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.-XX. D.L.R., See Pages xi-xx.

VOL. 20

EDITED BY

W. J. TREMEEAR

C. B. LABATT *and*

EDWIN BELL

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:

CANADA LAW BOOK CO., LIMITED

84 BAY STREET

1915

CASES REPORTED
IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 20 INCLUSIVE
OF THE DOMINION LAW REPORTS.

INDEX OF SUBJECT MATTER, VOL. XX., PART 1.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XX., PART 1.

BERGE v. MACKENZIE, MANN & CO.

Alberta Supreme Court, Scott, Stuart, and Simmons, JJ.
December 18, 1914.

1. Master and servant (§ II B—180)—Servant's assumption of risks —Fellow-servant's negligence.

An employee who permits a fellow-servant to do part of the work allotted to be personally performed by the former, and which it was no part of the fellow-servant's line of duty to do, cannot hold their common employer liable in negligence (apart from the Workmen's Compensation Act, Alta.) for personal injuries sustained by the negligence of the fellow-servant so assisting, although a superior foreman to both was aware that the latter had been in the habit of so assisting and had given no orders to prevent the continuance of that course of working.

[*Milner* v. *Great Northern*, 50 L.T. 367; *Englehart* v. *Farrant*, [1897] 1 Q.B. 240; *Gwilliam* v. *Twist*, [1895] 2 Q.B. 84, referred to.]

2. Negligence (§ I—1)—Absence of privity—Untrue statements — "Negligently but not fraudulently" made—Effect, as basis of action.

No action will lie for damages suffered by a plaintiff in consequence of his reliance on untrue statements made negligently but not fraudulently by the defendant when there is no contract between them. (*Per* Stuart, J.)

[*Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, 68 L.T. 626; *Nocton* v. *Lord Ashburton*, 83 L.J. Ch. 788, considered.]

Statement.

Appeal from the judgment of Beck, J., in plaintiff's favour in a negligence action.

Appeal allowed.

B. Pratt, for the plaintiff, respondent.

O. M. Biggar, K.C., for the defendants, appellants.

Scott, J.
Simmons, J.

Scott, J., and Simmons, J., concurred in the result.

Stuart, J.

Stuart, J.:—This is an appeal by the defendants from a judgment of Mr. Justice Beck who tried the action without a jury and gave the plaintiff $3,500 damages for injuries received through the negligence of one Stephanson a fellow-employee of the plaintiff. The learned trial Judge's judgment is short, and may as well be repeated. It is as follows:—

With a good deal of doubt I find in favour of the plaintiff. It appears to me that Stephanson, though originally employed to do other work, gradually drifted into the position of an assistant to the plaintiff with the knowledge and consent and approval of two or three foremen superior

ALTA.

S. C.

BERGE v. MACKENZIE, MANN & Co.

Stuart, J.

to the plaintiff. If this is so, I think the defendants liable for the negligence of Stephanson, who, I find, was negligent, and whose negligence I find was the cause of the injury to the plaintiff.

I assess the damages at $3,500 and give the plaintiff costs.

The facts shortly are these. The defendants were railroad contractors and were engaged in constructing a bridge with cement piers. They required a quantity of gravel and were going to obtain it from a certain gravel bed which needed to be opened up. As it was winter time the frozen surface had to be blasted out with explosives. There was a gang of some 125 or 130 men over whom there was a superintendent, O'Connor, and under him a foreman, Murray, who was assisted by a "straw-boss" Hagan. Among the men there was a limited number of drillers whose sole duty was to drill holes in the hard face of the gravel into which the explosive material was to be inserted. But having drilled these holes they had nothing further to do with the blasting. They were supposed to retire and then the blastman, in this case the plaintiff, came, inserted the explosives and set them off. The plaintiff was supplied with an electric battery with which to set off the explosives, but, on the particular occasion in question, according to his story, which was uncontradicted, and evidently believed by the trial Judge, Hagan the "straw-boss" told him to go down with his men and open up the gravel pit and that it was not necessary to take the electric battery along. The plaintiff proceeded to the work. The drillers had opened or drilled four holes into which shots were to be inserted by the plaintiff. Among the drillers was Stephanson. When the drilling was completed they all retired except Stephanson. The latter remained with the plaintiff, and apparently watched the plaintiff insert the explosives and attach the fuse in each of the four holes. Then when the plaintiff proceeded to light the fuses, Stephanson said to the plaintiff, "I will light the last one for you," and the plaintiff said "All right," and permitted him to do so. The plaintiff therefore lit only three of the fuses and then called upon Stephanson to come along. The plaintiff said in his evidence (a thing which is very important) "Stephanson he was lying there lighting his; I waited there for a while and asked him to come along." The two then ran away 50 or 60 feet to await the explosions. Three only

of the holes went off, being the ones that the plaintiff had himself lit. The fourth did not go off with the others and the plaintiff asked Stephanson if he had lit the fuse, to which Stephanson replied that he had not. The plaintiff then approached the fourth hole without waiting longer, and, just as he reached it, it exploded and injured him very seriously in the face and head.

It appeared that Stephanson had been in the habit of assisting the plaintiff in lighting his fuses and that both Murray and Hagan had seen this and had not interfered or forbidden it. That is clearly as far as the plaintiff's evidence goes. It was upon this circumstance, no doubt, that the learned trial Judge based his opinion that Stephanson

> though originally employed to do other work gradually drifted into the position of an assistant to the plaintiff with the knowledge and consent and approval of two or three foremen superior to the plaintiff.

Upon the argument of the appeal the chief contest seemed to turn upon the question whether Stephanson was acting within the scope of his employment when he went to the plaintiff's assistance and lit the fourth fuse. I am not sure that this is all that is involved in the case. There was admittedly no negligence on Stephanson's part in his dealings with the fuse. At least none is suggested. The explosion in the fourth hole was not an accident. It was really not the accident which caused the injury. That explosion was intended to occur. The "accident" lies almost, though not quite, entirely in a separate field, in the field of conversation rather than of action. The only *action* which could be said to have been a negligent one and to have contributed to the injury was the too early approach of the plaintiff within the zone of danger. Aside from that approach, everything else which can be said to have caused the injury in so far as legal liability is concerned, is a matter of *conversation*. The real negligence charged against Stephanson is not in connection with the lighting of the fuse but consists in his false, and therefore, so it is said, in the circumstances, negligent statement to the plaintiff that he had not lit the fuse at all. There was no doubt a duty upon Stephanson to be careful to tell the plaintiff the exact truth in regard to the matter, and if in the circumstances the plaintiff was entitled to rely upon his statement and was not

ALTA.

S. C.

BERGE v. MACKENZIE, MANN & CO.

Stuart, J.

himself guilty of carelessness in not making more careful inquiry, then, no doubt, Stephanson at least, whatever may be said of his employers, the defendants, was liable.

The case is interesting because it seems to present an example of the occasional overlapping of the doctrine of deceit or fraud and the doctrine of negligence. For instance, the case of *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, 68 L.T. 626, decides according to the headnote that

> no action will lie for damages suffered by a plaintiff in consequence of his reliance on untrue statements made negligently but not fraudulently by the defendant when there is no contract between them.

The Court overruled *Cann* v. *Willson*, 39 Ch.D. 39, a decision of Chitty, J., and approved of *Scholes* v. *Brook*, 64 L.T. 674. Lord Esher, M.R., in giving judgment, speaks of negligence as arising out of some act when two persons are so related to each other *physically* as to raise a duty to take care. But in regard to statements he says:—

> If a man wilfully tells a wicked falsehood to another intending him to act upon it, that is a fraudulent act. . . . Negligence, however great, is not fraud. The official referee has heard the whole of this case and has come to the opinion that the defendant has not been guilty of any dishonest conduct, that he has not told a wicked falsehood but that all he did was to give negligently an untrue certificate. That negligence gives the plaintiff no cause of action either at law or in equity.

And Bowen, L.J., said:—

> It was argued that though the defendant may not have been dishonest, yet he was so grossly negligent that damage was thereby caused to the plaintiffs. What duty did he owe to the plaintiffs? None under any contract with him;

and he relies specifically on the absence of any contract as a reason for denying liability.

There is no doubt that if Stephanson knew perfectly well that he had lit the fuse and yet falsely, and therefore necessarily, with a wicked and malignant mind, told the plaintiff he had not, intending the plaintiff to act upon it he would be liable in an action of deceit. But with regard to negligence, *Derry* v. *Peek*, 14 App. Cas. 337, as explained in *Nocton* v. *Lord Ashburton*, 83 L.J. Ch. 788, certainly decides that there is no right of action for a false statement made not knowingly and with a wicked mind, but merely negligently unless there exists some special relationship between the parties which creates a duty to be care-

ful. From both *Nocton* v. *Lord Ashburton* and *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, it might at first sight appear that this special relationship could only arise out of contract. But there is really nothing in those cases which actually lays down any such limitation; and there can surely be no doubt that if two fellow workmen are working together at a job in which one has to rely upon the statement of his fellow workman as to a certain fact, the existence of which is necessary before he can safely proceed to do a certain thing in the course of his employment, and if that statement is made by the other and the first, in reliance upon it, does that thing, and, owing to the statement being untrue and the necessary fact not existing, he does a thing which is therefore dangerous and so is injured, the other workman is liable, not merely for deceit if he knowingly and therefore wickedly misstated the fact, but also for negligence if he carelessly misstated it, because in such a case it would be his duty to be careful not to make a misstatement, and of course his master would also be liable if he acted within the scope of his employment as that phrase is generally understood.

The present action is based upon negligence. It was not necessary for the plaintiff to go so far as to assert that Stephanson knowingly and wickedly misstated the fact, which would amount to fraud and deceit. But the greater fault, of course, includes the less and although, as Esher, M.R., says, negligence, however great, is not a fraud, still fraud may, in this case, if it existed, be treated as negligence. The plaintiff's contention is that Stephanson either knew or ought to have known that he had lit the fuse. He was not called as a witness but seems to have been sent to an asylum for a time and after that he could not be traced.

There is, as it seems to me, at least a bare possibility in view of the evidence of suggesting the theory that he only honestly thought he had failed to light the fuse after attempting to do so and was merely negligent in failing to explain that he had made the attempt without apparently succeeding. The plaintiff's evidence, which is all we have, is that he went back, "because he told me he did not have fire to it." Taking this as it stands it perhaps can only mean that fire was not applied at

ALTA.

