at pp. 29 et seq. His view is in favour of upholding the general doctrine that, in all cases the normal rule prevails, except under such statutes as exclude the rule by express or implied provision to the contrary. In the comparatively few cases where convictions have been upheld in spite of essential ignorance,

> the offences have been of such a character as to involve great public danger or inconvenience, and the main object of the criminal or quasi-criminal proceedings usually is to effect the summary abatement or prevention thereof: *i.e.*, to secure the stopping of the actual mischief complained of, rather than to inflict retributive punishment or to deter offenders in general (page 34).

The author discusses the decision in *Reg.* v. *Prince*, *supra*, and *Reg.* v. *Tolson*, *supra*, the latter of which he says is easier to understand.

Those two cases he refers to as dealing with crimes. Other cases dealing with offences which he designates quasi-crimes are discussed by him at pp. 39 et seq. He considers these classes of so-called crimes as requiring no culpable intentionality whatever to constitute criminal liability in respect of them. Some of the cases cited by him have already been mentioned. There are others that are instructive, such as *Betts* v. *Armstead* (1888), 20 Q.B.D. 771, diseased meat; *Pain* v. *Boughtwood* (1890), 24 Q.B.D. 353; *Blaker* v. *Tillstone*, [1894] 1 Q.B. 345—where it was held by Lord Coleridge, C.J., at page 348, "We are dealing with a statute passed for the protection of the public, the purpose of which would be defeated if it were necessary to shew a guilty knowledge in the seller"; *Firth* v. *McPhail*, [1905] 2 K.B. 300, (where Lord Alverstone expressly approved the decision in *Blaker* v. *Tillstone*); *Attorney-General* v. *Lockwood* (1842), 9 M. & W. 378; *Reg.* v. *Woodrow*, 15 M. & W. 404; *Cundy* v. *Le Cocq* (1884), 13 Q.B.D. 207. In *Reg.* v. *Bishop* (1880), 5 Q.B.D. 259, 14 Cox. C.C. 404, the defendant was indicted for receiving more than two lunatics into an unlicensed house, and Lord Denman observed that if the defendant's honest belief was held to be a defence, the object of the statute might be frustrated. Stephen,

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Cameron, J.A.

J., said that the stringent construction put on the Act there in question was warranted by its general scope and the nature of the evils to be avoided. In *Reg.* v. *Woodrow*, 15 M. & W. 404, (cited in other cases on this point in Crankshaw, Criminal Code, page 25) a dealer in tobacco was held liable for having in his possession adulterated tobacco, though he had purchased it as genuine and had no knowledge or cause to suspect that it was not so. Parke, B., said, at page 417:

> An innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The Legislature have made a stringent provision for the purpose of protecting the revenue and have used very plain words.

Mallinson v. *Carr*, [1891] 1 Q.B. 48, dealt with the Public Health Act (Imp.), 38-39 Vict. 1875, ch. 55, by which power is given to a health officer to inspect meat and if it appears unsound he may seize it, thereupon a Justice may condemn the meat "and the person . . . in whose possession or on whose premises the same was found shall be liable to a penalty." The judgment of the Court was that a person having in possession unsound meat was liable to be convicted notwithstanding that he had not exposed the meat for sale. Lord Brampton, formerly Hawkins, J., in his judgment says: "It was urged in the argument . . . that the Legislature could not have intended that a person who was ignorant of the condition of unsound meat found on his premises should be liable to conviction." He declined to decide the question, but pointed out the absence of the words "knowingly" and "wilfully" from the statute in question.

In *Cork R.D.C.* v. *Walsh*, [1908] 20 I.R. 234, Lord O'Brien refers to that part of Lord Brampton's judgment just mentioned and goes on to say:

> He (Lord Brampton) gives no decided opinion as to whether the Legislature intended that a person who was ignorant of the condition of unsound meat, found on his premises, should be liable to a conviction. For my part I have no doubt about it and I take the view expressed by Stephen, J., page 240.

He then quotes at length from the judgment of that great jurist from which I take the following, see (*Mallinson* v. *Carr*, [1891] 1 Q.B. at 52):

> It was argued that this construction would render liable to conviction persons who were ignorant of the fact that the meat found in their possession

was unfit for human food, and it was said to be an unreasonable intention to impute to the Legislature. I do not think that is a proper way to interpret an Act of Parliament. The true rule is to take the words used in their ordinary and natural sense, and to construe them accordingly, without reference to any supposed intention of the Legislature which cannot be gathered from the natural and ordinary meaning of the words.

Parker v. *Alder*, [1899] 1 Q.B. 20, 19 Cox C.C. 191, 79 L.T. 381, was a case under The Sale of Food and Drugs Act, 38-39 Vict., 1875, ch. 63, where the respondent Alder shipped milk under contract to the Metropolitan Milk Supply Association to be delivered at Paddington Station. He delivered his supply of milk in sealed churns at Challow for transmission by the Great Western Railway to Paddington and did not and could not exercise control after delivery. The milk handed over at Challow was pure and the water was thereafter added in transit to Paddington by a stranger without the knowledge or default of the respondent. The Magistrate dismissed the charge and stated a case in which his findings of fact are set out. From this the appellant, an inspector who was the complainant, appealed. The appeal was allowed by Lord Russell, C.J., and Wills, J.

In a late case of *Andrews* v. *Luckin* (1917), 26 Cox C.C. 124, 87 L.J. (K.B.) 507, involving similar facts, Darling, Avory and Sankey, JJ., followed the decision in *Parker* v. *Alder*, *supra* Darling, J., at page 128 (26 Cox. C.C.) quotes with approval the statement of Lord Russell in his judgment where he said:

> Now, assuming that the respondent was entirely innocent morally, and had no means of protecting himself from the adulteration of this milk in the course of transit, has he committed an offence against the Acts? I think that he has. When the scope and objects of these Acts are considered it will appear that if he were to be relieved from responsibility a wide door would be opened for evading the beneficial provisions of this legislation.

We are, therefore, to look at the whole scope of the Inland Revenue Act, R.S.C. 1906, ch. 51, the object of its stringent provisions, the nature of the mischief they were intended to prevent, the wording of the Act as a whole and especially that of the particular provision in question. The section and subsection are plain, positive and direct:

> Every person who without having a license . . . has in his possession . . . any such still . . . or upon whose premises such things are found . . . is guilty of an indictable offence.

Neither the word "knowingly" nor any other similar word is found in it. In some of the sections, knowledge is necessary

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Cameron, J.A.

to constitute the offence, such as secs. 192 and 243. But in others it is not.

But apart from the wording of sec. 180, the whole scope and object of the Act point to the conclusion that unless the context otherwise requires or a contrary intention is to be fairly inferred the object of Parliament was to make the violations of the Act indictable offences without regard to the knowledge of the offender. I take it the Act is primarily intended as a revenue measure and that its drastic provisions are enacted for the purpose of protecting the revenues of the Crown. It can also be said that it is intended to protect the public in other respects apart from the question of revenue. The object of the section in question, therefore, might be rendered nugatory if it were necessary to shew a guilty knowledge in the person violating its provisions. I cannot help thinking that this was the deliberate intention of Parliament.

Let us take section 180, sub-sec. (e). What is the meaning of "possession" in the first line. It can be taken for granted that that word may usually imply knowledge as stated by Pollock, C.B., in *Reg.* v. *Woodrow*, *supra*. But "possession" is an indefinite term. In this section it seems to me that neither ownership nor knowledge is to be read into the word "possession" for the simple reason that either of them is entirely inconsistent with the last part of the sub-section "or in whose place or upon whose premises such things are found." In those concluding words, which can, and I think must, be taken as explaining or clarifying the term "possession" the ideas of ownership or knowledge appear to me to be negatived, and I cannot see it otherwise.

If the sub-section were intended to constitute two separate offences, that is, one offence for knowingly having and the other for innocently having a still without a license, why is it that Parliament has prescribed the same penalty in each case? The former case surely demands the greater penalty. From this viewpoint it is difficult to imagine that Parliament had two offences in contemplation. The "or" is obviously not disjunctive. As I see it, Parliament was elaborating or making more clear by the latter part of the section what is to be taken as the meaning of the first. It seems to me this consideration is really unanswerable.

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Cameron, J.A.

I have noticed a case in the United States Supreme Court Reports, vol. 216, page 57, where there was under consideration a statute providing one penalty where an act was committed knowingly and another and lesser penalty where the act was done ignorantly.

The concluding words of the sub-section are, in my opinion, not to be read as constituting a separate prohibition from that in the opening words of the section. They are there for the purpose of giving clarity to the whole sub-section. The fact that the information is laid in the words it is is in this view immaterial. In any event the finding of the Magistrate on which he bases the question submitted is in the concluding words and he could have amended and convicted accordingly. But from the construction I give the sub-section no amendment was necessary.

In *Rex* v. *Young*, 30 Can. Cr. Cas. 137, 24 B.C.R. 482, [1917] 3 W.W.R. 1066, it was held by the Court of Appeal for British Columbia that a temporary physical control of tobacco belonging to another does not constitute an offence within sec. 356 of the Inland Revenue Act. That section differs manifestly in its wording from sec. 180, sub-sec. (e), in lacking its including words and otherwise has no direct bearing on the case before us. But I wish to refer to the discussion of the word "possession" in the judgment of Martin, J.A., at page 1067, where he points out that it is a word of a wide meaning, upon which many different constructions have been placed and that in this Inland Revenue Act, R.S.C. 1906, ch. 51, it is used in several senses, contemplating different states of custody, with or without knowledge. He is dealing with what may be called the tobacco provisions of the Act, which may be considered as intended to be less stringent than those dealing with intoxicating liquors; but his remarks are in point in considering the other sections. Whatever might be meant by the word "possession" in the opening words of sub-sec. (e), without its concluding words is, to my mind, left by them in no doubt whatever.

I am not at all afraid of the possible wrong to an innocent man that has been conjured up as necessitating a judicial mitigation of the severity of the provisions of the Act. It is possible

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Cameron, J.A.

that a malevolent neighbour may, by erecting a still on another's premises, seek to wreak his vengeance on an upright and law-abiding farmer, who has incurred his enmity. It is not absolutely impossible, but it is so remotely improbable as to be worthy of little consideration. It is conceivable that a mischievous aviator might play some such trick. But these things do not happen. The Magistrate believed the denial of the accused as he had a perfect right to do. But when I consider the convenient place in which this apparatus was found, the circumstances surrounding the discovery and particularly the fact that the still smelt somewhat strongly of spirits and shewed signs of recent use I cannot refrain from saying that the Magistrate took a remarkably lenient view of the indisputable facts.

I would answer the question asked in the negative and under sec. 765 of the Code, remit the matter to the Magistrate with this opinion of the Court.

Haggart, J.A.

HAGGART, J.A.:—This is a case stated by the Police Magistrate under the provisions of sec. 761 of the Criminal Code. Cappan was prosecuted under the Inland Revenue Act, R.S.C. 1906, ch. 51, for having without a license under the Act in his possession a still or some parts thereof suitable for the manufacture of spirits without giving the notice necessary under the Act.

It is necessary that the prosecutor should establish that the accused was in possession of the still. Knowledge of the still was denied and it was also denied that the accused had ever manufactured liquor. The Magistrate makes an express finding that he believed the accused had no knowledge of the fact that this chattel was upon his premises.

What is the meaning of the word "possession?" In Stroud's Judicial Dictionary at page 1518 all goods being in the possession, order *or* disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.

It is to be remarked, however, that the words are not now—and have not been since 6 Geo. V. ch. 16, sec. 72—what they were when many of the earlier cases were decided. It is pointed out by Parke, B. (*Whitfield* v. *Brand* (1847), 16 M. & W. 282, 16 L.J. (Ex.) 103), that they now stand as "Possession, Order *or* Disposition," instead of "Possession, Order *and* Disposition."

He goes on further to say:

I think, therefore, that it is enough if these goods were in the "Possession" of the bankrupt in his trade or business, although they were not in his "disposition" therein, in the sense that they were such things as he sold in his trade. The words "order or disposition" seem to me, necessarily, to enlarge the word "possession" so as to include something beyond visible occupation by a reputed owner.

The author goes on to say:

If it be said that this construction appears inconsistent with Lord Watson's words in *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. at 440, 56 L.J.(Ch.) at 50, the principle which appears to me to be deducible from the authorities is this, that goods belonging to a third party are not within sec. 44 (iii) (of the Bankruptcy Act, 1883), unless they were left with the bankrupt in such circumstances that, as reputed owner, he could have sold them or otherwise obtained credit upon them in the course of his trade or business—then I would answer that I understand Lord Watson to have meant by "obtaining credit upon goods," not merely getting a loan by pledging them but, obtaining credit on the purchase of other goods because of the bankrupt appearing to own things valuable for business purposes though not for sale in his business. This construction recommends itself to me as being entirely consonant with the passage quoted in *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, at 447, 56 L.J. (Ch.) 53. (Stroud's Judicial Dictionary, page 1518, quoting *Sharman* v. *Mason*, [1899] 2 Q.B. 679, 69 L.J. (Q.B.) 3 at 7.)