S. C.

BERGE v. MACKENZIE, MANN & CO.

Stuart, J.

all. But one cannot help regretting that, when liability for negligence is attempted to be founded upon so narrow a basis as a careless verbal statement, the exact words were not directly related because in indirect narration a witness almost inevitably lends a little colour to the statement by his own words. On cross-examination it is again put in indirect narration by the words of counsel. The question and answer were:—

"Q. And you asked Stephanson if he had lighted the hole he had volunteered to light, and he told you he had not. A. Yes."

But there is one expression in the evidence of the plaintiff that does suggest the possibility of an honest though careless mistake. The plaintiff said, "Then I asked Stephenson if he had his shot lighted so when the three went off *we* went back to light his hole." Now, if Stephanson also went back as this seems to imply, he must have himself thought there was no danger. But how far he went back does not appear; and, as he was not hurt he could not have approached as closely as the plaintiff. Of course if he had a wicked intent this may have been part of his scheme to put the plaintiff off his guard.

Be this as it may, in my opinion, the conclusion cannot be avoided, taking the above evidence at its face value, and, although in indirect narration, as representing accurately the words used by Stephanson, that Stephanson was at least careless if not positively deceitful in making such a statement in the circumstances. For the reasons I have given, I think, owing to the relationship between the two men, there was a duty to be careful in his statements cast upon Stephanson, and that if there was nothing more in the case Stephanson and his employer would be liable.

The question whether it was really deceit or only negligence seems to me to be of importance because to a claim resting upon deceit an answer that Berge was himself careless in relying upon the untrue statement might not be an answer at all, and, perhaps, the liability of the employer in such a case might not be so extensive, while, if the statement was merely negligently made, there is a possibility of charging contributory negligence against the plaintiff.

In my opinion, therefore, although the evidence may seem to

favour the view that the misstatement was knowingly and therefore wickedly made, yet, since it is negligence which is made the basis of the action the Court should not give the plaintiff any higher rights than such as would arise from a careless and negligent misstatement of fact; because if the defendants were sought to be made liable for a knowingly false and therefore a wickedly deceitful statement of their employee, *i.e.*, for deceit, the action against them should have been definitely placed upon that ground.

This leaves it open clearly to the defendants to charge contributory negligence. In view of what actually occurred, I am not sure that the plaintiff ought not to be charged with contributory negligence in going back without further and more careful enquiry and in not pressing Stephanson for a more definite statement—in not asking him, that is, exactly what he had been doing then, when the plaintiff saw him at the hole. The plaintiff says this, "Then I started to light my three holes and when I came up to the pit Stephanson *was lying there lighting his.*" If he saw Stephanson there "*lighting his*" why did he not question him more closely, why did he not take care to know the true fact before going back? In such circumstances, I doubt very much if the plaintiff is entitled to the benefit of such a rule as is applied in cases of misrepresentation leading to a contract where a person is entitled to rely upon the statement of another party and that other party is not allowed to say that he should not have relied upon it. I am not sure that Stephanson might not, if charged merely with making a negligent statement or an untrue statement negligently, answer back to Berge:—"True, I may have been negligent in saying that, but you had every opportunity to avoid an accident by being more careful yourself, you were, yourself, particularly when you were entirely in charge, bound to take reasonable care, and when you saw me, as you say, lighting my hole you were yourself careless in acting so quickly and rashly upon that careless statement of mine. A reasonably prudent man would not, in such circumstances, have accepted my careless statement without more."

I am not sure, I say, that such an answer might not in the circumstances of this case, be successfully made by Stephanson

ALTA.

S. C.

BERGE v. MACKENZIE, MANN & CO.

Stuart, J.

and therefore by the defendants. Of course, if he was knowingly deceitful no such answer could be possible, but for the reasons I have given, I think that aspect of the matter should be disregarded.

Even, however, if this be not a satisfactory answer to the claim, I think the plaintiff is clearly not in so good a position as a third party or a stranger. I would be quite ready to agree thoroughly with the view taken by the learned trial Judge as to the position of Stephanson if the party injured had been a stranger. According to *Milner* v. *Great Northern R. Co.*, 50 L.T. 367, it is sufficient if the servant whose negligence caused the accident has *habitually* and *without objection* done the work which was strictly outside of the scope of what he was employed to do. And if a third party had been suing the defendants for an injury caused by some negligence of Stephanson while firing the fuse in question, it would, I think, have been clearly no answer if the defendants were to say in such a case that the firing of the fuses was Berge's work and not Stephanson's. In the jurisdictions where we get most of our authorities the doctrine of common employment still exists and therefore prevents our securing many precedents to cover such a case as this. But it does seem to me that there may be cases where the abolition of that doctrine does not necessarily place the plaintiff servant in absolutely as good a position as a stranger. Take the case of *Englehart* v. *Farrant*, [1897] 1 Q.B. 240. There the driver of the defendants' delivery wagon had a boy with him to deliver parcels. The driver left the wagon in charge of the boy, who, contrary to instructions, drove on and by negligence injured the plaintiff. The defendants were held liable because the driver should not have left the wagon in charge of the boy and his negligence in doing so was the efficient cause of the accident. It was just because of the driver's omission of duty that the defendants were held liable. But suppose that such a driver had been in the habit of letting the boy drive as they went along, though it was not the boy's proper work, but the driver's, and by the boy's negligence the driver himself were injured, if the doctrine of common employment were out of the way, would the driver be able to recover from his employees for the consequence

ALTA.

S. C.

BERGE v. MACKENZIE, MANN & CO.

Stuart, J.

of the boy's negligence, merely because the employees may have seen the boy doing the driving frequently and had not interfered? I have grave doubt about it. In the present case it was admittedly Berge's own work to light the fuses. He had been supplied with an electric battery for that purpose. It was Stephanson's work to drill holes. After the drilling was done he, just like the boy who wanted to drive, wanted to light a match and set off the fuse. Berge was in charge of him and the whole work. He could have told him to mind his own business and could have, himself, minded his own. As the driver could keep on driving and holding the reins, as he was paid to do, so Berge could have and properly should have, kept on lighting all the fuses which it was his duty to do. Instead of that he permits a man under his charge, over whom he had control, to do work with which he had properly no concern. Then by the negligence of that person he is himself injured and he claims that their common employer should be responsible because his superior foreman saw what was going on and did not keep them to their proper work, a thing he could and should have done himself. In actual fact he is seeking to make them liable for failing to reprove him, the plaintiff, for a breach of duty.

In my opinion, the master should not be liable in such a case. In *Gwilliam* v. *Twist*, [1895] 2 Q.B. 84, it was said:—

> A servant employed for a particular purpose can have no authority to delegate the performance of his duty to another person unless there is a necessity for his so doing.

And this was said as a ground for denying liability of the master to a third person. How much more should it be a ground for denying liability to the delegating servant himself.

This would, I think, be an answer even if the claim were for damages by reason of Stephanson's negligence in lighting the fuse itself. For the same reason and perhaps with still greater force it applies, in my opinion, as against the negligence alleged, viz., the careless and untrue answer about what he had done.

I think, therefore, the appeal must be allowed with costs, the judgment below set aside and the action dismissed with costs.

SASK.

S. C.

STANDARD TRUST CO. v. KARST.

Saskatchewan Supreme Court, Haultain, C.J., Newlands and Lamont, JJ., November 28, 1914.

1. SALE (§ I B—5)—PASSING OF TITLE; DELIVERY—GRAIN STORAGE TICKET—PRESUMPTIONS, HOW REBUTTED.

The presumption raised by the taking of a grain storage ticket in the shipper's own name that he intended to retain the right of disposal and that the property in the goods did not pass, may be rebutted by evidence shewing that he did not intend to retain any control or interest in the property represented by the storage ticket of an elevator company, but did intend that the whole property in the goods should pass to another having an equitable claim thereto of which he gave the elevator company notice.

[*Robinson* v. *Lott*, 2 S.L.R. 276; *Campbell* v. *McKinnon*, 14 Man. L.R. 421; *Falk* v. *Fletcher*, 144 E.R. 501, 18 C.B.N.S. 403, referred to.]

Statement.

APPEAL from a district Court.

Appeal allowed.

C. P. Fullerton, K.C., for plaintiff, appellant.

H. C. Pope, for defendants, respondents.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The facts in this appeal are as follows: By an agreement in writing, bearing date November 4, 1911, one Guy Cantrall purchased from O. K. McIlhenny the south half of 35-28-5, W. 3rd, paying a portion of the purchase price in cash and covenanting to pay the remainder by the delivery to the order of the vendor at the elevator of one-half of all the grain grown upon said land in each year. McIlhenny died, and the plaintiffs were appointed administrators of his estate. In September, 1913, Cantrall threshed the grain grown on the land during that year, and hauled it to an elevator owned by the Canadian Elevator Company. He first loaded a car, which was sold, and he obtained the proceeds thereof. He then hauled out twelve or thirteen hundred bushels and got paid for this. He told Erskine, the manager of the elevator, that the balance belonged to the plaintiffs. This balance he hauled out and took storage tickets therefor. He then went to Winnipeg, and on October 3, 1913, he assigned to the plaintiffs these storage tickets, which amounted to 8924. Two days before this assignment was made, namely, on October 1, the defendants served a garnishee summons upon the elevator company, in which they claimed that the company were indebted to Cantrall in respect of the grain represented by these storage tickets. An issue was directed

to determine whether the Standard Trusts Co. or the defendants were entitled to the moneys still in the hands of the elevator company. The issue was tried before Smith, D.C.J., who held that there had been no division of the grain and that the property therein was still in Cantrall, and that, therefore, the moneys due by the elevator company therefor were garnishable. From this judgment the plaintiffs now appeal.

In *Robinson* v. *Lott*, 2 S.L.R. 276, this Court held that in the case of a lease in which a portion of the grain grown upon the premises was reserved as rent, the property in the entire crop grown was in the lessee until he made delivery of the landlord's share at the elevator in accordance with the terms of the lease, or until the grain was divided and the landlord agreed to accept his share at some place other than that provided in the lease; and in *Campbell* v. *McKinnon*, 14 Man. L.R. 421, Killam, C.J., in giving the judgment of the Court *en banc* of Manitoba in a similar case, said:—

> The land was demised to the execution debtor, and out of the crop a certain portion was to be paid as rent. *Primâ facie* the property in the whole, until so paid over, would be in the lessee. There is nothing to indicate that he was to cultivate the soil as servant, agent, bailee or other instrument of the lessor. The construction that I would give to the instrument is that the legal property was to be in the lessee until delivered at the elevator for the lessor, but that from that time it was to be in the lessor.

The principle of these cases applies equally, in my opinion, where the relation of the parties is that of vendor and purchaser, instead of lessor and lessee. Delivery of the grain at the elevator for the lessor or vendor is, therefore, *primâ facie* evidence of appropriation of the amount delivered sufficient to pass the property in the grain: Sales of Goods Act (ch. 147, R.S.S.), sec. 20, sub-sec. (1) (rule v.). That Cantrall delivered the grain in question at the elevator is admitted. The question is, did he deliver it for the plaintiff in fulfilment of his contract or for himself?

Section 21, sub-sec 2, of the Sales of Goods Act provides:—

> (2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

If Cantrall retained the right of disposal of the grain represented by these storage tickets, the property therein did not pass. The *primâ facie* presumption of a reservation of a right of disposal

SASK.

S. C.

STANDARD TRUST v. KARST.

Lamont, J.

raised by the taking of a bill of lading or other document of title in the shipper's own name is a rebuttable one, and may be rebutted by evidence shewing that, though he took the tickets in his own name, he did not intend to retain any control of or interest in the property represented by these tickets. In *Falk* v. *Fletcher* (1865), 144 E.R. 501, 18 C.B.N.S. 403, the plaintiff, who was a salt merchant of Liverpool, was in the habit of shipping salt to Calcutta for one De Mattos. De Mattos chartered a ship from the defendant and sent it to the plaintiff to be loaded with a cargo of salt. The plaintiff had placed on board 1,007 tons of salt, for which he took the mate's receipts in his own name when he learned that De Mattos had suspended payment. He then refused to load any more salt, and demanded a bill of lading deliverable to his own order for the 1,007 tons. The defendant refused, and the vessel sailed with the salt on board. The plaintiff sued for wrongful conversion by the defendant of the salt. The trial Judge instructed the jury that, if they found that by delivering the salt on board the plaintiff intended to pass the property in it to De Mattos, and that the taking of the mate's receipts in his own name was a mere accident, they might find for the defendant; but if they found that by taking the receipts in his own name the plaintiff intended to retain control over the property, they must find for the plaintiff. The jury found the plaintiff intended to keep control of the property. In appeal, Erle, C.J., said:—

> The plaintiff was in reality in the position of an unpaid vendor. As agent for De Mattos, he put the salt on board a ship chartered by De Mattos, taking the mate's receipts for it in his own name. Under these circumstances, the proper question for the jury was whether—when he put the salt on board, he intended to pass the property in it to De Mattos or whether he intended to keep it under his own control.

In *Browne* v. *Hare*, 7 W.R. 619, the defendant purchased a quantity of oil from the plaintiffs to be shipped f.o.b. The plaintiffs shipped the oil, but took a bill of lading deliverable to their own order. They then endorsed the bill of lading to the defendant, and sent it to their broker. The ship was lost before the broker received it. The question was, had the property passed? The Court held that it had, that the taking of the bill of lading to the shippers' own order and endorsing it to the defendant was precisely the same, in effect, as taking the bill of

lading to the order of the defendant. In appeal the Exchequer Chamber unanimously affirmed this judgment. Erle, J., who gave the judgment of the Court, said:—

> If the bill of lading had made the goods to be delivered to the order of the consignee, the passing of the property would be clear. The bill of lading made them to be deliverable to the order of the consignor, and he endorsed it to the order of the consignee, and sent it to his agent for the consignee. The real question will turn on the intention with which the bill of lading was taken in this form, whether the consignor shipped the goods in performance of his contract and placed them free on board or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial. The only question before the Court below, or before us, being whether the mode of taking the bill of lading necessarily prevented the property from passing, which, in our opinion, it did not, under the circumstances.

The question, then, is, did Cantrall, when he delivered the specific grain represented by the storage tickets, intend to pass the property to the plaintiffs, or did he intend to retain control of it himself? What his intentions were must be gathered from the evidence of Erskine, the manager of the elevator, and Cantrall himself. In his evidence Erskine says:—

> Mr. Cantrall delivered, I think, between 4,500 and 5,000 bushels of grain to the Canadian Elevator Co. last fall. We first shipped a car, and the returns came to me, which I turned over to him. He also sold something like 1,200 or 1,300 bushels, I should judge, by waggon, for which I could not supply cars. Then he told me the balance of the grain belonged to the Standard Trust Co., and, of course, I knew the conditions on which he bought the place anyway before he made a settlement with me for the balance of the grain. I told him unless he had a good crop it would leave them scant. That is all I know of the transaction, except when the garnishee was laid upon me of course I could not have paid any more money to him. The next thing I found out the grain had been transferred to the Standard Trust Co. at Winnipeg.

Cantrall, in his evidence, said that he told the elevator manager, when he was loading the grain, that one-half belonged to the Standard Trust Co. He was asked how much money he had received previous to the delivery of the grain represented by these last storage tickets—that is, those he assigned to the plaintiffs. He replied that he could not say exactly—$1,200 or $1,300, he guessed, which was more than his half-share. He then was asked this question: "You had received payment before the last delivery of the grain represented by these storage tickets?" Answer: "Yes." He also said that, when he finished delivering the grain,

SASK.

S. C.

STANDARD TRUST v. KARST.

Lamont, J.

he had Erskine figure up the tickets to ascertain the amount the plaintiffs would receive.

This evidence satisfies me that, when he delivered the grain represented by the storage tickets in question to the elevator, Cantrall was unconditionally appropriating to the contract the specific grain which was then left upon his farm, and that he intended to pass the property therein to the plaintiffs. He did not, in my opinion, intend, when he took the tickets in his own name, to retain any control over them, but did intend that the whole property therein should pass to the plaintiffs. That being so, the property in the grain passed to the plaintiffs, and the money in the hands of the elevator company is not garnishable.

The appeal should, therefore, be allowed, with costs, the judgment appealed from set aside, and judgment entered for the plaintiffs with costs.

MAN.

K. B.

NATIONAL DRUG & CHEMICAL CO. v. ASTROF.

Manitoba King's Bench, Galt, J. November 14, 1914.

1. PARTIES (§ II B—115)—JOINDER—DEFENDANT—BOTH PERSONAL AND REPRESENTATIVE CAPACITY.

Under K.B. rule 243, Man., a plaintiff may join claims against the defendant whether as executrix *de son tort* or as administratrix, and claims against the defendant personally.

Statement.

APPEAL from the Referee.

Appeal dismissed.

S. H. Green, for the defendant.

E. F. Haffner, for the plaintiffs.

Galt, J.

GALT, J.:—Appeal from an order made by the Referee, dismissing an application by the defendant to compel the plaintiffs to elect as to whether they would sue her as executrix or personally.

The plaintiffs bring this action on behalf of themselves and all other creditors of Joseph Astrof, deceased, against Fannie Naomi Astrof, executrix of the last will of Joseph Astrof, and Fannie Naomi Astrof, in her personal capacity, claiming judgment for payment of the amounts alleged to be due to the two plaintiffs respectively, and that it may be declared that the lands and property of the said Joseph Astrof, deceased, held by the defendant as trustee for the said Joseph Astrof are part of the

estate of the said Joseph Astrof, and asking that the purchasing of the lands in question by the said Joseph Astrof, in the name of the defendant, be declared fraudulent and void as against the plaintiffs and other creditors of the deceased.

The plaintiffs allege, in par. 6, that, since the death of the said deceased, the defendant has taken possession of the estate and effects of the deceased, and has carried on the business formerly carried on by the deceased at 410 Redwood Ave., in the city of Winnipeg, and has otherwise acted as the executrix of the last will of the said deceased, although no grant of probate or administration of the estate and effects of the said deceased has been made to any person by any Court of the province of Manitoba.

It is further alleged by the plaintiffs, par. 7, that, during the lifetime of the said Joseph Astrof, and in or about the month of July, 1912, while the plaintiff company was a creditor of the said deceased, the said Joseph Astrof purchased lands in the city of Winnipeg, described: In accordance with the special survey of said city and being lot 19 in block 1, as shewn upon a plan of subdivision of lot 43 of the parish of St. John, registered in the Winnipeg Land Titles Office as No. 949; but the said Joseph Astrof, although the said lands were purchased with his money, purchased the same in the name of the defendant Fannie Naomi Astrof.

The defendant has filed a statement of defence both in her capacity as administratrix and personally, but I do not think this prevents her from applying for the relief sought by her original motion.

The rules applicable to the question now before me are rules 196, 197 and 243:—

196. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And, without any amendment, judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

197. It shall not be necessary that every defendant to an action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest.

243. Claims by or against an executor or administrator, as such, may

MAN.

K. B.

NATIONAL DRUG & CHEMICAL CO. v. ASTROF.

Galt, J.

be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

It is argued, on behalf of the defendant, that the claims set up against her personally are not alleged to have arisen with reference to the estate in respect of which the plaintiffs sue. The allegations in the statement of claim above quoted assert that the lands in question were purchased by the late Joseph Astrof with his own money, but were taken in the name of the defendant; that the said Joseph Astrof was indebted to the plaintiffs at that date; and that the transaction was a fraudulent one, carried out at a time when the said Joseph Astrof was in insolvent circumstances and unable to pay his debts in full.

In par. 6 the plaintiffs allege that the defendant took possession of the estate and effects of the deceased and carried on his business, although no grant of probate or administration had been made to her.

It appears to me that the plaintiffs are entitled under rule 243 to join their claims against the defendant whether as executrix *de son tort* or administratrix and personally.

The appeal will be dismissed with costs.

MAN.

C. A.

KERT v. STARLAND.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. November 2, 1914.

1. EVIDENCE (§ II E—185)—ONUS OF PROOF—FRAUD.

The *onus probandi* is upon the party who alleges fraud to prove his case as is alleged in the statement of claim or in his particulars.

Statement.

APPEAL from Metcalfe, J.

The appeal was dismissed.