The right to make a lawful disposition of the property in goods to a third party is one of the elements or ingredients of possession. The author goes on further to say, quoting Cotton, L.J., in *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261 at 274:

What meaning then are we to give to those words? Of course, where the goods are in the nature of stock-in-trade there is no difficulty; goods apparently forming part of the stock-in-trade of the firm must be in the order or disposition of the bankrupt in his trade or business. But, in my opinion, the words go further than that. I think the true construction is, that the goods must be in his order or disposition for the purposes of, or purposes connected with, his trade or business.

I do not think that under the circumstances the defendant or accused could be held to be in possession of the goods in question within the meaning of the statute. This disposition of the word "possession" disposes of the question of *mens rea*.

After carefully considering the cases cited to us upon the argument and the reasons given by my brother Judges, I have come to the conclusion that the Magistrate was right, and I agree with the majority of the Court when they answer the question in the stated case that the Magistrate was right in holding as he did.

I have been permitted to peruse the reasons given by Perdue, C.J.M., and Fullerton, J.A., and I agree with the answer given by them to the stated case in the affirmative.

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Haggart, J.A.

The denial of the accused that he had any knowledge of the still and the further denial that he ever manufactured liquor, and the statement of the Magistrate that he believed him to my mind settles the question.

We had before us in the case of *Rex* v. *Hoffman* (1917), 38 D.L.R. 289, 28 Can. Cr. Cas. 355, 28 Man.L.R. 7, a similar question to that before the Court here. It was there found by this Court that it was necessary to bring home the knowledge and consent of the proprietor of the poolroom as to what was taking place. There was no knowledge here that the accused had the still in his possession or control.

Fullerton, J.A.

FULLERTON, J.A.:—An information was laid against Hammond for unlawfully having in his possession a still suitable for the manufacture of spirits without having obtained the license required by the Inland Revenue Act: R.S.C. 1906, ch. 51.

Section 180 of that Act provides that:

> Every person who without having a license under this Act, then in force, (e) has in his possession, in any place, any such still . . . , or any part or parts thereof . . . is guilty of an indictable offence . . .

The Police Magistrate held that the mere finding of a still or portion of a still upon the property of the accused was not sufficient to justify a conviction unless it were shewn that the accused had knowledge of its existence on his property. He declined to make a conviction and at the instance of the Crown stated a case under the provisions of sec. 761 of the Criminal Code.

The still was found covered with a sack in a shed situated upon the premises of the accused, not far from the house. The accused denied all knowledge of the still and also denied that he ever manufactured liquor and the Police Magistrate believed him.

We are now asked to construe the Act in such a way as to justify the conviction of an innocent man and make him subject to a penalty not exceeding $500 and not less than $100 and to imprisonment with or without hard labour, for a term not exceeding 12 months and not less than one month.

The contention of the Crown is that the mere finding of the still on the premises of an accused person is sufficient. The Act, however, uses the words "has in his possession in any place." I think the answer to the contention of the Crown is that there

is no evidence to shew that the accused ever had the still in his possession. How a man can be said to be in possession of something he knows nothing whatever about, I am at a loss to understand.

In the case of *Rex* v. *Hoffman*, 38 D.L.R. 289, 28 Can. Cr. Cas. 355, 28 Man. L.R. 7, the accused was charged with unlawfully having liquor in a place other than his private dwelling. The evidence was that one of several men in the poolroom, of which the defendant was the proprietor, took a bottle of whiskey from his pocket, drank from it and gave it to others to drink from without the knowledge or consent of the proprietor though he was in the room at the time. The Court quashed the conviction holding that the evidence did not shew that the accused had liquor in a place other than the private dwelling house in which he resided.

Perdue, C.J.M., said, at page 300 (38 D.L.R.):

> The charge in this case is that the accused "did unlawfully have liquor" in a place other than his dwelling house without a license under the Act . . . the intention clearly is that it must be shewn that the person charged *had* the liquor in his possession or charge or control. Proof that liquor was brought upon his premises surreptitiously, without his knowledge or consent, does not render him guilty of an offence. The statute did not intend that a man should be declared guilty in such a case. It is incredible that there was any intention of authorising so monstrous an injustice. The prohibition in the statute is that no person "shall have" liquor on the premises, not that he shall be liable if there "is" liquor on the premises.

Rex. v. *Borin* (1913), 15 D.L.R. 737, 29 O.L.R. 584, 22 Can. Cr. Cas. 248, is to the like effect.

Counsel for the Crown, in support of his contention, cited a number of cases which deal with the construction of statutes passed for the protection of the revenue. For example, *Reg.* v. *Woodrow*, 15 M. & W. 404.

There the accused was charged with having in his possession adulterated tobacco contrary to 5 & 6 Vict. ch. 93, sec. 3.

The possession of the tobacco by the accused was proved, but it was found by the Court that he had purchased the tobacco of a manufacturer as genuine tobacco, and believed that the tobacco seized was genuine, and that he had no knowledge or cause to suspect that the tobacco had been adulterated. The Court of Exchequer, consisting of Pollock, C.B., Parke, Alderson and Rolfe, B.B., held that want of knowledge was no answer.

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Fullerton, J.A.

Pollock, C.B., at page 415, said:

. . . it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality. If this were the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness whether they know it or not, they are bound to take care.

Parke, B., at page 417, said:

. . . If a man is in possession of an article . . . and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved.

I cannot think cases of the class of the last mentioned case have any bearing on the question before us which is whether or not the accused can be said to have been in possession of the still.

If the case were that the defendant knew that the article which was in fact a still, was in the shed but did not know that it was a still, the case would be in line with the *Woodrow* case.

Some remarks of the Judges in the last mentioned case shew clearly what their view of "possession" is. Pollock, C.B., at page 415:

. . . It appears to me that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco (*indeed, a man can hardly be said to be in possession of anything without knowing it*), it is not necessary that he should know that the tobacco was adulterated; . . .

Alderson, B., at page 418:

. . . I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know that it was in an adulterated state but he knew he had it in his possession; and the question of "knowingly," it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. *I am not in possession of anything which a person has put into my stable without my knowledge.* It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned.

Where it is established, as it is here, that the accused had no knowledge of the still, although it was in a shed on his land, I hold that there is no proof of possession by the accused.

I would answer the question in the stated case in the affirmative.

Dennistoun, J.A.

DENNISTOUN, J.A.:—Section 180 (e) of the Inland Revenue Act, R.S.C. 1906, ch. 51, appears to set forth an offence with two branches:

Every person who . . . (a) has in his possession any such still, worm, etc., (b) or in whose place or upon whose premises such things are found . . . is guilty of an indictable offence.

I agree with the reasoning and conclusions of Perdue, C.J.M., that possession in this case includes knowledge either personally or through another; and that the Magistrate was right in refusing to convict when he had satisfied himself that the accused had no such knowledge of the existence of the still which was found upon his premises.

The charge was laid under (a) not (b) above stated. It is therefore unnecessary for the decision in this case to consider what may be irrebuttable presumptions in the case of a charge of finding a still etc. upon a person's property without any knowledge on his part that such things are there; and I express no opinion upon the meaning of the words "place or premises." They may or may not have reference to occupation or control. They may or may not include a property which the accused possesses, but has never visited or dealt with, directly or indirectly. I prefer to decide these points when they arise.

Stroud, in his work on Mens Rea, 1914, at page 12, says:

It can seldom be demonstrated that a man properly convicted has been perfectly innocent in the sense of having entertained no particle or scintilla of legal blameworthiness. Where any such case is found to occur, it must always be attributable either to a legal presumption, grounded upon general impracticability of proof, and existing at common law, or else to some extraordinary provision of statute law creating, in effect, what may be called a *quasi-crime*. It is a familiar doctrine that an Act of Parliament can do anything. The law recognizes no limit to its power, but such limits exist in fact. Even an Act of Parliament cannot make a man really guilty of a particular offence, when he is in fact innocent of any degree of intention to break the law.

But an Act of Parliament can require Courts and all persons to treat such an individual in all respects *as if* he were guilty, however innocent he may be in reality. This is precisely what certain modern statutes have done, with the result that in connection with certain prohibitions as to adulteration of food, sale of liquors and a few other matters, innocent people are occasionally "convicted" in a criminal Court in the same manner and with the like consequences as if they were guilty of the specified crimes charged against them.

In all such cases the justification of the arbitrary interference with liberty precisely similar to . . . is the difficulty which would ensue, or which it has been thought would ensue, in enforcing the statutory provisions in question, if the existence or absence of culpable intentionality were inquired into.

The Courts have always been extremely chary of reading into Acts of Parliament an implied intention to treat perfectly

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Dennistoun, J.A.

innocent people as if they were guilty, but they have shewn less reluctance in construing statutes as casting upon the defendant the onus of proving a higher degree of care and diligence than that ordinarily exigible in dealing with certain specified matters specially provided for by the Legislature.

"In all cases a departure from the ordinary doctrine of *mens rea* must be justified by the express terms of a statute or by necessary implication."

Mens rea is absent in many of the cases referred to on the argument before this Court which are referred to below, nevertheless convictions against the accused principal or employer were sustained for the reason that some person for whom or for whose acts the accused was directly or indirectly responsible had a guilty knowledge in respect to the violation of the statutory prohibition in question, or in any event was charged with a peremptory duty by reason of the statute which he failed to perform.

For selling or offering for sale adulterated milk, or tobacco or meat unfit for human consumption the accused may have had no *mens rea*, but he had a *mens* of some sort, he had assumed some mental attitude in reference to the prohibited article, and had dealt with it himself or through an agent. That being so the statute cast the duty upon him of protecting the public at any cost, and the fact that he had no *mens rea* as to the drugs in the tobacco, or the water in the milk, or the rottenness in the meat, made no difference.

But there has been no case quoted in which a conviction was sustained where the Court was satisfied that the accused had no knowledge whatsoever of the existence of the prohibited article, and no connection with it through the agency of another; where in fact he had taken no mental attitude of any sort or description in reference to the matter and could not do so, being in complete ignorance not only of the thing itself, but of any duty under the statute connecting it with himself.

For a Court to convict under such circumstances would to my mind be such an injustice as the Legislature never contemplated when it passed this drastic law.

When the statute refers to "possession" it means, in my opinion, to presuppose knowledge, or at least a dereliction of

duty of some sort either on the part of the accused or some person who stands in his place.

When the statute refers to an article being "found" on the place or premises of the accused, it means found in such a way as to create conclusive presumption of knowledge on the part of the accused that he has violated the duty cast upon him by the provisions of the statute; but if at the trial it is abundantly clear to the Court that the accused has never formed, or had an opportunity of forming, any mental attitude in respect to the articles "found," that they have, as suggested by my brother Cameron, been deposited by a mischievous aviator, or a malignant neighbour, I think the Magistrate should refuse to convict.

If this is not the meaning of the Legislature the Act can be amended to make the meaning clear; but so long as the wording remains as it is I feel constrained to hold that it was not the intention to impose a severe penalty upon a person who has unequivocally established a position which shews that a conviction would mean nothing short of rank injustice.

In the case under consideration the Magistrate apparently had no difficulty in deciding that the accused did not have the still in his possession for neither he nor any person acting for him knew of its existence.

Had the charge been for "finding" a still upon his place or premises, and the evidence being as it was, that the still was found in the woodshed close to his residence, I think the Magistrate might very properly have convicted in the absence of absolutely convincing evidence that the accused and all connected with him were free from knowledge of any kind that the still was on the premises, and had not fallen short of that degree of careful investigation and inquiry which the law requires.

Had the accused been able to satisfy the Court of his innocence and to account in a satisfactory manner for the presence of the still upon his property, the Magistrate would in my opinion have been justified in acquitting him and was not compelled by the words of this drastic Act to convict one whom he knew to be innocent, in the fullest sense of the term.

In the cases relied on by counsel for the appellant, such as *Parker* v. *Alder*, [1889] 1 Q.B. 20, 19 Cox. C.C. 191, 79 L.T. 381,

MAN.

C. A.

THE KING EX REL. HAMMOND v. CAPPAN.

Dennistoun, J.A.

in which milk was adulterated by a stranger without the knowledge of the accused, and the numerous cases under the Sale of Food and Drugs Act there was in all of them knowledge on the part of the accused or those acting for the accused of the existence of the milk, meat, tobacco or other product, and a statutory duty was laid upon them as vendors to protect the public against adulteration. The fact that the accused did not prevent the adulteration from taking place, or detect that it had taken place was held to be no sufficient excuse.

To put the case under consideration on a par with the cases referred to, if the accused Cappan had been found in possession of a still, and had put forward the defence that he had no knowledge of stills and did not know what the machinery found on his premises really was, it would have availed him nothing even if the Magistrate believed him. So soon as his mind was directed to the existence of the prohibited articles the duty was cast upon him of knowing what they were, and of keeping them at his peril.

I cannot assume that the Legislature intended to impose a minimum penalty of $100 fine upon an accused person who was able to satisfy the Magistrate that he had no knowledge, personal or through any person acting for him of the existence of the prohibited articles.

It was pointed out by Willes, J., in *Parker* v. *Alder*, *supra*, that the adulteration of the milk of the accused by a stranger was an offence under drastic legislation which is meant to be so, but in construing the intention of the Legislature he points out that the Magistrate has power to dismiss the charge without inflicting a punishment, if he considers the offence to be of a trifling nature.

There is no such power in this case, and no discretion is given to the Magistrate except to adjust the fine between the sums of $100 and $500 with or without imprisonment at hard labour, and from this the inference is drawn that the Legislature did not contemplate a conviction in a case where a still being "found" its presence was satisfactorily explained, by the accused.