J. P. Foley, for appellant, plaintiff.

S. E. Richards, for respondent, defendant.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—The plaintiffs brought this action to set aside a certain agreement, made March 7, 1914, for the sale to them by the defendants of a moving picture business and equipment, known as the "Dreamland" Theatre, by reason of fraudu-

lent representations made to them inducing the sale. Damages are also claimed in the action. The representations alleged in the pleadings were, on the trial and on this appeal, practically confined to that in which it is charged that the written statement exhibited to the plaintiff and, as is alleged, relied upon by them, shewing the expenses of "Dreamland" incurred weekly was false. Mr. Justice Metcalfe, before whom the action was tried, gave a verdict for the defendants with costs.

The dispute in this matter, as stated, concerns the statements made to the purchasers as to expenses. There is no question with reference to that covering the receipts.

The principal witness for the plaintiffs was A. Kert, the brother of J. A. Kert, the plaintiff, who negotiated the transaction. When A. Kert first saw Martin, the agent, the latter shewed him ex. 1, headed "Expense of 'Dreamland,'" and he says Martin told him that those were the expenses of "Dreamland" for a week: p. 34. Exhibit 2 was also shewn him: "'Dreamland' Theatre, gross earnings, Dec., 1912, to Nov., 1913. Monthly Amount," and "Daily Average." When he left Martin, the latter gave him ex. 4, a copy of ex. 1, except that the fourth item is $5 larger. He also obtained exs. 5 and 6, the latter being a letter from the defendants in reply to a letter from Piggott & Co. This letter of December 10, 1913, concludes with the statement: "The weekly expenses are approximately as follows:" (giving a number of items aggregating $284). Martin then explained that the "Starland" people in this statement had left out some small items which he had added in the list previously given.

After the interview with Martin, A. Kert took his father to him. Wilson, the manager of "Dreamland," was sent for, and said that the papers A. Kert had, shewed the receipts of "Dreamland" and expenses. Wilson discussed the item of advertising, saying that they were not now incurring that item of expense, and said that "practically everything" was in the statement. All this was on a Friday. On Saturday, A. Kert, with his brother, the plaintiff, went over the matter with Martin, when the lease of the premises was discussed. Mrs. Kert was telephoned for and the document, ex. 7, was prepared by Martin and signed by the parties. On Monday the plaintiffs took possession of the premises. There being no grievance as to the statement of

MAN.

C. A.

KERT v. STARLAND.

Cameron, J.A.

receipts, the controversy centres about three items in the statement of expenses: (1) The salaries. Not in the total, but individual amounts: p. 21. (2) Film rent. (3) Light and power. Joseph A. Kert was informed, he says, by Wilson, that ex. 1 "was the average weekly expenses for 'Dreamland' Theatre: the running expenses for 'Dreamland' Theatre." He, further, says:—

Q. This is an estimate of what the expenses would be? A. This was a statement of what they actually would be.

This answer would seem to indicate that the witness regarded the statement rather as a forecast of future than a statement of past expenses.

In his next answer, however, he says he understood the statement to be "an actual statement of the expenses actually paid out by the management of the 'Dreamland' Theatre." Nowhere is he more definite than this.

A. Kert says:—"Q. Look at ex. 4, wasn't this intended to shew you what it would cost you to run 'Dreamland'? A. That was made out before I came into the office, and it was made out to shew what it would cost anyone to run 'Dreamland' ": p. 25.

It is nowhere set out in the evidence for the plaintiff that statements of expenses were for any particular week or an average for a series of weeks extending over a particular period. The statement of claim alleges, however, the representation to be "that the said statement shewed the total expense which had been incurred weekly during the period from December 1, 1912 to December 1, 1913."

Upon consideration, it does not appear to me that, in this case, where it is necessary clearly to allege and prove the misrepresentation relied upon, the plaintiffs have succeeded in meeting the onus cast on them:—

> A man who alleges fraud must clearly and distinctly prove the fraud he alleges. The *onus probandi* is upon him to prove his case as it is alleged in the statement of claim or in his particulars. . . . If the fraud is not strictly and clearly proved, as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. Kerr on Fraud (4th ed.), p. 447.

The opinion expressed by the learned Judge, at the trial, that the statement of expenses furnished by Martin was intended and understood as an estimate of what the expenses of management would, or might, be for the future, rather than a definite and

MAN.

C. A.

KERT v. STARLAND.

Cameron, J.A.

positive allegation of what they had been for some period in the past, appeals to me as reasonable. There is a lack of precision in the evidence of the plaintiff, J. A. Kert, and his brother that strikes me as failing adequately to support their complaint that the representation as to expenses was intended to cover the period set out in the statement of claim or any other definite past period. It was presented to them rather as an estimate, not intended to be accurate, but approximate, of what, judging from past experience, those expenses would be in the future management of the concern. It is a fact that they became the purchasers of a business which disappointed their expectations; but they entered into the transaction in haste and at an unfortunate time.

I find myself, therefore, unable to find sufficient ground to disturb the judgment appealed from, and would dismiss the appeal with costs.

CASE v. GODIN.

MAN.

K. B.

Manitoba King's Bench, Macdonald, J. November 4, 1914.

1. INTEREST (§ I D—35)—ON JUDGMENTS—RATE—INTEREST ACT.

Section 13 of the Interest Act, R.S.C. 1906, ch. 120, providing for interest at the rate of 5 per cent. per annum upon judgments, does not apply to Manitoba; in that province the rate remains 4 per cent. under the English Judgment Act, 1838.

2. INTEREST (§ I D—35)—ON JUDGMENTS—RATE—B.N.A. ACT—FEDERAL AND PROVINCIAL POWERS.

Section 714 of the King's Bench Act, Man., purporting to provide for interest upon the amount of a judgment recovered is *ultra vires* of the Manitoba Legislature, the subject of interest being assigned under the B.N.A. Act to the federal Parliament.

APPEAL from a referee's order. Statement.

The appeal was dismissed.

J. W. E. Armstrong, for plaintiff.

MACDONALD, J.:—This is an appeal from the Referee dismissing a motion to set aside a writ of *fieri facias de bonis*, on the grounds: (1) That the endorsement on the writ claims 6 per cent. interest as part of the levy, and that the Referee had not the power to change the rate claimed from 6 per cent. to 4 per cent.; (2) that there is no provision legally entitling a judgment creditor to claim any interest. Macdonald, J.

Counsel for the appellant admits that the Referee had the power to change the rate from 6 per cent. to 5 per cent., because

MAN.

K. B.

CASE v. GODIN.

Macdonald, J.

the material before him shewed that claiming 6 per cent. was a mere slip on the part of the attorney issuing the writ, and that 5 per cent. was what he had intended.

The learned Referee held that 4 per cent. and not 5 per cent. was the legal rate; but counsel for the defence contends that there is no authority for either rate, and that none can be collected.

The subject of interest is one within the exclusive jurisdiction of the Dominion Parliament, and if sec. 714 of our King's Bench Act provides for interest upon the amount of the judgment *qua* interest, it is clearly *ultra vires* of the provincial legislature, and if intended as a penalty and the rate simply fixing the amount of such penalty, this would be *intra vires* of the provincial legislature. In my opinion, however, sec. 714 provides for interest *qua* interest, and as such is *ultra vires* and of no effect, and we will have to look to the law as it stood irrespective of provincial legisation, and as if such had never been enacted.

Section 13 of the Interest Act, ch. 120, R.S.C, provides for interest at the rate of 5 per cent. per annum upon judgments until satisfied; but this does not apply to Manitoba. The English Judgment Act, 1838, must, therefore, apply to judgments recovered in this province, and that Act provides for 4 per cent., which is the rate levied here.

The objection that the Referee had no power to order an amendment cannot be of any effect. The endorsement on the writ is one by the attorney issuing it, and the correction could have been made by him without an order.

The appeal is dismissed with costs.

B. C.

C. A.

COZOFF v. WELSH.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. November 3, 1914.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—PROCEDURE—ARBITRATOR—SUBMITTING QUESTIONS TO JUDGE—TIME FOR.

After the publication of an arbitrator's award under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, the arbitrator cannot submit questions under sec. 4 of the Act to a Judge of the Supreme Court. [*Lewis* v. *G.T.P.*, 13 D.L.R. 152, 18 B.C.R. 329, followed; *Cozoff* v. *Welsh*, 18 D.L.R. 8, reversed.]

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—PROCEDURE—APPEAL—ERROR OF FACT.

Where parties have an opportunity to ask the arbitrator to state

his award under the Workmen's Compensation Act, R.S.B.C. 1911 ch. 244, in the form of a special case and neglect to do so, the award should not, in the absence of misconduct, be set aside so as to enable him to obtain the opinion of the Court on a point of law not open at the hearing.

[*Tabernacle* v. *Knight*, [1892] A.C. 298; *Armstrong* v. *St. Eugene Mines*, 13 B.C.R. 385; *Basanta* v. *C.P.R.*, 16 B.C.R. 304; *Disourdi* v. *Sullivan*, 14 B.C.R. 241; *Vancouver* v. *Loutet*, 16 D.L.R. 395, 19 B.C.R. 157; *North Vancouver* v. *Jackson*, 16 D.L.R. 400, 19 B.C.R. 147, referred to.]

B. C.
C. A.
COZOFF v. WELSH.

APPEAL from order of Morrison, J., 18 D.L.R. 8. Statement.

Appeal allowed.

Ritchie, K.C., for appellant.

Alexander (*Vaughan* with him), for respondent.

The judgment of the Court was delivered by

IRVING, J.A.:—The learned arbitrator made his award dismissing the claim on these facts, *viz.*, that on October 22, 1913, the claimant was already suffering from hernia, and that the strain, if any, of lifting some rock on that day only advanced it a stage. The case put forward was that the lifting had then caused an internal rupture and hernia. Irving, J.A.

The claimant's advisers, being of opinion that if the employee is a man who has a defect, such for instance, as a weakness in an artery, that defect is no defence against a claim for compensation for an accident which takes place in your service and produced an incapacity (*Noden* v. *Galloways*, [1912] 1 K.B. 46, at 51; following *Clover, Clayton & Co.* v. *Hughes*, [1910] A.C. 242, 102 L.T. 340, took an appeal from the dismissal of the claim to a Judge of the Supreme Court, and Mr. Justice Morrison, having read the evidence, came to the conclusion that there was no evidence of any pre-existing hernia or any condition (evidence) which would support the contention that a hernia had existed, and that it was merely aggravated by the strain, which, according to the only evidence given, the claimant had suffered. He, therefore, sent the case back to the arbitrator to assess the compensation to which he thought the plaintiff entitled.

By sec. 4 of the 2nd schedule it is enacted that an arbitrator may, if he thinks fit, submit any question of law to a Judge of the Supreme Court. That method seems to be the only method of having an award under the Act reviewed, and the remedy is confined to questions of law. The question of a general right

B. C.

C. A.

COZOFF v. WELSH.

Irving, J.A.

of appeal under sec. 4 was negatived in *B.C. Sugar Co.* v. *Granick* (1910), 44 Can. S.C.R. 105, and in *Lewis* v. *G.T.R. Co.* (1913), 13 D.L.R. 152, 18 B.C.R. 329, this Court held that an arbitrator having once made his award could not state a case.

The learned Judge, in my opinion, had no jurisdiction to make an order remitting the case back to the arbitrator on the ground that he made a mistake in the facts. The claimants, however, contend that the award, on its face, was bad, and that, therefore it should be set aside, as was done in the case of *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C.R. 241. In that case the arbitrator had given a lump sum for compensation, in stead of a number of weekly payments, such as is by the 1st schedule contemplated. He had made an award which he had no authority to make. In this case it is claimed that the award is bad on its face, for, if the construction contended for by the claimant is put on the language used by the arbitrator, facts have been found which entitle the claimant to compensation. The language of the arbitrator is guarded. It is not clear that he misdirected himself in any way. The plaintiff failed to satisfy the arbitrator: (1) That he had ruptured himself in the defendant's service; or (2) that there had been a strain. The arbitrator's language is not to be construed into a finding that there was in fact a strain which had advanced the hernia. That condition of affairs is now the basis of the claimant's appeal, but that was not contended for at the hearing. He said:—

> I never had any trouble there before (p. 36). I never felt a bulging pain down in the lower part of the abdomen. . . . I used to be always healthy, I never had any pain at all in the bowels or abdomen (p. 41).

The arbitrator might very well say, having regard to the claim and the evidence: "Here is a man with a hernia—that is established by the doctor's evidence, but I think it is an old hernia—not sustained in the defendant's service, and the claimant has falsely represented that it was." The award must be read having regard to the claim made and the evidence given. The claimant now wished us to read it as if the claim had been made for a strain sustained on a pre-existing hernia.

Where parties have an opportunity to ask the arbitrator to state his award in the form of a special case and neglect to do so, the award should not, in the absence of misconduct be set aside, so as to enable him to obtain the opinion of the Court on a point

of law not open at the hearing. The matter is at an end. The arbitrator is *functus*. In *Tabernacle Permanent Building Soc.* v. *Knight*, [1892] A.C. 298, the rapidly-prepared award had not been executed until after the application to the Court had been made. In *Armstrong* v. *St. Eugene Mining Co.* (1908), 13 B.C.R. 385, the first or supposed award was held not an award, and, therefore, the arbitrator was not *functus*.

I would allow the appeal and set aside the order of Morrison, J.

B. C.
C. A.
COZOFF v. WELSH.
Irving, J.A.

GALLON v. ELLISON.

KNOWLES v. ELLISON.

B. C.
S. C.

British Columbia Supreme Court, Clement, J. November 27, 1914.

1. FIRES (§ I—1)—NEGLIGENCE—SERVANT CLEARING LANDS—FOREST FIRES ACT.

Apart from the Forest Fires Act, R.S.B.C. 1911, ch. 91, a person is liable for negligence on the part of his servant acting in the course of the master's business, in taking no steps to prevent fire set out for clearing lands from spreading to adjoining lands.

[*Derby* v. *Ellison*, 2 D.L.R. 279; *Crewe* v. *Mottershaw*, 9 B.C.R. 246; *Laidlaw* v. *Crow's Nest Ry.*, 42 Can. S.C.R. 355; *Lloyd* v. *Grace*, [1912] A.C. 716, referred to.]

ACTION for damages from the setting out of fire. Statement.

Judgment was given for the respective plaintiffs.

McIntyre, for plaintiffs.

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

CLEMENT, J.:—These two actions were tried before me at Vernon, on the 31st ult., and I then provisionally assessed the damages suffered by the respective plaintiffs, reserving the question as to defendant's liability upon the facts as I should find them. Upon further consideration I find the facts as follows: The fire which gave rise to these actions had its origin upon the defendant's land, being set out by his workmen in the early part of May, 1909. The defendant's land was admittedly within a "fire district" to which the Forest Fires Act (now R.S.B.C. 1911, ch. 91) would apply; consequently the setting out of fire by the defendant's workmen was in clear contravention of the statute as no permit had been obtained under the Act. Apart from this breach of the statute, I am unable to find that the fire was negligently started. By the next day, it had pretty well died Clement, J.

B. C.

S. C.

GALLON v. ELLISON.

KNOWLES v. ELLISON.

Clement, J.

down but in the middle of the day a wind storm, not abnormal or of unprecedented violence, swept up the valley, with the result that the fire begun by defendant's workmen and over which they were keeping no watch spread to adjoining properties and much damage was done, the plaintiffs in these two actions being among the sufferers. They did not, however, bring their action within the three months limited by the statute. The damage was done on May 3, 1909, and these actions were not begun until November 2, of that year. The only other fact upon which it is necessary to find is whether or not the defendant's workmen were acting within the scope of their employment in setting out the fire in question. I find that they were. Notwithstanding the evidence of the defendant, it seems clear to me that these workmen were ordinary farm labourers hired to do anything that might require to be done upon the defendant's lands. Only a short time before Blondin, one of these workmen, had attempted to burn a clearing for a cabin at the defendant's express direction and under his personal supervision. That attempt was abandoned owing to the spot selected proving too wet and green; but that episode satisfies me that it was within the scope of the employment of these workmen to set out the fire in question, even if its setting out at this particular season were, as defendant said, contrary to his express orders. Upon this question I am entitled to make use of my own knowledge of conditions upon ordinary well-wooded farms or ranches in this province: see *Citizens Life Assce Co.* v. *Brown*, [1904] A.C. 423; 73 L.J. P.C. 102; and, using that knowledge, I have no hesitation in finding as I have done. Lord Macnaghten in a recent case in the House of Lords—*Lloyd* v. *Grace*, [1912] A.C. 716, 81 L.J. K.B. 1140, at 1148—says that the phrases "acting within his authority," "acting in the course of his employment," and "acting within the scope of his agency," speaking broadly, mean one and the same thing. He adds: "Whichever expression is used, it must be construed liberally." The setting out of the fire in question was in the supposed interest of the defendant to burn away a lot of fallen timber and debris upon a sparsely wooded point or triangle of land which jutted out between two of the defendant's meadows. *Lloyd* v. *Grace* (*ubi supra*), shews,

however, that this is no longer a necessary separate enquiry and that the general proposition upon which must rest the defendant's liability in a case of this kind is that the principal is liable for the act of the agent in the course of the master's business and no sensible distinction can be drawn between the case of fraud and the case of any other tort. The phrase "in the course of the master's business" means the same thing as the other phrases above referred to.

In an earlier case, *Derby* v. *Ellison* arising out of the same fire, the trial took place in the County Court of Yale, before His Honour Judge Swanson, who gave judgment for the plaintiff upon the ground of negligence on the part of the defendant's servants in taking no steps to prevent the fire from spreading to adjoining lands. There was no evidence before him that the defendant's lands were within a fire district and there was therefore no case of breach of a statute to be considered. He thought no case of *viz major* made out. An appeal was taken to the Court of Appeal but the judgments there are unreported. (See 2 D.L.R. 279.) I have been furnished with a copy of the judgments of Mr. Justice Irving and Mr. Justice Galliher; and it was stated to me that the Chief Justice of the Court concurred in the dismissal of the appeal, giving oral reasons. Mr. Justice Galliher agreed with the learned trial Judge that no evidence had been given that the defendant's lands were within a fire district, and that no admission of that fact could be taken from the pleadings. Mr. Justice Irving treated the fact as admited, but was of opinion that the fact that the servants' act was a breach of a statute did not free the defendant from liability if the act were otherwise within the scope of their employment. He cited *Dyer* v. *Munday*, [1895] 1 Q.B. 742, in support of his view. *Lloyd* v. *Grace* (*ubi supra*) might now also be cited. To my mind the defendant's contention on this point is quite untenable, but even if I were disposed to think otherwise I should certainly consider myself bound by the opinion expressed by Mr. Justice Irving. Mr. Maclean cited before me *Wilson* v. *Rankin*, 35 L.J.Q.B. 87, as an authority in favour of the contrary view, but that case, when examined has, in my opinion, no bearing here. The plaintiff there sued upon a policy of insurance upon

B. C.
S. C.
GALLON v. ELLISON.
KNOWLES v. ELLISON.
Clement, J.

cargo. The defendant pleaded that part of the cargo had been stowed by the ship's master upon deck contrary to a statutory prohibition, without alleging knowledge of that fact upon the part of the plaintiff, the ship's owner. The Court held that such knowledge was necessary in order to avoid the policy and that it could not, as a matter of legal intendment, be imputed to the plaintiff in the case of such an illegal and unauthorized act as that of which the ship's master had been guilty. The ship, it was found, had not been made any the less seaworthy by the illegal stowage. No question, therefore, of damage to a third party arose at all in the case, and, in my opinion, it has no application here; and, as already intimated, the cases which do bear directly upon the question arising here are clear, as Mr. Justice Irving, indeed, shews. *Vis major* was not argued before me.

Upon the facts, then, as I find them, the question is simply this: If A. without negligence sets fire upon his land and such fire being unwatched spreads to the land of B. and there does damage, is A. liable? The statutory negligence cannot be set up as these actions were not brought within the time limited by the statute; and so the question squarely arises as I have put it. It seems to me to be the same question which arose in *Crewe* v. *Mottershaw* (1902), 9 B.C.R. 246, and which was determined by the Chief Justice in favour of the plaintiff who had suffered by the fire. As it is there put, it may be proper to call it negligence to omit any reasonable precaution; or to say that the duty (not observed here) is to take all possible precautions to prevent the fire from spreading: *sic utere tuo ut alienum non ladas.* In my opinion the action is really one of trespass. I so read *Jones* v. *Festiniog Ry. Co.* (1868), 37 L.J.Q.B. 214; and I so held in *Woolbridge* v. *Patterson Timber Co.*, in January, 1912 (not reported). See also *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48, 63 L.J.P.C. 32; and the judgment of Idington, J., in *Laidlaw* v. *Crow's Nest Ry.*, 42 Can. S.C.R. 355.