Among the cases considered are the following, in each of which the accused person had taken some mental attitude or assumed some responsibility in respect to the *res gestae* before

trial: *Reg.* v. *Dias* (1898), 1 Can. Cr. Cas. 534, liquor license; *Rex* v. *Labbe* (1910), 17 Can. Cr. Cas. 417, motor vehicle; *Cundy* v. *Le Cocq*, 13 Q.B.D. 207, sale to drunken person; *Rex* v. *Brennan*, 35 N.S.R. 106, still; *Rex* v. *Kennedy*, 35 N.S.R. 266, still; *Reg.* v. *Prince*, L.R. 2 C.C. 154 at 163, girl under sixteen; *Reg.* v. *Woodrow*, 15 M. & W. 404, adulterated tobacco; *Blaker* v. *Tilstow*, [1894] 1 Q.B. 345, unsound meat; *Mallinson* v. *Carr*, [1891] 1 Q.B. 48, meat; *Mullins* v. *Collins* (1874), L. R. 9. Q.B. 292; *Brown* v. *Foot* (1892), 17 Cox .C.C. 509; *Parker* v. *Alder*, [1899] 1 Q.B. 20, 19 Cox. C.C. 191, adulterated milk; *Reg.* v. *Bishop*, 5 Q.B.D. 259, receiving lunatics; *Brooks* v. *Mason*, [1902] 2 K.B. 743, intoxicating liquors; *Rex* v. *Young*, 24 B.C.R. 482, 30 Can. Cr. Cas. 137, tobacco.

The magistrate having dealt with this case as one of "possession" only, I think he was right in refusing to convict. If he had dealt with it as one of "finding upon the premises" he might well have convicted by reason of the place and proximity to the residence of the accused in which the still was found, for there is a duty cast upon all persons to exercise a high degree of diligence to keep their premises free from articles which may be used for illicit distillation.

I would answer the Magistrate's question in the affirmative.

Judgment accordingly.

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.

JACOBUS v. SADOWSKI.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. February 7, 1920.

COURTS (§ II A—151)—*District Court Judge—Jurisdiction—District Courts Act, Alta., 1907, ch. 4, sec. 42—Rules 432, 438, 536.*]—Appeal by defendant from the Local Judge of the Supreme Court at Lethbridge. Affirmed.

O. E. Culbert, for appellant; *A. Macleod Sinclair*, for respondent.

WALSH, J.:—One ground of appeal attempted to be argued before me was that the requirements of r. 128, which are by r. 129 applied to such a proceeding as this were not complied with by the plaintiff but as that was not taken in the notice of appeal I refused to consider it. The only other ground was "that the said order was made without jurisdiction in the said learned Judge."

The order was made upon the return of an originating summons for the recovery by the plaintiff of the possession of land of which the defendant was the lessee from him. It is argued that a Local Judge has no power to make such an order.

Sec. 42 of the District Courts Act, Con. Stats. Alta., 1915, ch. 4 (1907), gives to the Judge of a District Court in all actions brought in his district concurrent jurisdiction with and the same power and authority as a Judge of the Supreme Court to do and perform all such acts and transact all such business in respect to matters and causes in the Supreme Court as he is by Statute or Rules of Court empowered to do and perform and provides that in the exercise of such jurisdiction he may be styled "Local Judge of the Supreme Court." An action as defined by the Act means a civil proceeding commenced in manner prescribed by Rules of Court. Rule 536 gives to a Local Judge in actions brought or proceedings taken in his district the powers of a Judge of the Supreme Court sitting in Chambers save and except in respect of certain specified matters of which such an application as this is not one. Under r. 432 proceedings to recover possession of land may be commenced by originating notice and under r. 438 the Judge may summarily dispose of the questions arising on it or may direct the trial of any of them. Rule 8 provides that except

as otherwise provided all motions, applications and hearings other than the trials of actions, may be disposed of by a Judge in Chambers and it is not otherwise provided with respect to a motion upon originating notice and this is not the trial of an action.

I think that a Judge of the Supreme Court sitting in Chambers has the power to make an order upon the return of an originating notice for the recovery of possession of land and under the Statute and Rules above quoted as full power is given to a local Judge to make such an order in proceedings originating in his district as is possessed by a Judge of the Supreme Court sitting in Chambers.

If the Judge who made this order held no judicial office under Federal appointment other than that of District Court Judge a serious question would arise as to his power to make it. In doing so, he undoubtedly acted as a Judge, for the order finally determines and disposes of the rights of the parties to the possession of land and that is something that only a Judge can do. It is true that sec. 42 of the District Courts Act attaches to the office of District Court Judge certain powers as a Local Judge of the Supreme Court but that in itself does not in my opinion authorise him to do things in that Court which only a Judge can do. He must derive his authority to do such things by appointment from the only authority competent to make it, which is of course the Governor-General.

It is a matter of common knowledge however that one who is in this Province appointed a District Court Judge is by the same competent authority but under a different commission appointed a Local Judge of the Supreme Court for the same district for his appointment as such is gazetted as is his appointment to the District Court. This is a fact so well known that I think I have a right to take judicial notice of it. There is nothing before me by way of proof of the appointment of this particular Judge to this office but upon the *omnia præsumuntur* principle I think that I have the right to presume it. He has made the order as a Local Judge and I assume that he is one in every sense.

I hold therefore that under his appointment as a Local Judge of the Supreme Court the Judge had the power to make this order in this proceeding as it originated in his district and is one which a Judge of the Supreme Court sitting in Chambers has the power to make. Accordingly the appeal is dismissed with costs.

Appeal dismissed.

MAN.

K. B.

Re ESTATE OF FRANCES E. FENTON.

Manitoba King's Bench, Galt, J. March 13, 1920.

WILLS (§ III D—100)—*Probate—Death of executor—Administration with will annexed to trust company—Bequest for alleviation of tuberculosis—Mortmain Act—Validity.*]—Motion on behalf of the administrator with will annexed for the interpretation of a clause in the will.

T. A. Hunt, K.C., for Trust Co.; *James Auld*, for Mrs. Fest; *H. A. Bergman*, for beneficiaries; *John Allen*, for Attorney-General.

GALT, J.:—This is a motion on behalf of the Canada Trust Co., administrators, with the will annexed of the estate of the late Frances Emily Fenton for the interpretation of a clause in the will.

The deceased lady was a spinster, resident at Solsgirth, Man., but some time prior to the year 1911, she went to Las Vegas, in New Mexico, U.S.A., to be treated for tuberculosis.

By her will, dated October 5, 1910, she appointed Francis T. B. Fest, of San Miguel, her sole executor. She died on March 21, 1911, and Dr. Fest obtained probate of the will on November 9, 1911, in the Northern Judicial District. The executor proceeded to administer the estate, but before completing it, he died on March 12, 1917. On December 20, 1918, administration with the will annexed was granted to the Canada Trust Co.

It appears that all the debts of the testatrix have been paid and that the only property unadministered consists of certain lands in Manitoba, being the north-west quarter and the south half of Sect. 2, Tp. 17, range 26 west of the principal meridian.

The clause of the will which gives rise to this motion is the following:—

> All the rest, residue and remainder of my property and estate, both real and personal, of whatsoever kind and wheresoever situate, of which I may die seized or possessed, or in which I may have any interest whatever, I hereby give, bequeath and devise unto my executor and administrator, Dr. Francis T. B. Fest, the same to be applied by said executor and administrator for the purpose of research of work in the alleviation of tuberculosis, and to be expended according to the best judgment of said administrator hereinafter appointed.

Upon the motion before me Mr. Hunt appeared for the Canada Trust Co., Mr. Auld for Mrs. Fest, the administratrix of the late Dr. Fest; Mr. Bergman for several beneficiaries who would be entitled to share in any property of the testatrix undisposed of by the will, and Mr. John Allen for the Attorney-General.

MAN.

K. B.

The principal question argued was as to whether or not the statute, 9 Geo. II. ch. 36, sometimes called the Mortmain Act and sometimes the Charitable Uses Act, is or is not in force in Manitoba. If it be in force, the gift to Dr. Fest for research work in aid of treatment for tuberculosis would fail as being a charitable use within the meaning of the Act. In such case the beneficiaries represented by Mr. Bergman would be entitled to the property. If, on the other hand, the statute be not in force, the Attorney-General claims the right to take over the property and apply the proceeds of it towards the cure of tuberculosis in Manitoba at the Ninette Sanitarium or otherwise.

In support of his argument, Mr. Allen handed in a carefully prepared memorandum of the history of this mortmain legislation down to date, and he presented a strong argument against the view that the Statute of Mortmain is in force in Manitoba.

The Mortmain Act of 9 Geo. II. ch. 36, substantially provides as follows: No disposition or gift of lands for charitable uses whatsoever shall be made unless such gift be made by deed in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor, and be enrolled in His Majesty's High Court of Chancery within six calendar months next after execution thereof, and unless the same be made to take effect in possession for the charitable use intended to take effect in the making thereof and be without any power of revocation. An exception is made in favour of dispositions for the benefit of the two universities and of the colleges of Eton, Winchester or Westminister, and all property in Scotland is excepted.

In Ontario the received opinion is that the statute is in force there. In reaching this conclusion the Courts have been strongly influenced by the fact that in several Acts of the Legislature references to the Mortmain Act were made on the assumption that it was there in force. See *Doe d. Anderson* v. *Todd* (1845), 2 U.C.Q.B. 82.

Mr. Allen, in the memorandum which he has handed in, sets out, with his usual frankness, several references of the same kind in the statutes of Manitoba. For instance: In ch. 50 of the Manitoba statute, 58-59 Vict., 1895, incorporating the Masonic Temple Association of Winnipeg, the following clause appears:—

2. The said Corporation shall have perpetual succession and a common seal, with power to make, alter or break the said seal by by-law to that effect,

MAN.

K. B.

and shall have power from time to time and at all times, hereafter be able and capable to purchase, acquire, hold, possess, exchange and to have, take, receive by gift, or devise (without being subject to any law of Mortmain), etc.

One would suppose that where the introduction of a new law depended upon statute some provision would be enacted directly and definitely introducing the law. It often happens that provisions are inserted in statutes *ex abundanti cautela* or *per incuriam*.*

However, the Courts of Ontario have looked at the matter from a different point of view and have accepted casual references in statutes to the Statute of Mortmain as indicating the view that the Province had introduced that law.

The position of the question is the same here in Manitoba as it was in Ontario. There is no direct statutory provision introducing the law, but we have a decision of the late Richards, J., in *Law* v. *Acton* (1902), 14 Man. L.R. 246, following the reasoning of the Ontario Judges. All that Richards, J., said in his judgment was this (at page 248):—

> The Mortmain Act, 9 Geo. II., ch. 26, has been repeatedly held to be in force, in Ontario, except as limited by Provincial statutes; and such holding has been approved by the Supreme Court of Canada in *Macdonnell* v. *Purcell* (1894), 23 Can. S.C.R. 101. There is, I think, no doubt that, except as it may be affected by Provincial statutes, the above Act of 9 Geo. II. is in force in Manitoba.

It is inaccurate, however, to say that the decisions in Ontario have been approved by the Supreme Court of Canada in *Macdonnell* v. *Purcell*, referred to. That case was heard before five members of the Supreme Court and only two of them appear to have expressed opinions in favour of those decisions.

Mr. Allen argues that the question was not carefully examined by Richards, J., and he points out that the decision in *Law* v. *Acton* has been adversely commented upon by one or more Judges in other Provinces. Be that as it may, the practice in Manitoba is that when a question has been decided by one of the Judges, the decision is accepted and followed by any other single Judge unless under very exceptional circumstances.

A very similar point of law arose in *Bourne* v. *Keane*, recently decided by the House of Lords, in [1919] A.C. 815. The question in that case was as to whether a bequest of personal estate for

*Misapprehension of the law by the Legislature does not make bad law good: *Mollwo, Marsh & Co.* v. *The Court of Wards* (1872), L.R. 4 P.C. 419, at 437; *Pooley* v. *Driver*, 5 Ch. D. 458 at 484; *Re Rockwood etc. Society* (1899), 12 Man. L.R. 655, *per* Killam, C.J., at 662, and *per* Richards, J., at 668.

MAN.

K. B.

masses for the dead is or is not void as a gift to superstitious uses. Decisions had been rendered from 1835 down to date holding that such bequests were void. The House of Lords overruled these decisions. Lord Birkenhead, L.C., says, at page 860:—

In my view it is undoubtedly true that ancient decisions are not to be lightly disturbed when men have accepted them and regulated their dispositions in reliance upon them. And this doctrine is especially deserving of respect in cases where title has passed from man to man in reliance upon a sustained trend of judicial opinion. But this, my Lords, is not the present case. If my view is well founded, citizens of this country have for generations mistakenly held themselves precluded from making these dispositions. I cannot conceive that it is my function as a Judge of the Supreme Appellate Court of this country to make error perpetual in a matter of this kind. The proposition crudely stated really amounts to this, that because members of the Roman Catholic faith have wrongly supposed for a long period of time that a certain disposition of their property was unlawful, and have abstained from making it, we, who are empowered and bound to declare the law, refuse to other members of that Church the reassurance and the relief to which our view of the law entitles them. My Lords, I cannot and will not be a party to such a proposal.

So far as I can see it is quite open to the Supreme Court or the Privy Council at any time to overrule the views expressed by the Ontario Judges and it is open to our Court of Appeal to overrule the decision of Richards, J.

But for the reason which I have already given, I follow the decision in *Law* v. *Acton, supra*, leaving the parties to obtain the views of the Court of Appeal if they so desire.

I therefore hold that the residuary bequest to Dr. Fest was void under the Statute of Mortmain and that the beneficiaries are entitled to the property.

I think it is a case in which the costs of all parties should come out of the estate. *Judgment accordingly.*

Re WINNIPEG ELECTRIC R. Co.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M. October 20, 1919.

PUBLIC UTILITIES COMMISSION (§ I—1)—*Commissioner—Appointment—Validity—Powers of Provincial Legislature.*]—Application on behalf of the City of Winnipeg for leave to appeal against an order made by the Public Utilities Commissioner granting an increase in the fares chargeable on the Winnipeg Electric Railway. Application dismissed.

MAN.

C. A.

Theo. A. Hunt, K.C., and *Jules Preudhomme*, for the City of Winnipeg; *E. Anderson*, K.C., and *D. H.Laird*, K.C., for Winnipeg Electric Ry.; *John Allen*, Deputy Attorney-General, for Manitoba Government.

PERDUE, C.J.M.:—The main ground taken upon this application is that the Public Utilities Act, R.S.M. 1913, ch. 166 or the part of it relating to the appointment of the Public Utilities Commissioner, is beyond the powers of the Provincial Legislature to enact. This point was before the Court of Appeal in 1916 and the judgments delivered by the several members of the Court are reported in *Re Public Utilities Act* (1916), 30 D.L.R. 159, 26 Man. L.R. 584. In that case the Court divided equally upon the question whether the constitutional validity of the Act was properly before the Court on the appeal. The result was that the appeal to the Court was dismissed. Leave to appeal to the Privy Council was granted, but the appeal has never been argued. In the meantime the Public Utilities Commissioner has been exercising the powers purporting to have been conferred upon him under the Act and his orders and rulings have been obeyed hitherto, in so far as I am informed.

In the 1916 application the constitutional question was raised by the Winnipeg Electric R. Co., and counsel for the company urged that the Act was *ultra vires* of the Provincial Legislature. Counsel for the City of Winnipeg, on the other hand, sought to uphold the validity of the Act.

The only provision in the Act allowing an appeal is contained in s. 70. That section is as follows:

> 70. An appeal shall lie to the Court of Appeal, in conformity with the rules governing appeals to that Court from the Court of King's Bench or a Judge thereof, from any final decision of the commission upon any question involving the jurisdiction of the commission, but such appeal can be taken only by permission of a Judge of the Court of Appeal given upon a petition presented to him within fifteen days from the rendering of the decision, notice of which petition must be given to the parties and to the commission within said 15 days. The costs of such application shall be in the discretion of the said Judge.

Under the section there can only be an appeal from a final decision of the commission. The order from which the city desires to appeal is not final. The order commences with the recital: "Upon the application of the Winnipeg Electric R. Co., for a further temporary increase in fares to meet increased wages."

MAN.

C. A.

The written judgment of the Commissioner states that the application is a special one "made during the tendency of a major application by the company for a permanent increase in fares." He then goes on to say that the

> major application involved an elaborate investigation into the affairs of the company and will not reach a determination probably until the end of the year. Meantime expenditures in wages over and above what have to be provided under the existing scale will have to be met and the company claims that it is without the means to meet these increases without additional revenue.

The Commissioner also refers to the fact that the application then before him was analogous to a special application made by the company for an emergency increase in the price of gas in July, 1917.

In the case before this Court in 1916, *Re Public Utilities Act supra*, to which I have above referred, the order of the Commissioner from which the appeal was brought was of a distinctly final character. It ordered the company, amongst other things, to so construct and maintain its railway tracks and other parts of its system that a certain result might be attained in regard to the free return of the currents of electricity to the central station with the object of lessening the danger of electrolysis.

The question of the constitutional validity of the Ontario Railway and Municipal Board Act recently came up for consideration before the Appellate Division in *Re Toronto Railway Co. and City of Toronto* (1918), 46 D.L.R. 547, 44 O.L.R. 381. The question was raised on an appeal from an order made by the Board. Meredith, C.J.O., expressed the following opinion at p. 551:

> There is, however, an insuperable difficulty in the way of the appellant's success on this branch of the case.
>
> That it is not open to attack, in a collateral proceeding, the status of a *de facto* Judge, having at least a colourable title to the office, and that his acts are valid, is clear, I think, on principle and on authority, and it is also clear that the proper proceeding to question his right to the office is by *quo warranto* information.

This opinion was concurred in by all the members of the Court.

The Public Utilities Act has been in force since 1912 and the Commission has had under its consideration a great number of important matters upon which it has adjudicated and in respect of which its decisions have been regarded as binding and have

MAN.

C. A.

been carried out by the parties affected. In these circumstances, and in view of the above decisions, I do not think that leave to appeal for the purpose of testing the constitutional validity of the Act should be granted.

The question as to the power of the Public Utilities Commissioner to increase the rates chargeable by the Winnipeg Electric Ry. Co., for the carriage of passengers over its lines is one which can more properly be dealt with at the trial of the action now pending, in which the City of Winnipeg is applying for an injunction against the company to restrain it from charging the fares set out in the order made by the Commissioner. I do not think that I should on this application express any opinion which might have the effect of embarrassing the Judge on the trial of that action.

The application for leave to appeal is dismissed. I make no order as to costs. *Application dismissed.*

K. B.

SUCKLING v. LYONS PAINT AND GLASS Co.

Manitoba Court of King's Bench, Mathers, C.J.K.B. April 28, 1920.

COSTS (§ II—29)—*Landlord and tenant—Application to recover possession of premises in possession of tenant—Dismissal—Costs—Taxation—Appeal.*]—Appeal by plaintiff from the taxing officer in a landlord and tenant proceeding.

F. Heap, for appellant.

J. C. Collinson, for defendant.

MATHERS, C.J.K.B.:—The landlord made a summary application under sec. 11 of the Landlord and Tenant Act, R.S.M. 1913, ch. 109, to a Judge of this Court to recover possession of premises in the occupation of the tenant. The application was dismissed with costs and the costs have been taxed by the taxing officer. The landlord appealed as to four items. During the argument I dismissed the appeal as to all items except the counsel fee allowed at the hearing.

The trial or inquiry lasted one and a half days and the taxing officer allowed a counsel fee of $75. He made the allowance under item 137 of the tariff relating to "attendance of counsel on opposed motion or application . . . to a Judge in Chambers."

MAN.

K. B.

The question of the scale of costs applicable to proceedings of this kind first came before the late Chief Justice Sir Thomas W. Taylor in *Winnipeg* v. *Guiler* (1885), 3 Man. L.R. 23. In all essential respects the present Act is substantially the same as the Act then in force. After consulting two of the other Judges he decided that the costs were to be taxed according to the "scale of costs in like proceedings" and that the nearest analogy of a "like proceeding" was a trial of an action for ejectment. He pointed out that the then Act said nothing about the application being made in Chambers but that it was to be made to a Judge of the Court whether in term or in vacation, and that it was a mere accident that he heard the application while sitting in Chambers. The same observation may be made with respect to the present Act.

In *West Winnipeg Development Co.* v. *Smith* (1910), 20 Man. L.R. 274, I followed *Winnipeg* v. *Guiler*. The Act has been several times revised and consolidated since *Winnipeg* v. *Guiler* and once since *West Winnipeg Development Co.* v. *Smith*, without any change having been made to indicate that these decisions did not express the intention of the Legislature.

In my opinion the taxing officer erred in taxing the counsel fee under item 137 of the tariff. He should have taxed it under item 140, relating to trials, etc.

In the event of arriving at this conclusion I was invited to reconsider the fee under tariff item 145. I have, however, not sufficient information to enable me to form a judgment as to the proper allowance to be made and I therefore refer the bill back to the taxing officer to reconsider this item and tax it under item 140 instead of 137.

As the appellant has had only partial success there will be no costs of this appeal. *Judgment accordingly.*

ROYAL PRINT AND LITHO LTD. v. ADAMS.

N. S.

S. C.

Nova Scotia Supreme Court, Longley and Drysdale, JJ., Ritchie, E.J., and Meilish, J. February 9, 1920.

PLEADING (§ I N—124)—*Frivolous and vexatious—Striking out—Appeal.*]—APPEAL from an order striking out a defence to an action on a promissory note as being frivolous and vexatious and disclosing no reasonable answer. Affirmed.

N. S.
S. C.

E. P. Allison, K.C., for appellant; *L. A. Forsyth*, for respondent.

RITCHIE, E.J.:—An application was made at Chambers to strike out the defence as false, frivolous and vexatious, and as disclosing no reasonable answer.

The defence was struck out and an appeal taken.

It is now admitted that paragraphs 1, 2, 3, and 4 were properly struck out, and the sole question is as to paragraph 5. This paragraph is as follows:

"5. The defendant made the said promissory note sued on herein for and on account of the price of certain work and labour to be done and performed for and certain materials to be supplied to the defendant by the plaintiff, to wit: the printing and supplying of 150 bound printed copies of a directory of the city of Fredericton in the Province of New Brunswick; 150 bound printed copies of a directory of the town of Amherst in the Province of Nova Scotia; and 500 printed copies of a directory of the city of Sydney in the said Province of Nova Scotia. The plaintiff has failed to supply or deliver to the defendant 40 of the said 150 copies of the said directory of the said city of Fredericton; 14 of said 150 copies of the said directory of the said town of Amherst; and 116 of the said 500 copies of the said directory of the said city of Sydney to be printed and supplied by the plaintiff to the defendant as aforesaid, although repeatedly requested so to do by defendant, and whereby the defendant has sustained and suffered great loss and damage. The time for the supplying and delivery of the said copies of the said several directories expired long previous to the commencement of this action, and the consideration of the said promissory note sued on herein has thereby wholly or partially failed."

The original account for the bound copies of the directories was $2,542.76. The defendant complained that the price was excessive and the parties agreed upon a compromise, fixing the price at $1,800.00. Of this amount $500 was paid in cash, and notes given for the balance; the note sued on is one of these notes.

On the affidavits, including that of Mr. Allison, K.C., I am of the opinion that paragraph 5 is obviously false, frivolous and vexatious. The matter of the account was finally settled and a new cause of action arose, namely, the right to sue on the notes.

N. S.
S. C.

I am satisfied that the matters and things set up in paragraph 5 do not constitute any defence to this action.

The defendant did not satisfy the learned Chief Justice, and he has not satisfied me, that he has a defence which should be investigated by a trial in the ordinary way. I am not prepared to go so far as to decide that in no case can an application of this kind be successfully met by an affidavit of information and belief, because affidavits of information and belief are acted upon in interlocutory applications. I agree, however, with the following remarks of the Chief Justice:

"The defendant has not made any affidavit, but his solicitor has, and this is what he says about the nature of his information:

'I am the solicitor of the defendant herein and the facts hereinafter deposed to by me are deposed to on information received by the defendant herein and which information I do verily believe to be true and correct.'"

When the affidavit was read the solicitor said the words "received by" should be "received from."

There is not a word in the affidavit to shew why the defendant did not make his own affidavit. His solicitor verbally stated that his client was in the West, but the motion has been adjourned from time to time for more than a month to enable the solicitor to get his client's affidavit and in the end there is no explanation in the solicitor's affidavit of the absence of this affidavit from the defendant.

I do not think a motion to set aside a defence can be successfully met in this way.

As to the amendment of the counterclaim I agree with my brother Mellish.

I would dismiss the appeal with costs.

LONGLEY and DRYSDALE, JJ., agreed.

MELLISH, J.:—I think that the affidavits on file, including the affidavit of defendant's solicitor, clearly shew that the defence pleaded is not maintainable and should be struck out. The appeal should therefore be dismissed with costs. Defendant's counsel, I understood on the argument, asked for leave to amend the defence by pleading that the note sued on was given in consideration of a settlement the terms of which were unfulfilled by the plaintiff. I do not think such an amendment should be

N. S.
S. C.

now allowed even if it would constitute a defence as to which, under the facts proved, I have great doubt.

The ends of justice would be met, I think, by allowing defendant to amend his counterclaim, if so advised.

Appeal dismissed.

ONT.
S. C.

WADE v. JAMES.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. February 10, 1919.

ASSIGNMENT FOR CREDITORS (§ V—43)—*Purchase by creditor and inspector of assets of estate—Resale to wives of insolvents—Consideration—Fraud on estate—Illegality—Public policy.*]—Appeal by defendants from an order of Masten, J., in an action brought by the assignee for the benefit of creditors for an account—Reversed.

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

A. C. McMaster, for respondent.

The judgment of the Court was read by:—

MEREDITH, C.J.O.:—This is an appeal by the defendants from an order of Masten, J., dated the 16th October, 1918, dismissing an appeal from the report of the Master in Ordinary, dated the 17th May, 1918, made in pursuance of the order of reference directed by the judgment at the trial, dated the 28th February, 1918.

By the judgment at the trial it was referred to the Master in Ordinary to take an account "of the profits, if any, made or to be made by the defendants out of the purchase of the insolvent estate in question;" and it was ordered that "the amount thus found due by the defendants to the plaintiff should be paid forthwith after confirmation of the Master's report."