There will therefore be judgment for the respective plaintiffs with costs on the Supreme Court scale.

CAMPBELL v. GHIZ.

SASK.

S.C.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ.
November, 28, 1914.

1. BILLS AND NOTES (§ V B—130)—PURCHASER IN GOOD FAITH WITHOUT NOTICE FOR VALUE BEFORE MATURITY—ENDORSER WITHOUT ANY TITLE—EFFECT.

Under the Bills of Exchange Act, R.S.C. 1906, ch. 119, a person taking a bill of exchange or promissory note before maturity in good faith without notice of any defect and giving value for same obtains a valid title though he takes it from one who has none by reason of his having obtained it solely for collection on behalf of the previous holder.

[*London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201; *Venables* v. *Baring Bros.*, [1892] 3 Ch.D. 527; *Raphael* v. *Bank of England*, 17 C.B. 161, applied.]

APPEAL from the district Court. Statement.

Appeal allowed.

T. D. Brown, for appellant, plaintiff.

No one for respondent.

HAULTAIN, C.J., and LAMONT, J., concurring.

NEWLANDS, J.:—The defendant Ghiz, being indebted to defendant Soliman, gave him her promissory note, dated March 12, 1913, for the sum of $200, payable 3 months after date. The defendant Soliman endorsed it over to one Moses Salloum, for collection on his, Soliman's, account. Moses Salloum was manager for Salloum & Co., who were indebted to the plaintiff company. After obtaining possession of the note, Moses Salloum, in fraud of the defendant Soliman, endorsed it before it was due to the plaintiff company, on account of the debt due by Salloum & Company to them. Frederick Hockin, the credit manager of plaintiff company, gave the following evidence at the trial:— Newlands, J.

The note was given to me by Moses Salloum, for Salloum & Co. Salloum & Co. owed us money. We refused to ship more goods until they gave us security or paid us some money. We had the note as security for our goods. Salloum & Co. still owe us $426. We are still the owners of the note. We had no knowledge of any fraud in connection with the note.

Section 53 of the Bills of Exchange Act (ch. 119, R.S.C.) provides that valuable consideration for a bill may be constituted by (*b*) an antecedent debt or liability. Section 54 provides that

Where value has, at any time, been given for the bill, the holder is deemed to be a holder for value as regards the acceptor, and all parties to the bill who became parties prior to such time.

SASK.

S. C.

CAMPBELL v. GHIZ.

Newlands, J.

Section 56 is as follows:—

A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

(*a*) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notion of any defect in the title of the person who negotiated it.

These provisions of the Bills of Exchange Act apply to promissory notes. The plaintiffs, being holders in due course, are, therefore, entitled to recover.

The learned trial Judge, however, held:—

I find, on the evidence, that the plaintiffs took no title to the note sued on; that the note was stolen by Moses Salloum, and endorsed over to the plaintiffs.

I cannot agree with the findings that the plaintiff company took no title to this note. There were no circumstances in connection with their taking this note which would create any suspicion in their minds. In the *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, it was held that a person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who has none. Halsbury, L.C., at 212, says:—

The broad proposition laid down by Abbot, C.J. (3 B. & C. 47), that whoever is the holder of a negotiable instrument "has power to give title to any person honestly acquiring it" seems to me to be decisive in this case.

In *Venables* v. *Baring Bros.*, [1892] 3 Ch.D. 527, where stolen securities which were held to be negotiable instruments were taken by plaintiff for value, Kekewich, J., at p. 543, says:—

The question is whether, before the day on which the money was advanced on the faith of these bonds—that is, before the moment of the advance—Mr. Venables, through his agent in Paris, was aware that these bonds were in fact stolen, so that their depositor could not make a good title to them, notwithstanding their negotiability. I have no evidence before me that either the plaintiff or his agent had any such knowledge; and, therefore, I must hold that the plaintiff is entitled to the declaration he asks—namely, a declaration that these particular bonds, with particular numbers and the coupons attached thereto, are his property as against the defendants.

Raphael v. *Bank of England*, 17 C.B. 161, is to the same effect.

The appeal should, therefore, be allowed with costs.

HAGEMEIR v. CANADIAN PACIFIC R. CO.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 2, 1914.

1. NEW TRIAL (§ IV—31)—NEWLY DISCOVERED EVIDENCE—PROBABILITY OF DIFFERENT VERDICT, GOVERNING PRINCIPLE.

A new trial will not be granted in a damage action on the discovery of new evidence unless the proposed fresh evidence is such that there is a reasonable probability that, if brought before a jury, a different verdict to that in the former trial would be given.

[*Anderson* v. *Titmas*, 36 L.T. 711, applied.]

2. NEW TRIAL (§ IV—30)—NEW EVIDENCE—TO IMPEACH WITNESS—EFFECT.

The discovery of new evidence to impeach the testimony of a witness examined on the former jury trial is not sufficient ground to grant a new trial.

[*Dickenson* v. *Blake*, 7 Bro. P.C. 177, referred to.]

Statement.

APPEAL by defendant from judgment at trial before Metcalfe, J., and a jury.

Appeal dismissed, RICHARDS and PERDUE, JJ.A., dissenting.

L. J. Reycraft, for appellant, defendant.

C. H. Locke, for respondent, plaintiff.

HOWELL, C.J.M., concurred in dismissing the appeal.

Cameron, J.A.

CAMERON, J.A.:—This action is brought by the plaintiff to recover damages for a team of horses killed, waggon demolished and harness, etc., broken, by reason of being struck by a locomotive of the defendant at a crossing, known as the Springfield Crossing, on the Winnipeg-Molson branch of the defendant's line of railway. Negligence on the part of the engineer in charge is alleged in approaching and passing over a highway crossing at rail level without warning by whistle or bell, in carrying a dim and insufficient headlight, and in travelling at an excessive rate of speed. This last ground was eliminated, at the request of plaintiff's counsel, at the trial, and withdrawn by the learned trial Judge from the consideration of the jury. The jury found in favour of the plaintiff for $600 damages.

It appears from the evidence that Arthur Hagemeir, the son of the plaintiff (the owner of the waggon and horses), aged 16 years, with Louis Schick, another youth, was returning to his home in Springfield from Winnipeg, on a dark and cloudy night in November. They were sitting in a high waggon box, the sides of which came up to their shoulders. Arthur Hagemeir, when at the telegraph

MAN.

C. A.

HAGEMEIR v. CANADIAN PACIFIC R. Co.

Cameron, J.A.

pole near the crossing, got up and looked both ways at the railway track, which they were approaching, going in an easterly direction on the highway, which crossed the railway at an acute angle. Thus he ought to have had a good view of the track coming from the east, there being no obstructions to the view of any kind. Schick also got up and looked. Hagemeir stood up and continued to drive slowly at a rate of about 3 miles an hour. He heard nothing but the noise of shunting in the Transcona yards, 5 miles away. Schick also heard no warning signals. Just as the horses stepped on the track the young man heard a roar, the engine was on the horses, and they jumped for their lives. Hagemeir and Schick both state positively they heard no warning signals by bell or whistle, and that they would have heard them if they had been given. The signals referred to are those prescribed by sec. 274 of the Railway Act.

On the other part, the locomotive engineer testifies positively that on the occasion in question he blew the whistle and turned the bell ringer. Doherty, the fireman, strongly corroborates the engineer's evidence.

It is contended that the evidence of the defendant company's witnesses is of such a superior quality that it should be preferred to that of the witnesses for the plaintiff. Reliance is placed upon the opinion expressed by Mr. Justice Duff in *Grand Trunk R. Co.* v. *Sims*, 8 Can. Ry. Cas. 61. But a perusal of that judgment shews that the learned Justice's remarks were directed to the particular facts and circumstances of the case before him. It appears also that his view was not shared by the other learned Justices of the Court, as the Chief Justice and Mr. Justice Girouard allowed the appeal on the ground of contributory negligence, while Justices Idington and Maclennan dissented.

In *Zweldt* v. *C.P.R. Co.*, 23 O.L.R. 602, it was held that the finding of the jury upon the question of the signals was not satisfactory, there being a considerable body of direct testimony, not only from employees of the company, but from independent witnesses, that the signals were given. The jury had not only found against the defendant on this point, but upon the question of inefficient headlight and excessive speed, and with both of these findings the Court of Appeal was dissatisfied also.

Upon the whole, I do not consider it would be safe in this

case to reject the evidence of the plaintiff's witnesses when the jury have accepted it. That is the decision of the tribunal entrusted by law with the consideration and determination of the facts in the case. In the case so frequently cited of *Slattery* v. *Dublin W. & W. Ry. Co.*, 3 App. Cas. 1155, where there was a remarkable conflict of testimony on this very point of whistling, the House of Lords held that the decision as to the credibility of the evidence must always rest with the jury. I refer also to *Metropolitan* v. *Wright*, 11 App. Cas. 152; *Cox* v. *English*, [1905] A.C. 168, and to p. 270 of the judgment of Lord Atkinson in *Toronto R. Co.* v. *King*, [1908] A.C. 260. This Court might entertain suspicions as to the trustworthiness of the two young men and the value of their evidence as contrasted with that for the defence, but those matters were all before the jury for their decision.

There was also raised before us the question that the evidence for the plaintiff as to the headlight being dim and insufficient was unsatisfactory. It was urged that the learned trial Judge erred in directing the jury that it was negligence for the company to carry an oil, and not an electrical, headlight on the engine in question. The question as it was put to the jury was, rather, whether the company in this case did or did not have a reasonable headlight, whether the ordinary oil reflector was or was not sufficient?

Now, there was evidence before the jury that the headlight in question was not efficient, and their finding to that effect might be supported. But the verdict given by the jury is general. It comes before us with all the presumptions in favour of the plaintiff, and, until those are displaced, must stand. We are not called upon to assume, in the absence of any proof or reasoning whatever, that the verdict was necessarily based upon the one ground of an insufficient headlight. The verdict could be supported upon the ground of a neglect on the part of the defendant to give the statutory signals. In that view, the subject of head light, the evidence relating thereto and the Judge's charge thereupon, may not be considered as essential.

In my opinion, therefore, the appeal must be dismissed with costs.

CAN.

S. C.

DORCHESTER ELECTRIC CO. v. ROY.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 23, 1914.

1. DAMAGES (§III L—230)—EMINENT DOMAIN—RIPARIAN PROPRIETOR—PERMANENCY OF INJURY—DAMAGES ONCE FOR ALL.

Where the result of the erection of a dam for a power-house under the statutory authority of R.S. Que., 1909, arts. 7295 and 7296, is to destroy the water power of the upper riparian proprietor and some of his property, and there is no suggestion that the power-house dam and its method of user is to be otherwise than permanent, damages may be assessed once for all in an action taken by the upper proprietor, in default of the appointment of experts under the statute, on the basis of a continuing injury to the full extent to which experts might award compensation in expertise proceedings.

[*Breakey* v. *Carter*, Cassels' S.C. Dig., 2nd ed., 463; *Gale* v. *Bureau*, 44 Can. S.C.R. 305; *Montreal Street R. Co.* v. *Boudreau*, 36 Can. S.C.R. 329, referred to; *Dorchester* v. *Roy*, 12 D.L.R. 767, affirmed.]

2. EMINENT DOMAIN (§ III C—144)—RIGHTS AND REMEDIES—COMPENSATION FOR RIPARIAN RIGHTS—ARBITRATION—ACTION—COMMON LAW REMEDY NOT SUPERSEDED, WHEN.

A mere invitation to the upper riparian proprietor by the company whose works, constructed under statutory authority, have interfered with his riparian rights that he name his arbitrator, but without the company naming any arbitrator for itself, is not a commencement of expertise proceedings under R.S. Que., art. 7296, so as to operate as a bar to his proceeding by action in lieu of arbitration to recover compensation for the damages sustained, particularly where it was not shewn that the company had taken any further steps towards an arbitration.

[*Dorchester* v. *Roy*, 12 D.L.R. 767, affirmed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, Appeal side (12 D.L.R. 767, Q.R. 22 K.B. 265), which varied the judgment of McCorkill, J., in the Superior Court for the District of Quebec (Q.R. 22 K.B., at 266), by increasing the damages awarded to the plaintiff.

The plaintiff was the owner of a mill driven by water power, on the river Etchemin, near the site of which the company, defendants, erected a dam in connection with a power-house which they were constructing on the same stream a short distance below the plaintiff's mill. The dam was of a permanent character, and had the effect of penning back the water, raising its level and flooding the tail-race of plaintiff's mill to such an extent that his mill-wheels were drowned. Another effect of the dam was to make still water where previously there had been a rapid, that ice formed in the pond so created, and, when it came out in freshets, the ice carried away the plaintiff's mill. For all these injuries the plaintiff sued to recover $6,000 damages, and, at the

trial, McCorkill, J., assessed the damages at $1,070, being for the actual losses incurred up to the time of action, less $110 for some of the machinery which had been saved, and recourse was reserved to the plaintiff to bring further actions for any damages happening subsequently. Both parties appealed, and, by the judgment now appealed from, the Court of King's Bench dismissed the appeal taken by the company and allowed that of the plaintiff by increasing his damages to $3,685, in consideration of the diminished value of the plaintiff's water power and adjoining property.

The questions in issue on the present appeal are stated in the judgments now reported.

The appeal was dismissed, IDINGTON and ANGLIN, JJ., dissenting.

Taschereau, Roy, Cannon & Fitzpatrick, for the appellants.
Pelletier, Belleau, Baillargéon & Belleau, for the respondent.

DAVIES, J.:—The trial Judge did not grant damages once for all, because he felt himself concluded from doing so by the decision of this Court in *Gale* v. *Bureau*, 44 Can. S.C.R. 305. I do not think, however, that that case decided that point absolutely. There are obviously many cases in which future damages may or may not arise and which may or may not be foreseen or capable of being estimated at the time action is brought or proceedings begun under the statute to fix them. In all such cases recourse may be reserved for future damages. But, with respect to damages which have been incurred and which are capable of being estimated when action is brought or proceedings taken under the statute to estimate them, I see no reason whatever why they should not be estimated and determined. Davies, J.

With respect to the value of the water power of the plaintiff which the trial Judge did not include in his judgment, because he thought it was a subject-matter for future damages which the authorities probibited him from considering, I cannot see why such value may not now be estimated as well as later.

It is found as a fact by both Courts that the plaintiff's mill has been destroyed and his water power had ceased to be a water power—as such it has been destroyed. The defendant does not plead that the dam erected by him which caused this destruction

CAN
S. C.
DORCHESTER ELECTRIC CO. v. ROY.
Davies, J.

was a temporary construction or other than a permanency. In the absence of any such plea, we must hold it to be intended as a permanent work. If the plaintiff is not now entitled to be compensated for the loss of this water power, when will his future right to such compensation arise? A reservation of future rights in such a case would be an illusory one. He has, in my opinion, under the circumstances, a right to damages as well for the destruction of his water power as for the destruction of his mill. The assessment of damages made by the Court of Appeal, on the basis of the plaintiff being entitled to such damages once for all, I see no reason to quarrel with.

On the other question as to the right of the plaintiff to take proceedings for the recovery of the damages in the Courts, without resorting to the method prescribed by the statute, I am of opinion that we are bound by the authorities to hold that the statute does not take away the common law right of the party damnified to sue unless at any rate proceedings had been properly commenced and prosecuted under the statute for the assessment of the damages.

I do not think the letter written to the plaintiff in this case before suit began constituted such a valid commencement of proceedings under the statute. It was, no doubt, an invitation to the plaintiff to name an arbitrator under the statute, but that was all, and such a mere invitation, without the naming of an arbitrator by the party himself making it, cannot be held to constitute a valid commencement of proceedings.

I would dismiss the appeal.

Duff, J.

DUFF, J.:—The respondent was the proprietor of a mill situate on the river Etchemin worked by the direct application of water power derived from the river. The appellant company, at a place below the respondent's mill, erected a dam, for the purpose also of obtaining water power for working its plant. The respondent's mill was carried away by a freshet in April, 1911, and it was charged by the respondent and has been held by the Courts below that this was due to the presence of the appellant's dam. It has also been found as a fact that the effect of erecting the dam was to raise the level of the river to such an extent as to submerge the respondent's turbines and permanently to diminish the head of water available for the working of his

mill. The learned trial Judge held that the plaintiff was entitled to compensation in respect of the injury proved to have been suffered by him down to the time of the commencement of the action—such damages comprising the value of the mill swept away and loss of profits arising, first, from the diminished efficiency, and afterwards from the destruction of the mill. The Court of Appeal held that the plaintiff was entitled to reparation not only in respect to the damages mentioned, but also for loss in respect of the diminution in the value of respondent's land by reason of interference with his water power. Two questions arise: First, Can compensation for such loss be awarded? and, secondly, whether, by reason of certain proposals made by the appellant's solicitors, prior to the commencement of the action, the action ought to be entirely dismissed?

The appellant's dam was erected and worked under the authority of art. 7295 of R.S.Q. of 1909. That article and the succeeding art. 7296 are as follows:—

7295. Every proprietor of land may improve any water-course bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for this purpose may erect and construct in and about such water-course, all the works necessary for its efficient working, such as flood-gates, flumes, embankments, dams, dykes and the like.

7296. (1) The proprietors or lessees of any such works are liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise.

(2) Such damages shall be ascertained by experts to be appointed by the parties interested in the ordinary manner.

(3) In default of either of the said parties appointing an expert, experts selected by the warden of the county shall act; and, in case of difference of opinion, the two experts appointed shall choose a third.

(4) The experts shall be sworn before a Justice of the Peace faithfully to perform their duty as such.

(5) In assessing the damages and fixing the compensation to be paid, the experts may, whenever proper, set off against the whole or any part of such damages, any increased value which the property of the claimant has acquired by reason of the erection of such works, mills, manufactories or machinery.

(6) In default of payment of the damages and indemnity so awarded, within six months from the date of the report of the experts, together with legal interest to be computed from the said date, the party by whom the payment is due, shall demolish the works which he shall have erected, or they shall be so demolished at his expense, upon judgment to that effect rendered, the whole without prejudice to the damages already incurred.

It was held by this Court, in *Breakey* v. *Carter*, Cass. Dig.

CAN.

S. C.

DORCHESTER ELECTRIC CO. v. ROY.

DUFF, J.

(2 ed.) 463 (I am quoting for convenience from my own judgment in *Gale* v. *Bureau*, 44 Can. S.C.R. 305, at 312:—

> That the right given by art. 7295, in so far as it justified the penning back the waters of a stream upon the upper riparian proprietors, is to be regarded as a right of servitude to which is attached an obligation to indemnify the proprietor who is prejudiced by the exercise of it.

It was also held in that case (Cass. Dig. (2 ed.) 463), and the decision on that point was followed in *Gale* v. *Bureau*, 44 Can. S.C.R. 305, at 312, that this statutory right to reparation was one in respect of which the person damnified has recourse to the Courts, as damage from time to time accrues notwithstanding the provisions of art. 7296. I think, moreover, that there is no satisfactory ground for holding that (assuming an action to lie in the circumstances) the plaintiff cannot recover in the action reparation once for all to the full extent to which experts proceeding under the Act would be entitled to award him compensation. I may add that I regard this action as a proceeding to recover compensation under this statute; I decide nothing as to the rules of law by which, apart from the statute, the measure of damages would be determined.

As to the second ground of appeal, I think that, in the circumstances, the appellants were, at least, bound to shew that they were in point of fact ready and willing to proceed under art. 7296, and, having regard to the delay that had already taken place, I agree with Mr. Justice Cross that they have failed to do so.

ROWLAND v. CITY OF EDMONTON.

ALTA.

S. C.

Alberta Supreme Court, Stuart, Beck, and Simmons, JJ. June 30, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ VI—60)—PLANS—EFFECT OF REGISTRATION IF ANY TRANSFER MADE THEREUNDER.

   The effect of sub-sec. 2 of sec. 124 of the Land Titles Act, 1906, Alta., ch. 24, is that a plan of subdivision, when once properly registered, is binding on everybody if a sale, mortgage, encumbrance or lease has been made according to it, unless and until it is cancelled or amended in whole or in part by a Judge's order.