The purchase referred to in the judgment was a purchase by the appellant James, for $3,587, of the assets of Krieger Brothers, who had made an assignment of their estate for the benefit of their creditors to the respondent.

James was an inspector of the estate, and this transaction was attacked on the ground that, being an inspector, he was disqualified from being a purchaser, and one of the objects of the action was to compel the appellants to account for the profits made out of the purchase.

It appears from the evidence taken in the Master's office that the purchase was made in pursuance of an arrangement entered

ONT.

S. C.

into between the wives of the insolvents and James that he should purchase the assets for them, and that they should repay him the purchase-price and in addition should pay the balance of the indebtedness of the insolvents to the appellants, less the amount of the dividends which they should receive.

That arrangement was carried out. James purchased for $3,587, turned over the assets to the wives of the Kriegers, and got from them $1,500 in cash and four promissory notes, each for $1,000. The $5,500 appears to have been made up of the $3,587 and the amount of the indebtedness of the insolvents to the appellants, $1,877—deducting $464, which was the amount which it was estimated would be received in dividends.

The whole of the amount of the promissory notes has not been paid. After deducting payments there is still due on them upwards of $1,739.25, and for that sum with interest on it from the 28th June, 1916, the Master has reported that the appellants are liable, as "profits made or to be made by the appellants out of the purchase of the insolvent estate in question."

There is no doubt, I think, that, if the transaction had been simply a sale to James and a resale by him to the wives of the Kriegers, the Master's finding would have been right; for it is clear, upon the evidence, that when the notes fell due the makers were solvent and the amount due on the promissory notes might have been collected; but that was not, as I have said, the nature of the transaction that was entered into.

The real transaction was a fraud upon the estate, to which the wives of the Kriegers were parties; and the position taken by the appellants is, that they could not, by reason of the illegality of the transaction, recover the balance remaining due on the promissory notes; and that, therefore, that balance is not profits made or to be made, within the meaning of the judgment. In my opinion, that position is well taken.

Although the general rule is, that a person cannot set up the illegality of a transaction to which he was a party, he may, on grounds of public policy, in a case such as this, set up the illegality of the transaction.

It was contended that that question had been determined adversely to the appellants by the trial Judge. It is true that some observations were made by him which seem to indicate that

ONT.
S. C.

he thought that the general rule to which I have referred precluded the wives of the Kriegers from setting up as a defence to an action on the promissory notes the illegality of the transaction of which the making of them formed part, but there was no determination of the question, and the question is left quite open by the judgment. If, as the respondent contends, that question had been decided adversely to the appellants, the judgment should have contained a declaration to that effect; and I do not see, if it had been the case, why any reference was directed. There was no dispute as to the amount owing on the promissory notes, and one would have thought that the judgment would have simply directed payment of that balance.

It may be that the relief to which the respondent was entitled was a judgment against the appellants for the amount by which the sum which the appellants were to receive for the assets exceeded what was paid to the assignee for them, but that is not the relief which was awarded by the judgment.

In coming to my conclusion, I do not differ from my brother Masten, for his decision proceeded upon the hypothesis that there was simply a sale by the respondent to James, and a sale by him to the wives of the Kriegers; but that was not, in my opinion, the real nature of the transaction that was entered into.

I would, for these reasons, reverse the order appealed from and substitute for it an order varying the report of the Master by deducting from the amount found due by the appellants the sum of $1,739.25 and the interest upon that sum, amounting to $163.17.

The case is, however, one in which the parties may properly be left to bear their own costs of the appeal to my brother Masten and of this appeal. *Appeal allowed.*

SASK.
C. A.

UNION BANK v. BOGGS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

MORTGAGE (§ VI G—105)—*Sale under—Private contract—Public auction abortive—Release of personal covenant to pay—Land Titles Act—Registrar's powers.*]—Appeal from the Master of Titles confirming a decision of the Registrar of Land Titles.

L. McLean, for appellant.

No one contra.

SASK.

C. A.

The judgment of the Court was delivered by

NEWLANDS, J.A. This is an appeal from the master of titles confirming a decision of the registrar of land titles for the Saskatoon land registration district imposing as a condition upon the sale of land under a mortgage by private contract, after an abortive sale by public auction, that the mortgagee must file a release of the personal covenant to pay, and, in the event of his not doing so, confining him to the remedy by foreclosure.

The registrar's powers in this behalf are given in sec. 109 of the Land Titles Act, 8 Geo. V. 1917 (2nd Sess.), Sask., ch. 18, and are to the effect that he may direct that the sale shall take place at such time and in such manner as he sees fit; that the land may be sold altogether or in lots; that it may be by public or private contract or other mode of sale, and subject to such terms and conditions as to expenses or otherwise as he sees fit.

It is the sale that is to be subject to such terms and conditions as to expenses and otherwise, so that it is not necessary to invoke the rule that general words following particular words in a statute are to be restricted in their meaning by the particular words they follow. The general words "or otherwise" are so restricted when the interpretation is given to the previous words that it is the terms and conditions of the sale that he is to direct, not the effect of the sale upon the parties as distinct from its effect upon the land, which latter is provided for in subsequent sections of the Act.

He cannot therefore impose any term which has not to do with the sale of the land or the payment of the purchase money, all of which should be directed to the obtaining of the best price for the land and the regulating of the expenses of the proceedings.

What he has done in this case is to attempt to affect the rights of the parties after the sale. He says, in effect, that, after the mortgagee sells the land, he is not to proceed upon the personal covenant to pay. It is true that this may be the effect of a sale by a mortgagee to a third party, but, if it is, it is for the Courts to say so, not the registrar.

Now if he cannot impose this term as a condition of a sale of the property, can he refuse to allow a private sale after an abortive public sale? I do not think so. There is nothing in the Act which forbids a private sale after an attempt to dispose

SASK.

C. A.

of the property by public sale. The object of the section is to enable the mortgagee to get his money out of the land by sale; if he cannot obtain a purchaser by public auction there is nothing to prevent him from doing so by private sale, provided he complies with all the terms and conditions that the registrar has power to impose, and, so that these proceedings should not be a burden upon the mortgagor, the registrar is given power to fix the expenses that the mortgagee may charge against the mortgagor.

When he has done these things he has done all that the statute authorizes him to do, and he cannot decide as to the rights of the parties as between themselves apart from the land, the title to which he would in due course transfer to the purchaser upon the subsequent provisions of the statute being complied with.

HAULTAIN, C.J.S., LAMONT and ELWOOD, JJ.A. concurred.

K. B.

OSCAR ST. CYR v. THE SPENCER GRAIN Co. AND THE NORTHERN CROWN BANK.

Saskatchewan Court of King's Bench, Macdonald, J. January 12, 1920.

CONVERSION (§ I B—10)—*Principal and agent—Sale of grain.*]—Action for an accounting of the proceeds of grain sold.

J. F. Frame, K.C., and *A. Marcotte*, for plaintiff.

Hugh Phillipps, K.C., for Spencer Grain Co.

P. H. Gordon, for Northern Crown Bank.

MACDONALD, J.:—The plaintiff is a farmer residing at Ponteix, Saskatchewan; the defendant Spencer Grain Co. Ltd. is an incorporated company having its head office at Winnipeg; the defendant bank had at all the times in question herein a branch at Ponteix.

About May 16, 1916, the plaintiff began loading wheat in three Canadian Pacific Railway cars, Nos. 135996, 125118 and 33052. One B.C. Rogers had been doing business as a grain commission agent at Ponteix for some time, and had on various occasions through the winter solicited business from the plaintiff. The cars were being loaded at Gouverneur where there was no agent of the railway company, and while they were being so loaded, the plaintiff sent word to Rogers by a neighbouring farmer if he, Rogers, wanted plaintiff's grain to get everything ready.

SASK.

K. B.

On May 18, while plaintiff was on his way home from Gouverneur, Rogers overtook him with 3 bills of lading for said 3 cars, 2 on the C.P.R. Co.'s form and one on said form with the name of the defendant grain company printed as consignee and party to be notified, all filled in by Rogers.

In the bill of lading for car No. 135996 the wheat was consigned to the defendant grain company, and there was no endorsement thereon; in the bills of lading for cars Nos. 125118 and 33052, the wheat was consigned to the order of the plaintiff and over the signature of the plaintiff on the back of each appear the words: "Deliver to order of the Northern Crown Bank." Whether those words were there when the plaintiff signed, he was unable to say. The plaintiff signed all 3 bills of lading as shipper, endorsed 2 as aforesaid, and handed all 3 back to Rogers.

The plaintiff does not frankly tell for what purpose he delivered the bills of lading to Rogers. In his examination for discovery he says merely that he gave them to Rogers so Rogers could bill the cars for him at the station and get the money for him; at the trial he says he told Rogers he wanted the bills of lading to go to the bank, and, again, that Rogers was to put the bills in the bank to get money on them. Rogers, at any rate, did take the bills of lading to the defendant bank, made 3 drafts on the defendant grain company for $1,200, $1,200 and $800 respectively, with the bills of lading attached, and received from the defendant bank advances in said amounts which were placed to Rogers' credit. The drafts were paid by the grain company to the defendant bank, and the latter endorsed the 2 bills of lading, payable to its order as follows:—"On payment of all charges deliver to the order of Spencer Grain Co. For the Northern Crown Bank, Winnipeg, without recourse, H. J. L. Auchmuty, pro Manager."

On May 22 the plaintiff received from Rogers a cheque for $1,000 as an advance in respect of said wheat and on June 6 the plaintiff asked Rogers for a further advance of $1,000. Rogers said on that occasion he was too busy to go to the bank but if the plaintiff would go there the next day he would get the money. On said next day the plaintiff went to the defendant bank and found that Rogers had placed to the credit of the plaintiff in said bank a sum of $1,000. On June 12 the defendant grain company received instructions from Rogers to sell the grain in question

SASK.

K. B.

and did so, and as Rogers was very largely indebted to the defendant grain company, the latter placed the proceeds of the sale of said wheat to the credit of said Rogers, which still left a very large balance owing from Rogers to the defendant grain company in respect of advances made by the grain company to Rogers.

Some time in July Rogers left Ponteix and has not been heard from since, and plaintiff has received nothing in respect of said 3 cars of wheat except two sums of $1,000 each.

On these facts the plaintiff sues the defendants. He first alleges that he employed the defendant grain company, through its lawfully authorised agent, B. C. Rogers, as commission merchants to sell the car-loads of wheat in question; that on or about July 24, 1916, he instructed the defendant grain company to sell such grain at a price to net the plaintiff $1.08½ per bushel at Gouverneur station, Sask. He further alleges that the Spencer Grain Co. Ltd. sold or converted the said wheat to their own use and, save for the sum of $2,000, received as already set out, that the plaintiff has received no accounting for the proceeds of the said wheat from the defendant grain company. He thirdly alleges that the grain was sold by the Spencer Grain Co. and proceeds converted to the use of the defendants or one of them, but in what porportion or manner is unknown to the plaintiff, and that, save for the sum of $2,000, the defendants failed and refused to account to the plaintiff for the balance coming to him; and plaintiff claims against the defendant bank the proceeds arising from the sale of the grain contained in cars numbered 125118 and 33052 which they received or, but for their negligence, would have received. In the alternative, the plaintiff claims against the bank as endorsee of the bill of lading for the use of the plaintiff, the monies arising on said sale; as against the Spencer Grain Co. Ltd., the plaintiff claims the liability to account to him as his agent for the sale of said grain and the payment of the balance arising under such sale, and, in the alternative, for monies received by such defendant to his use on the sale of said 3 cars of grain.

With respect to the claim that Rogers was the agent of the defendant grain company, I cannot find that there is any such agency established or that there was any holding out of Rogers by the defendant company as its agent, so that the sole question left

SASK.

K. B.

for determination is whether the defendants or either of them were, on the facts of the case, guilty of conversion of the plaintiff's grain. As before stated, the plaintiff did not fully or frankly state what took place between himself and Rogers at the time he handed the signed bills of lading to Rogers, but, in the light of the plaintiff's own subsequent acts and the portions of his evidence in that respect, already referred to, I must infer that the plaintiff gave the bills of lading to Rogers in order that Rogers might obtain for the plaintiff advances against them. Rogers, therefore, had authority to deal with the said bills of lading and it seems to me that as against the defendant bank it in good faith advanced the money on such security and against the grain company it became a subsequent *bonâ fide* purchaser for value, a good title was acquired by estoppel against the plaintiff the true owner.

In *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, at 285, Lord Herschell said:—

> If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it he is estopped from asserting his title as against a person to whom said third party has disposed of it and who received it in good faith and for value.

In *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, at 215, 61 L.J. (Ch.) 723, occurs the following:—

> The general rule of law is that where a person has obtained the property of another through one who is dealing with it without the authority of the true owner no title is acquired as against that owner, even though full value be given and the property be taken in the belief that an unquestionable title thereto is being obtained unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn a good title is acquired by personal estoppel against the true owner.

In *Henderson* v. *Williams*, [1895] 1 Q.B. 521, at 525, 64 L.J.Q.B. 308, Lord Halsbury says:—

> It appears to me that quite apart from any contract which might be affirmed or disaffirmed afterwards, the question here is whether the true owner of the goods has so invested the person dealing with them with the indicia of property as that when an innocent person enters into a negotiation with the person to whom these things have been entrusted with the indicia of property the true owner of the goods cannot afterwards complain that there was no authority to make such a bargain.

In *Henderson* v. *Williams* already referred to, Lord Halsbury further says, as follows, at pages 528-529:—

> I think that it is not undesirable to refer to an American authority, which I observe, was quoted in the case of *Kingsford* v. *Merry* (1856), 1 H. & N. 503, *Root* v. *French*, (1835), 13 Wend. 570 and see Kent's Comm. II. 514. in which,

SASK.

K. B.

in the Supreme Court of New York, Savage, C.J., makes observations which seem to me to be well worthy of consideration. Speaking of a *bonâ fide* purchaser who has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests.

Counsel for the plaintiff claims that there is a limitation of the said principle and cites *Farquharson* v. *The King*, [1901] 2 K.B. 697, 70 L.J.K.B. 985. The decision in the Court of Appeal in said *Farquharson* v. *The King* was appealed to the House of Lords whose judgment appears in [1902] A.C. 325, 71 L.J.K.B. 667, and reverses the judgment of the Court of Appeal on the ground that, on the facts of the case, the principle was not applicable at all, but I am of the opinion that even with the limitation or rather the explanation of the principle contained in the judgment in *Farquharson* v. *The King*, both in the Court of Appeal, [1901] 2 K.B. 697, 70 L.J.K.B. 985, and in the House of Lords, [1902] A.C. 325, 71 L.J.K.B. 667, said principle applies in the present case.

In the Court of Appeal, 70 L.J.K.B. 985, at 993, Vaughan Williams, L.J., says as follows:—

The conclusion I have come to is that one of two innocent parties ought never to be said to have within the meaning of the rule enabled a third person to commit a fraud, unless the act he has done is an act intended to be acted upon by somebody. I will illustrate this. Suppose in the case of *Brocklesby* v. *Permanent Building Society*, [1895] A.C. 173, 64 L.J. (Ch.) 433, the father had merely entrusted the son with the deeds of the property, and the son had fraudulently taken them and raised money on them, could it have been said that the act of the father was within the rule? In my judgment, it clearly could not have been said so, because the father would not upon that supposition have done any act which he intended to be acted upon. The father in the hypothetical case, having merely handed the deeds to his son to be taken care of, could not be said to have enabled the son to occasion the loss within the meaning of the rule, because he did not intend the son to deal with the deeds at all. In the actual case as it came before the Court the father did not hand the deeds to the son to be taken care of merely, but that the son might do that which he did do, namely, raise money upon them. It is true that in raising the money the son departed from the authority given to him; but nevertheless the Court held that, as the father had entrusted the deeds to the son to do that which he did do—namely, raise money by the deposit of the deeds, the father was bound, although the son departed from the authority given to him, and could only get back the deeds on repayment of the money advanced upon them.

SASK.

K. B.

In *Young* v. *MacNider* (1895), 25 Can. S.C.R. 272, at 279, the following quotation from Smith's Mercantile Law, 10th ed., page 136, is quoted with approval:—

> He who accredits another by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorize him or not, since, when one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud, should be the sufferer.

Now, in this case, did the plaintiff by his conduct enable Rogers to perpetrate the fraud in question, and, if so, how? In my opinion he did by handing over the bills of lading in question to Rogers and thereby apparently clothing him with full authority to deal with said bills of lading as he saw fit, and herein I can draw no distinction between the bill of lading in which the grain was consigned to the defendant grain company and the 2 in which the grain was consigned to the order of the plaintiff and endorsed as aforesaid. By handing said bills of lading to Rogers, it appears to me that he held out Rogers as having authority to dispose of said bills of lading, in the one case to the defendant bank and in the other case to the Spencer Grain Co., and I find that the defendants *bonâ fide* entertained the belief that Rogers had the right to deal with the bills of lading and that such belief was well founded under the circumstances.

The facts in this case are to my mind in all essentials the same as those in question in *Bedard* v. *Spencer Grain Co.*, [1919] 2 W.W.R. 723, and it is unnecessary for me to say more than that I adopt the law and reasoning therein so fully set out.

The action will, therefore, be dismissed with costs.

Action dismissed.

DAVEY v. WALKER.

Saskatchewan Court of King's Bench, Embury, J. April 29, 1920.

COSTS (§ I—14)—*Security—Order for—Non-compliance—Inevitable delay—Application for extension of time—Refusal—Dismissal of action—Appeal.*]—Application by way of appeal from an order of a District Court Judge dismissing plaintiff's action for non-compliance with an order for security for costs. Appeal allowed.

SASK.

K. B.

H. E. Sampson, K.C., for appellant.

P. H. Gordon, for respondent.

EMBURY, J.:—This is an application by way of an appeal from the order of the Judge of the District Court for the Judicial District of Kindersley, dismissing the plaintiff's action for non-compliance with an order for security for costs. The order provides that the plaintiff "do, within three months from the service of this order, give security on his behalf in the penal sum of $200.00 to answer the defendant's cost of the action;" and it is further ordered that "in default of such security being given by the plaintiff this action be dismissed with costs unless the Court or a Judge upon special application for that purpose shall otherwise order." The plaintiff took all necessary steps to comply with this order, but owing to the fact that there was a severe blizzard his money was delayed in transit, as a result of which it was paid into Court two days too late. The fault in the matter was in no way with the plaintiff, but arose from circumstances over which he had no control. The present state of the proceedings is as set out in an affidavit on file, which shows the proceedings in the action up to date to be as follows:

Writ of summons issued.
Appearance of L. C. Walker, October 29, 1919.
Copy of writ of summons filed November 13, 1919.
Affidavit of G. W. Murray filed November 13, 1919.
Affidavit of L. C. Walker filed November 13, 1919.
Notice of motion filed November 14, 1919.
Order for security of costs filed December 8, 1919.
Taken November 27th, 1919.
Paid into Court by plaintiff $200.00 March 10, 1920.

The plaintiff actually paid the required amount into Court in pursuance of the order, although the time had elapsed, and has applied to the Judge of the District Court for an extension of the time for payment in, and the application was refused. From this latter order the plaintiff appeals. The appellant urges that under r. 704, which reads as follows:

> The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed,

he is entitled to an extension of the time. It is urged, however, on behalf of the defendant that, on the authority of *Whistler* v.

SASK.

K.B.

Hancock (1878), 3 Q.B.D. 83, and *King* v. *Davenport* (1879), 4 Q.B.D. 402, the application cannot be entertained because the action is already dead. The affidavit above set out as to the proceedings which have taken place shews that the action is not dead, but that a further step remains to be taken, namely, the formal entry of judgment, which is made after search in the office of the Clerk to see if the security has been filed. This step has not been taken, and therefore the action cannot be said to be dead. The form of the order is not in the words that "the action do stand dismissed without further order," as would be a proper wording in case the order for security for costs were itself to be the judgment in case of such default. Following the judgment of Kekewich, J., in *Collinson* v. *Jeffrey*, [1896] 1 Ch.D., 644, I am therefore of the opinion that the appeal in this matter should be allowed. The circumstances are such that a grave injustice will be done to the plaintiff in this action unless this appeal is allowed, and this injustice would be done to him through no fault of his own. In *Collinson* v. *Jeffrey*, *supra*, Kekewich, J., says, as follows, at 646:

> Authorities, two in the Queen's Bench Division and one in the Chancery Division, have been quoted to shew that I am incompetent now to make the order at all. All those cases were concerned with dismissal for want of prosecution. The defaulting party was ordered to take a step in the action within a certain time, and, if he did not do so, the action was to be at an end. The object of that is to put an end to litigation by compelling the defaulting party to proceed within a certain time on pain of dismissal. But that practice has never been applied to a case of this kind, where the question is one of payment of money into Court as security or under an order.
>
> The form of the order in a redemption action is that if the money is not paid by a certain time "let this action from thenceforth stand dismissed out of this Court." No doubt, there is great difficulty in dealing with the action after the time for payment has expired when peremptorily fixed; yet it is not the practice to say that the action is dead, for it is necessary in this and other analogous cases to make a further application in order to obtain the absolute dismissal of the action. There is another form of order available and appropriate where the Court thinks that severe terms should be imposed—namely, that on failure to do certain acts within a specified time then "the action do stand dismissed without further order." In this case no such words are in the order. In my opinion the applicant is entitled to an order in the terms of the notice of motion.

This would seem to me to meet the present case.

The appeal therefore will be allowed with costs in the cause to plaintiff. The costs of the motion to extend the time will be costs in the cause to the defendant in any event of the action.

Appeal allowed.

SASK.

K. B.

ELLIOTT v. WINKENWEDER.

Saskatchewan Court of King's Bench, McKay, J. January 3, 1920.

FALSE IMPRISONMENT (§ II A—7)—*Damages—Non-payment of feed bill—Information laid on advice of Provincial police—Presence of defendant at arrest—No warrant—Irregularity—Remarks made by defendant after arrest—Liability.*]—Action for damages for false imprisonment.

C. A. Irvine, for plaintiff.

P. E. Mackenzie, K.C. and *Mr. Marks* for defendant.

MCKAY, J.:—This is an action for damages for false imprisonment, and for the return of $38.30 alleged to have been obtained by the defendant from the plaintiff unlawfully and by undue influence and duress while undergoing such false imprisonment.

The evidence shews that on April 15, 1919, the plaintiff placed some horses in the defendant's feed barn at Rosthern, and took them away the same day without paying his feed bill of $4.30. The defendant spoke to the Provincial policeman at Rosthern, Sandford by name, the next day, telling him what happened, and Sandford told defendant he (defendant) would have to lay an information before he could proceed against the plaintiff. The defendant laid the information referred to in the pleadings. The defendant is and was engaged in the livery business at the time of the happening of the matter complained of, and was in the habit of driving around Policeman Sandford in connection with the latter's business.

On April 17, 1919, in the morning Policeman Sandford employed defendant to drive him from Rosthern beyond Hague, on business in no way connected with the charge against plaintiff, and thence to Hepburn. While at the latter place two men hired defendant to drive them into Saskatoon. On the road into Saskatoon Sandford told defendant:—"We will drive into Saskatoon and see if Mr. Elliott is there." After defendant and Sandford had their supper in Saskatoon, they went out to locate the plaintiff and found him at Johnson's barn. The plaintiff says he saw defendant and Sandford coming up to the barn in a car, and defendant got out of his car and pointing to plaintiff said "This is him." Sandford then told plaintiff he had a warrant for him for false pretences and that he was wanted at Rosthern. Sandford gave him a paper and he gave it back

SASK.

K. B.

to him, and Sandford told him if he had any witnesses to bring him along. Plaintiff then went further in the barn to get Fraser his man, and returned to Sandford, and while he was talking to Sandford, protesting against being taken back to Rosthern for such a small matter as the $4.30 feed bill, defendant came up to them and said: "This is no place to settle, we will settle this in Rosthern," or words to that effect. The plaintiff is corroborated by his man Fraser as to the above remark of defendant, and I find that the defendant did make it, or words to that effect, but I also find that he made it after the arrest of the plaintiff. The defendant brought back the policeman to Rosthern with the plaintiff and others, and they saw Mr. Ens, J.P., that night, and the plaintiff intimating to Mr. Ens that he wished to settle, he did so by paying $38, which included the feed bill, alleged costs, and $10 for defendant's charge to take back the plaintiff to Saskatoon, whereupon the plaintiff was released, and defendant's man took him back to Saskatoon.

The plaintiff was arrested without a warrant, as none was issued on the information laid, but defendant did not know this, and the evidence shews that the defendant was not guilty of the offence charged, although defendant acted in good faith in laying it. The manner of settling the charge laid against the plaintiff was, to say the least, irregular. In my opinion the plaintiff was falsely imprisoned, but is the defendant liable for this false imprisonment?

In considering this case one must bear in mind that it is an action for trespass to the person, and not one for malicious prosecution.

The weight of authority appears to be that merely pointing out the plaintiff as the man to be arrested, that is, identifying him, or the laying of the information, is not sufficient to make the defendant liable. See 27 Hals., p. 879, foot-note (b), *Grinham* v. *Willey* (1859), 4 H. & N. 496, 28 L.J. (Ex.) 242. *Sewell* v. *National Telephone Co.*, [1907] 1 K.B. 557. The defendant is therefore not liable in trespass for those acts. But the defendant did more than lay the information and point out the plaintiff: he made the remark above referred to immediately after the policeman arrested the plaintiff. Does that remark make him liable? The fact that the defendant was present when the arrest

SASK.

K. B.

was made, in my opinion, is satisfactorily explained by the evidence, which shews that he was employed by the policeman as a liveryman to drive him in his car, and he was not there as an interested party and taking part in the arrest as was the case of Mason in *Robitaille* v. *Mason* (1903), 9 B.C.R. 499, who organized the expedition to recover the float, and actually assisted in the arrest. In the case at bar the defendant, after stating the facts to the policeman, at the suggestion of the policeman, laid the information against plaintiff and left the subsequent proceedings in the hands of the Justice of the Peace and the policeman. In 27 Hals. at p. 878, para. 1552, the author states:—

"The imprisonment for which the action of false imprisonment lies must be the direct act or the result of the order of the person sued, or of someone for whose acts he is liable."

and at p. 879, par. 1553:—

"A private person is liable if he himself unlawfully detains another, or if he gives another in charge to a police officer who thereupon arrests the other, or if he causes a police officer to arrest or detain the other, or if he participates in the arrest or detention."

The defendant did not himself detain the plaintiff, or give him in charge to the policeman, nor did he cause him to arrest or detain him. But was the remark made by defendant, if an interference or participation in the arrest of the plaintiff, a sufficient interference or participation to make him liable?

It seems to me, bearing in mind what Halsbury states in par. 1552 above, the participation referred to by him in par. 1553 must be a participation which directly causes or at any rate is one of the things which directly causes the arrest or detention, and, on looking up the authorities he cites, I am confirmed in this view.

In *Grinham* v. *Willey*, 4 H & N. 496, the headnote is as follows:—

A felony having been committed, the defendant sent for a policeman, who, on the defendant's information, and on inquiries made by himself, arrested the plaintiff. The defendant accompanied the policeman to the station and signed the charge sheet. Held, that the defendant was not liable in an action of trespass.

In this case the jury found that the defendant did not give the plaintiff into custody, but that the plaintiff was given into custody by the consent of the defendant, and at pp. 498, 499 Pollock, C.B., states:—

The circumstances of this case are, that the defendant appealed to the authorities who are charged with the preservation of the peace. The arrest and detention were the acts of the police officer, and the defendant did nothing more than he was bound to do, viz., sign the charge sheet . . . *A person ought not to be held responsible in trespass, unless he directly and immediately causes the imprisonment.*

Cozens-Hardy, L.J., at 560, in *Sewell* v. *National Telephone Co. Ltd.*, [1907] 1 K.B. 557, quotes with approval the latter portion of the judgment of Pollock, C.B.

In *Grimes* v. *Miller* (1896), 23 O.R. 764, the headnote is in part as follows:—

His liability in an action of trespass for such imprisonment would depend upon whether he had directly interfered in and caused the arrest or whether the conviction and imprisonment were the acts of the magistrates alone.

and Burton, J.A., at p. 771, says:—

But I agree with those Judges who have intimated that a person cannot be held to be guilty of a trespass unless he either acted personally in the arrest, or expressly authorised someone to act for him.

As above stated, after laying the information the defendant left the subsequent proceedings to the policeman and the Justice of the Peace and the above remark was made after the policeman had arrested the plaintiff. In view of the foregoing authorities in my opinion such remark was not a sufficient participation in the arrest or detention to make the defendant liable for what the policeman did, and the defendant is not liable in trespass.

Furthermore, by the remark made by defendant, he may have simply meant that this matter cannot be settled here, the Justice of the Peace is the only one that can settle it.

The signing of the charge sheet would not be evidence to go to the jury if contradictory inferences can be drawn from it, for the duty lying on the plaintiff of proving his case would not be completed. (Collins, M.R., in *Sewell* v. *National Telephone Co. Ltd.*, *supra*, at page 560.)

I am therefore of the opinion the defendant is not liable for the false imprisonment, and for this reason he is not liable to return the money paid to him through the Justice of the Peace and the $10 paid to him by the plaintiff for the return trip.

The plaintiff's action will therefore be dismissed with costs.

Action dismissed.

SASK.

K. B.

IN Re ESTATE OF IVER QUAAL.

Saskatchewan Court of King's Bench, Embury, J. April 28, 1920.

WILL (§ III B—80)—*Construction—Devisees—Joint tenants—Tenants in common—Saskatchewan Land Titles Act, 8 Geo. V. 1917 (2nd Sess.), ch. 18.*—Application for the construction of a will.

R. W. E. Scott, for the administrator; *J. K. Hunter*, for Leonard E. Quaal; *H. Fisher*, for the Official Guardian.

EMBURY, J.:—The will of the late Iver Quaal reads as follows: "That I Iver Quaal wish to after death leave all property right and titles of all my possessions, to my wife and family."

The point to be decided is: Do the devisees under the will take as joint tenants or tenants in common? The Court leans in favour of construing the tenancy in such cases to have been a tenancy in common, but tenancy in common would not be established unless there is something in the will from which the intention can be inferred. In the absence of any statutory enactment it is doubtful whether under the authorities which have been cited this will would create a tenancy in common. The Saskatchewan Land Titles Act, 8 Geo. V. 1917 (2nd Sess.), ch. 18, sec. 197, reads as follows:—

> Whenever, by letters patent, transfer, conveyance, assurance, or other assignment, land or an interest therein is granted, transferred, conveyed or assigned to two or more persons, other than executors or trustees, in fee simple or for any less estate legal or equitable, such persons shall take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, conveyance, assurance or other assignment, that they shall take as joint tenants.

Under this section, do the words "letters patent, transfer, conveyance, assurance or other assignment" cover a devisee by way of will? I consider that a will devising an estate is an assignment within the meaning of this section. There are no statutory enactments defining the word "assignment," so one is driven to look further for authorities on the subject. In the case of *Rendall* v. *Andreæ* (1892), 61 L.J.Q.B. 630, and the cases therein referred to, it is assumed that an executor comes within the meaning of the term "assign," and accordingly that a will is an assignment, and in the said case it is laid down that he would be liable as an assign to pay the rent under a lease, if in pursuance of the will and as an executor he entered into possession as a tenant. Further, in

SASK.

K. B.

Williams on Real Property, 22nd ed., at 76, the elementary principle is laid down as follows:—

> And all other persons, whom a tenant in fee simple may please to appoint as his successors, are not his *heirs*, but his *assigns*. Thus, a purchaser from him in his lifetime, and a devisee under his will, are alike *assigns* in law, claiming in opposition to, and in exclusion of the *heir*, who would otherwise have become entitled.

If the same root meaning attaches to the words "assign" and "assignment," then a will is an assignment within the meaning of the section above referred to, in which case the tenancy created by the will would be a tenancy in common, as I think it is. The authorities shew that the words "assign" and "assignee" have the same meaning in so far as they refer to one to whom the property or right is legally transferred: See New English Dictionary (Oxford), under "assign" and under "assignee."

It has been urged that under the *ejusdem generis* rule, the meaning of the word "assignment" in sec. 197 of the Land Titles Act must be limited to the class covered by the words which precede it, namely, "letters patent, transfer, conveyance, assurance" and so would not include "will." It seems to me that the section is couched in words intended to give it a wide meaning; not only are words used as above but they are predicated by the words "granted, transferred, conveyed or assigned." Furthermore, the rule is not to be applied where there is an exception provided to the general class as there is in this case regarding conveyances to "executors and trustees:" See Maxwell on Statutes, 4th ed., page 507: also *Ivison* v. *Gassiot* (1853), 3 DeG. M. & G. 958.

I have not decided the question of the exact interest which the wife is entitled to under the will—whether a one-half or a one-seventh, for the reason that the matter was not argued and if it is to be decided it should be brought up in another application.

BIETEL v. CORBALLIS.

Saskatchewan Court of King's Bench, Embury, J. April 20, 1920.

CERTIORARI (§ I A—9)—*Conviction—Illegal still—Inland Revenue Act—Improper conduct of magistrate.*]—Application by way of *certiorari* to quash the conviction of the accused for contravention of the Inland Revenue Act. Conviction quashed.

SASK.

K. B.

W. G. Ross, for informant.

I. F. Hare, for Attorney-General.

E. F. Collins, for applicant.

EMBURY, J.:—The accused man was convicted before two Justices of the Peace, H. Webber and L. E. Arnott, of having in his possession a still, worm, rectifying or other apparatus, or part or parts thereof, suitable for the manufacture of spirits, contrary to the Inland Revenue Act.

On March 11, 1920, the informant, Jerbert J. Corballis, Staff-Sergeant Joyce and J. P. Lane, visited the premises of the accused where the seizure of the articles complained of was made. They were driven out to make the seizure and the search by Arnott, one of the Justices of the Peace before whom the accused was tried, and who is a liveryman, and, presumably, Arnott would be paid as a liveryman for making the trip. Where there is a fine following a conviction in these cases, half of the fine goes to the informant, in this case Corballis, who was one of the men driven out by Arnott. In spite of the fact that there is evidence on which the conviction can be maintained; also in spite of the fact that there is no proof of actual bias on the part of Arnott who sat as a magistrate, still I am of opinion that it is contrary to the interests of the administration of justice, especially in a new country such as this, that a conviction under such circumstances should not be quashed. The administration of justice must at all times be above reproach, and no ground must be allowed to exist from which any suspicion could possibly arise as to the propriety of the motives of the presiding magistrates or Judges. In this case there is no evidence whatever that Arnott was actually biased; nevertheless, he being one of the parties who was present when the search was being made, having driven these men out for which service he would be paid, and then after presiding on a case in which part of the penalty goes to the informant, I consider that it is improper that he should have sat on the case and that the conviction obtained under such circumstances should be quashed.

The rule in this matter has been discussed fully by Meredith, C.J.O., in the Ontario case of *The Queen* v. *Steele* (1895), 2. Can. Cr. Cas. 433, and I consider that the rules therein enumerated

SASK.

K. B.

cannot be too strictly adhered to, especially in a new country where indeed many of the inhabitants become subject to the rule of British law for the first time. An objection to Arnott sitting should have been taken by the accused at the hearing before the magistrate, but the accused is a foreigner who has to have the use of an interpreter, and at the hearing he was not represented by counsel. Accordingly I don't think that his failure to take objection under the circumstances should be allowed to prevail.

The conviction therefore will be quashed but without costs to the accused, and there will be the usual order for protection of the magistrates. *Conviction quashed.*

INDEX.

APPEAL—
Costs—Security for—Extension of time—Refusal—Dismissal of action 713
Default—Interlocutory judgment—Improper case—Order setting aside—Defence filed 316
Interpleader—Arising out of divorce action 642
Landlord and tenant—Recovery of possession—Costs—Taxation .. 700
Master in Chambers—District Court action—Order—District Courts Act, sec. 24—Judicature Ordinance, sec. 27 574
Pleading—Frivolous and vexatious—Striking out 701

ARBITRATION—
Submission to arbitrators—Scope of—Jurisdiction—Evidence on matters beyond scope—Failure to object 643

ASSESSMENT—
See TAXES.

ASSIGNMENT—
Suit for wages due to husband and wife—Defence—Agreement for purchase of land—Assignment of wages—Inoperative—R.S.M. 1913, ch. 13, sec. 3 441

ASSIGNMENT FOR CREDITORS—
Purchase by creditor and inspector of estate—Resale to wives of insolvents—Consideration—Fraud on estate—Illegality—Public policy 704

ASSIGNMENT OF WAGES BY MARRIED MAN—
See ASSIGNMENT.

AUTOMOBILES—
As to cost of repairing motor truck injured by a negligent act. See DAMAGES.
Collision—Negligence—"Jitney" rights of passengers 455
Hiring of car—Operated by one as servant or agent of others—Control of car—Collision—Contributory negligence—Damages 576

BANKS—
Lien on shares of its own stock by bank standing in name of customer—Bank Act—Equitable title to shares in creditor of customer—Knowledge of bank—Failure to disclose—Title to shares 636

CARRIERS—
Loss of goods—Special damages—Contract—Knowledge of special terms 668

CASES—

Beckford v. Wade, 17 Ves 87, applied 75
Bernina, The, Mills v. Armstrong, 13 App. Cas., followed 455
Cambrian Mining Co., 48 L.T.R. 114, applied and followed 589
Cardigan v. Armitage, 107 E.R. 356, applied 307
Clarkson v. McMaster, 25 Can. S.C.R. 96, followed 309
C.P.R. v. Fréchette, 22 D.L.R. 356, [1915] A.C. 871, followed 429
Craig v. Lamoureux, 50 D.L.R. 10, 36 T.L.R. 26, followed 143
Cunningham v. Hedge, 76 N.Y. St. Rep. 547, 12 N.Y. App. Div. 212, distinguished 329
Ellis v. Emmanuel, 1 Ex. D. 157, distinguished 353
Emerson-Brantingham Implement Co. v. Schofield, 43 D.L.R. 509, affirmed 87
French v. Row, 77 Hun (N.Y.) 380, distinguished 329
Fry and Moore v. Speare, 26 D.L.R. 796, 30 D.L.R. 723, distinguished 489
Fulton v. Andrew, L.R. 7 H.L. 448, distinguished 143
Guiard v. de Clermont, [1914] 3 K.B. 145, distinguished 486
Hamilton v. Graham, L.R. 2 Sc. & Div. 166, applied 307
Harris v. Taylor, [1915] 2 K.B. 580, distinguished 486
Imperial Merchant Shipping Act, 57-58 Vict., ch. 60, sec. 503, distinguished 94
Jones v. Bright, 5 Bing. 533, 130 E.R. 1162, distinguished 509
Macleod v. Edinburgh Tramways Co., 1 Sess. Cases 1912-13, 624, distinguished 429
Mercer v. The B.C. Electric R. Co., Ltd., 8 D.L.R. 144, 17 B.C.R. 465, followed 372
Metallic Roofing Co. v. Local Union No. 30, 5 O.L.R. 424, distinguished 444
Miles v. McIlwraith, 8 App. Cas. 120, applied and followed 383
Mills v. Armstrong, The Bernina, 13 App. Cas. 1, distinguished 576
Moon v. Stephens, 23 D.L.R. 223, 8 S.L.R. 218, followed 507
Nicholson v. Hooper, 4 Myl. & Cr. 179, applied 636
Ottawa, City of, and Provincial Board of Health, Re, 20 D.L.R. 531, 33 O.L.R. 1, approved 445
Pere Marquette R. Co. v. Mueller Mfg. Co., 48 D.L.R. 468, 45 O.L.R. 312, distinguished 242
Poulin v. Grand Trunk Ry. Co., 37 D.L.R. 792, 27 Que. K.B. 141, approved 88
Rex v. Horne Tooke, 25 How. St. Tr. at 120, followed 1
Rex v. Martin, 28 D.L.R. 578, 26 Can. Crim. Cas. 42, 9 Alta. L.R. 265, note 5 Can. Cr. Cas. 430, distinguished 503
Rex v. Pollard, 39 D.L.R. 111, followed 173
Rowbotham v. Wilson, 8 H.L. Cas. 348, applied 307
St. Patrick's Market, Re, 1 O.W.N. 92, approved and followed 477
Savage v. Foster, 9 Mod. 35, applied 636
Savile v. Savile, 24 E.R. 596, distinguished 155
Sercombe v. Township of Vaughan, 46 D.L.R. 131, 45 O.L.R. 142, distinguished 454
Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670, followed 486

Soar v. Ashwell, 2 Q.B. 390, applied 75
Taylor v. Davies, 41 D.L.R. 510, 41 O.L.R. 403, affirmed 75
Woods Estate, Re, 31 Ch. D. 607, distinguished 470

CERTIORARI—
Conviction—Illegal still—Inland Revenue Act—Improper conduct of magistrate 721

COMPANIES—
Winding-up—Winding-up Act, R.S.C. 1906, ch. 144—Offer to purchase assets—Consideration—Payment of creditor's claims and allotment of shares in new company to shareholders of insolvent company—Power of Court to sanction acceptance of offer—Sec. 34(c) and (h) of Act—Approval of large majority of shareholders—Rights of minority—Approval of Court 589

CONTRACTS—
Repairs to chattel—Work done—Defective material—Implied condition as to fitness of material—Sale of Goods Act, R.S.M. 1913, ch. 174 509
Workman—Hiring of—Repudiation by master—Compensation—Damages for breach 313

CONVERSION—
Principal and agent—Sale of grain 708

COSTS—
Landlord and tenant—Application to recover possession of premises in possession of tenant—Dismissal—Costs—Taxation—Appeal. 700
Position of Workmen's Compensation Board (B.C.)—Agent or servant of the Crown—Not liable for costs—Crown Costs Act, R.S. B.C., 1911, ch. 61 470
Security—Order for non-compliance—Inevitable delay—Application for extension of time—Refusal—Dismissal of action—Appeal 713

COURTS—
District Court Judge—Jurisdiction—District Courts Act, Alta., 1907, ch. 4, sec. 42—Rules 432, 438, 536 692
Jurisdiction—Judgment in other Province—Validity 485

CRIMINAL LAW—
Reading over and signing evidence—Criminal Code, sec. 684—Shorthand 539

CROWN—
Agent or servant of—Liability for costs 470

DAMAGES—
Defective material used in repairing chattel. See CONTRACTS.
Contract—Hiring—Repudiation—Compensation.... 313
False imprisonment—Advice of Provincial police—Presence of defendant at arrest—Irregularity.... 716
Injury to motor truck—Negligence of defendant—Special and general damages—Error—Appeal.... 507

DESCENT AND DISTRIBUTION—
Death of owner—Receipt of rents by husband—Attempt to shew title by possession—Petition under Quieting Titles Act—Onus of proof—Character of husband's possession—Absentees represented before Court—Devolution of Estates Act R.S.O.,1887, ch. 108.... 489
Insurance—Wife beneficiary—Death of wife before maturity—Estate.... 369

DIVORCE AND SEPARATION—
Interpleader, arising out of divorce action—Appeal.... 642

ELEVATORS—
Canada Grain Act—Operator bond—Terms and conditions—What included—Track buyer—Interpretation of Act.... 624

EVIDENCE—
Criminal law—Reading over and signing—Shorthand—Cr. Code, sec. 684.... 539
Government railway—Collision—Accident—Negligence—Exchequer Court Act, sec. 20.... 558
Illegal still—Possession of—Proof—Knowledge—Inland revenue... 672
Nuisance—Sulphur smoke from smelter works—Injury to crops—Evidence—Experts—Finding of facts—Damages.... 565
Stowaway—Enemy country—Neutral ship—Unneutral service—Confiscation.... 426

EXECUTORS AND ADMINISTRATORS—
Contracts made relating to management of estate—Not an obligation of the testator—Personal liability of the executors.... 614
Grant of administration in estate of man who disappeared—Opposition to grant by purchaser of lands, mentioned in schedule of assets, from person who was in possession of same for 17 years.. 474

FALSE IMPRISONMENT—
Non-payment of feed bill—Information laid on advice of Provincial police—Presence of defendant at arrest—No warrant—Irregularity—Remarks made by defendant after arrest—Liability... 716

FISHERIES—
Lease of water lot—St John harbour—Fishing privileges—Injunction—Appeal.... 495

FORECLOSURE—
See MORTGAGE.

FRAUD AND DECEIT—
Lien on shares of its own stock by bank, standing in name of customer—Equitable title to shares in creditor of customer—Knowledge of bank—Failure to disclose—Bank Act—Title to shares 636

GUARANTY—
Canada Grain Act—Country elevators—Track buyer—Bonds, interpretation thereof—Interpretation of statute—Penalty or liquidated damages 624
Letter to bank signed by directors guaranteeing indebtedness of company to bank for limited amount—Construction of guarantee bond—Extent of guarantor's liability 353

HEALTH—
Compulsory vaccination—Duty of city council—Vaccination Act, R.S.O. 1914, ch. 219, sec. 12—Mandamus—Power of Court—Statutory duty of council—Proper person to ask for order—Status of Provincial Board of Health—Public Health Act, R.S.O. 1914, ch. 218 444

INSURANCE—
Policy in favour of wife—Death of wife before maturity of contract—Beneficiaries—Estate of insured—Life Insurance Beneficiaries Act (Alta.) 369

INTERPLEADER—
Arising out of divorce action—Right of appeal 642

INTOXICATING LIQUORS—
Physician—Prescription—Actual need—Manitoba Temperance Act—Charge—Definiteness—Identity of accusation 652
Sale of liquor—Conviction of employee of accused—Punishment also of actual offender—Prohibition Act, 6 Geo. V., 1916 (B.C.), ch. 49, secs. 38, 39 503

JUDGMENT—
Default—Interlocutory judgment signed—Improper case for—Old Rule 92 (Alta.)—Order setting aside judgment—Defence filed—Appeal 316
Judgment on default—County Court, Ontario—Action on same in Alberta—Application to set aside—Effect—Jurisdiction 485

LANDLORD AND TENANT—
Recovery of possession of premises—Costs—Taxation—Appeal 700

LIBEL AND SLANDER—
Action for libel—Subject—Letter by defendant to plaintiff's husband —Privileged communication—Question of malice..... 396
Foreign words—Allegations—Proof—Pleading..... 345

LIENS—
Thresher's right to seize grain—Thresher's Lien Act (Sask.)—Injunction restraining—Legality—Damages for excessive seizure... 326

MASTER AND SERVANT—
Claim of plaintiff under Railway Act—Provision repugnant to section of Workmen's Compensation Act—Dominion Act overrules—Injunction restraining defendant from applying to Board..... 480

MORTGAGE—
Action for foreclosure—Co-owners of equity of redemption—Advances by one—Charge on shares of others—Redemption—Tacking—Consent to sale..... 514
Sale—Conditions—Objection—Payment within sixty days—Practice..... 453
Sale under—Private contract—Public auction abortive—Release of personal covenant to pay—Land Titles Act—Registrar's powers..... 706

MUNICIPAL CORPORATIONS—
Regulation of pool room—Betting—Powers of municipality—Vancouver Incorporation Act..... 320

NEGLIGENCE—
Of doctor. See PHYSICIANS AND SURGEONS.
Collision of automobiles on highway—Right of way—Contributory negligence—Excessive speed—Injury to passengers in "jitney" —Unlicensed driver—Liability of defendants..... 455
Contributory—Hiring of motor car—Operated by one as servant or agent of others—Collision—Damages—Right of party to recover..... 576
Government railway—Collision—Burden of proof..... 558
Injury to boy by tramway—Finding of facts by jury—Contributory negligence—Not sole cause of accident—Reduction of damages —Liability of defendant..... 429

NOTICE—
Vendor and Purchaser—Objections to title—Previous conveyance "in trust"..... 659

NUISANCE—
Sulphur smoke from smelter works—Injury to crops—Expert evidence—Finding of facts—Damages..... 565

PERPETUITIES—
See WILLS.

PHYSICIANS AND SURGEONS—
Childbirth—Contract to attend—Notification—Delay—Death of child—Agreement with husband—Damages 323
"Infamous or disgraceful conduct in a professional respect"—Ontario Medical Act, R.S.O. 1914, ch. 161, sec. 31 (1)—Conviction for offence against Ontario Temperance Act, sec. 51—Evidence—Finding of discipline committee—Adoption by college council—Order for removal of name from register—Penalty—Fair trial 522

PLEADING—
Frivolous and vexatious—Striking out—Appeal 701
Libel and slander—Foreign words—Statement of claim—Allegations—Proof 345
Order allowing amendment of statement of claim—Correction of error only—No new cause of action pleaded—Appeal—Dismissed 372

PRINCIPAL AND AGENT—
Authority of agent—Action against undisclosed principals—Goods sold on agent's credit—No knowledge of agency on part of plaintiff—Limitation of agent's authority—General agency ... 383
Sale of grain—Conversion 708

PRINCIPAL AND SURETY—
Accommodation notes—Representations by payee to maker—One note used as collateral to another—Liability of endorsers of second note—Art. 1233 (1) and 1955 C.C. 579

PUBLIC HEALTH—
See HEALTH.

PUBLIC UTILITIES COMMISSION—
Commissioner—Appointment—Validity—Powers of Provincial Legislature 697

RAILWAY BOARD—
Powers of Ontario and Municipal Board—Supply of natural gas—Price fixed by Board—Orders of Board—8 Geo. V. 1918 (Ont.), ch. 12 548

SALE—
Conditional sale—Agreement—Default—Repossession and sale—Concealment—Right of redemption—Rights of parties—Conditional Sales Act, R.S.O. 1914, ch. 136, sec. 8 328

SHIPPING—
Collision in Halifax harbour—Damages—Liability of ship-owners.. 403
Stowaway—Enemy country—Neutral ship—Unneutral service—Captain's deceptions—Confiscation..... 426

SPECIFIC PERFORMANCE—
Vendor and purchaser—No exception of mineral rights—Objection to title—Reference—Compensation..... 602

STREET RAILWAYS—
Increase of fares—Public Utilities Commission—Appointment—Validity..... 697

TAXES—
Assessment—Powers of Board of Revision and Appeal under the Assessment Act, Nova Scotia—Right of Appeal to County Court—Assessment Act, secs. 26, 27, 32 and 57..... 341
Joint interest—Assessed for greater or other than real interest—Procedure..... 609

TENANCY BY THE CURTESY—
See DESCENT AND DISTRIBUTION.

TRADE MARKS—
Registration—Trade name, passing off..... 433
Rights as between two parties who use a trade mark concurrently.. 436

TRIAL—
Action against municipality and a corporation—Interim injunction granted—Speedy trial ordered—Failure to attend trial—Objection—Trial—Appeal—New trial ordered—Service on necessary party..... 373

VACCINATION—
See HEALTH.

VENDOR AND PURCHASER—
Agreement for sale of land—Objections to title—Previous conveyance "in trust"—Constructive notice—Actual notice..... 659
Sale of lands—No exception of mineral rights—Objection taken to title by purchasers—Suit for specific performance—Reference to Master—Compensation..... 602

WILLS—
Construction—Devisees—Joint tenants—Tenants in common—Saskatchewan Land Titles Act, 8 Geo. V. 1917 (2nd Sess.), ch. 18 720
Devise of land to municipality for park—Proviso to keep in repair—Forfeiture for breach—Acceptance—Breach..... 477
Probate—Death of executor—Administration with will annexed to trust company—Bequest for alleviation of tuberculosis—Mortmain Act—Validity..... 694

WORDS AND PHRASES—
"A farce and a travesty" 38
"A poisoned jury, by a poisoned Judge and is in gaol because of a poisoned sentence" 38
"At large" 104
"For the purpose of enforcing compliance" 69
"Inexcusable fault" 88
"Infamous or disgraceful conduct in a professional respect" 522
"In trust" 659
"Jitney" 455
"Leave to all parties to bid" 294
"No keeper of a billiard and pool room shall permit . . . any person to play or have part in any game . . . upon the result of which there is any wager or stake other than the price of the game . . ." 320
"On the 28th and 29th of November, 1919 . . . did . . . give prescriptions for intoxicating liquors in cases where there was no actual need" 652
"Possession" 672
"Property situated in Ontario" 114
"That the company may procure itself to be registered . . . and exercise its powers in such Provinces" 433

WORKMEN'S COMPENSATION—
See MASTER AND SERVANT.