2. ESTOPPEL (§ II A—20)—BY DEED—TRANSFERRING UNDER EXISTING PLANS —EFFECT.

   An estoppel may be created as to a right to object that subdivision plans were not binding upon a person laying claim to a part of a street or road shewn thereon by his making conveyances of adjoining property in describing which such street or road is recognized and approved.

3. DEDICATION (§ II—23)—BY ESTOPPEL—WHAT CONSTITUTES—IN WHOSE FAVOUR.

   Dedication by estoppel for purposes of a highway may arise in favour not only of a grantee, but of the public and of the local governing authorities having control of highways.

APPEAL from the judgment of HARVEY, C.J., at trial.

The appeal was allowed, STUART, J., dissenting. SIMMONS, J., concurred with BECK, J.

G. B. O'Connor, K.C., for plaintiff, respondent.

J. C. F. Bown, K.C., and *O. M. Biggar*, K.C., for defendant, appellant.

BECK, J.

BECK, J.:—This is an appeal from the judgment of the learned Chief Justice. The facts seem to be as follows:—The plaintiff, in 1880, was a "squatter" upon land near what is now the city of Edmonton. In 1882 there was a Dominion Government survey of the Edmonton Settlement and, at the same time or soon after, a survey of the adjacent township. Rat Creek, which for many years formed at the locality in question the northerly boundary of the town, now the city of Edmonton, constituted under these surveys the boundary between certain river lots (12, 14, 16, 18, and 20) of the Edmonton Settlement, and the land allotted to the plaintiff, which included the westerly 25 chains of section 9, in township 53, range 24, west of 4th meridian, that is, Rat Creek formed the northerly boundary of the river lots and the southerly boundary of the plaintiff's land.

A certificate of title was issued to the plaintiff on June 15, 1887, for 160 acres, more or less, comprising, with other land, the westerly 25 chains of section 9. From a time beginning a number of years before the plaintiff "squatted" upon the land in question, as far back as 1871,—what was known as the "Fort Trail," that is, the "trail" between Fort Saskatchewan and Edmonton, ran through the plaintiff's land and approximately along the north side of Rat Creek. The town of Edmonton was incorporated in 1892, the northern boundary being—at this locality—Rat Creek. The limits of the town were extended, in 1904, so as to comprise land beyond the creek.

The North-West Territories Act (R.S.C. 1886, ch. 50), sec. 108, made provision for the Governor-in-Council directing the survey of "any particular thoroughfare or public travelled road or trail in the Territories, which existed as such prior to any regular surveys" and for the transfer of the control of the same "according to the plan and description thereof to the Lieutenant-Governor-in-Council for the public purposes of the Territories."

ALTA.

S. C.

ROWLAND v. CITY OF EDMONTON.

Beck, J.

Under the provisions of the above-mentioned section steps were taken to survey and transfer the Fort trail.

One Belanger, D.L.S., made a survey of the trail in 1889. It was approved and confirmed by the Department at Ottawa in 1891, and on May 16, 1895, an order-in-Council was passed transferring to the Lieutenant-Governor, for the public uses of the Territories, "the trail from Edmonton to Fort Saskatchewan" according to the plan and description thereof made by Belanger. Belanger's survey, however, extended—from the north-east south-westerly—only to or quite close to the south-west corner, section 15, township 53, range 24, west of the 4th meridian, which corner is also the north-east corner of section 9, a portion of which section is in question.

In 1891 (ch. 22, sec. 17) a new section was substituted for sec. 108 of the North-West Territories Act (R.S.C. 1886, ch. 50). It provided, in substance, that, on request, the Governor-in-Council might direct the survey by a D.L.S. of any public travelled trail which existed prior to the subdivision of the land into sections, and that the Governor-in-Council might thereafter transfer any such public travelled trail, according to the plan and description thereof, to the Lieutenant-Governor-in-Council, subject to any right acquired under patent for any land crossed thereby. The section directed that "the width of such highways shall be one chain or sixty-six feet; and, in making the survey, the surveyor shall make such changes in the location" as he finds necessary, without altering its main direction.

In 1897 (ch. 28, sec. 19) a new section was again substituted for sec. 108 of the North-West Territories Act. This new section provided for the filing of a copy of the "return of such survey," which, no doubt, means the plan, in the Land Titles Office. It retained the direction that the width of the trail, as surveyed, should be one chain or sixty-six feet.

In 1900 one Driscoll, D.L.S., continued Belanger's survey south-westerly across river lots 24 and 22 and section 9 to the westerly boundary of section 9. Driscoll's survey, although made in 1900 and certified by him on January 29, 1901, no doubt at the request of the Territorial Government, in anticipation of a Dominion Order-in-Council, which, perhaps, had not yet been asked for, appears to have been sent to the Commissioner of

Public Works at Regina, and to have been approved by the Department at Ottawa on October 11, 1904. It seems to have been duly authorized by Order-in-Council of May 31, 1901. The plan was, as already indicated, filed in the Department at Ottawa, but was never registered in the Land Titles Office.

Running south-westerly across river lots 24 and 22 and section 9 until it met the production northerly of the road allowance between river lots 20 and 18, the trail, as surveyed by Driscoll, was 66 ft. in width. From that point westerly it ran to the westerly boundary of section 9, shewing as the southerly boundary of Rat Creek and as the northerly boundary a line running straight for a certain distance and then at angles to conform approximately to the sinuosities of the creek, with the result that this latter portion of the trail, as surveyed, varies in width, and at most points, if not at all, exceeds in width 66 ft. Along the westerly boundary of section 9 there is a road allowance; this continued southerly west of river lot 14 and afterwards became known as Nemayo Avenue.

An explanation why the direction of the statute that the width of the trail should be 66 ft. was not adhered to was given by Driscoll. The ground, naturally, sloped down to the bed of the creek. He could not very well make the creek the southerly boundary of the surveyed trail, because the creek had a number of very sharp curves and there were a number of low places; it was a very crooked little creek, and, besides, he says, "we were all supposed to follow the old trail pretty well."

He also gave evidence as follows:—

Q. Well, as was pointed out, it [the surveyed trail] is in nearly all cases? more than 66 ft. wide? A. Oh, yes, it is.—Q. Why was that necessary-A. In that particular instance it seemed very necessary, it was used [apparently he means the sloping bank]; there was a certain slope there which it seemed advisable should belong to the trail. The portion that was left there seemed at that time of very little value, and it was used by the people coming in from the country largely for watering their horses. It seemed to be just the last place they watered their horses before coming into town, and occasionally there would be a few tents pitched there, people unhitching their horses and giving them a run there. At that time it seemed it should be thrown in as a trail or boulevard. The expression "boulevard" might not have fitted it, but at the time it seemed necessary for the purpose of making a satisfactory trail.

He said, also, that one of his reasons for including the sloping bank was "drainage for the road; to make a good road."

ALTA.
S. C.
ROWLAND v. CITY OF EDMONTON.
Beck, J.

"Roughly speaking, it was the northern half of the survey which was the old trail."

Driscoll, for the reasons he gave, made the middle thread of the creek the southerly boundary of the surveyed trail. The result was that the width of the trail was, at four different points, 82 ft. 5 in., 115 ft. 5 in., 115 ft. 5 in., and 165 ft. respectively, and, on a rough estimate, I calculate that, as surveyed, the trail was, on the average, somewhat less in width than twice 66 ft.

At this point this view occurs to me. If Driscoll had made the southerly boundary of the surveyed trail the water's edge, instead of the middle thread of the stream, this description would have carried with it the land between the water's edge and the middle thread. It could not, in that case, have been supposed that the plaintiff was to retain the ownership in the land between these two lines under the conditions then existing. If this is so, the question, as it is before us, would have to be looked at in exactly the same way as if the southerly boundary were the water's edge. The result would be that the excess of land taken for the trail beyond the 66 ft. in width would be considerably reduced; to what extent does not appear, but the surplus could hardly be greater than a quarter of that which would have been included in a width of 66 ft. Perhaps, however, there is nothing in this suggestion.

It seems to me that the provision of the statute that the width of the surveyed trail is to be 66 ft. must be taken to be directory and not mandatory—in this sense, that, where reasonable convenience calls for a comparatively small extension of the width, it is not prohibited by the statute. The statute provides that, in making the survey, the surveyor shall make such changes in the location as he finds necessary without altering the main direction.

One can amagine that a surveyor might "find it necessary" —which must not be taken, I think, as meaning more than that his own good practical common sense should be his guide—to make straight a trail, which, like so many of these old trails, was very winding, by cutting through a hill. The cut at the apex of the hill and for some distance on either side might well be wider than 66 ft., and the advantage might be considerable to the owner of the land by restoring to him the level land on

which the old trail ran and taking in its place a useless hill. If the statute, in this respect, is directory, then, putting ourselves back to the point of time when Driscoll made his survey, it seems to me that, taking into account the condition of the ground and its surroundings, its small value, its uselessness for any purpose except for the purpose of the public passing over it, he did not go beyond what is permitted by the statute in giving the trail at this locality the extra width. Even if this view, in itself, is insufficient to constitute an answer to the plaintiff's claim, it does, at least, I think, add considerable weight to the evidence to which I am about to refer, upon which the defendants submit that the plaintiff is estopped from setting up a claim to the land in excess of 66 ft. in width.

Before referring to this further evidence, I must call attention to the fact that there is no evidence that, although Driscoll's survey was, as I have held, duly authorized, there was ever an Order-in-Council transferring the trail so surveyed to the Lieutenant-Governor. It seems to me, however, that such an Order-in-Council is provided for only as the means of transferring the control to the Territorial Government, and that the survey itself, having been duly authorized, made the trail a public highway.

On October 23, 1902, the plaintiff sold a portion of his land abutting upon the northerly boundary of the surveyed trail to a Mrs. Sinclair. The transfer describes the land by metes and bounds as follows:—

> Commencing at a point on the west boundary of section 9 aforesaid 1.30 chains north of Rat Creek, which point is also on the northern boundary of *a surveyed road* along the *north side of Rat Creek;* thence north along said western boundary 9.94 chains; thence east and at right angles to the last-described course 11.50 chains, thence south and parallel to the said western boundary 6.62 chains to the north boundary of *the said surveyed road* to the point of commencement; containing by admeasurement 10 acres more or less, *which land is coloured pink on the map hereunto attached, drawn up by A. Driscoll,* 30-9-02.

Attached to the transfer is a plan on tracing paper, shewing the 10-acre plot coloured pink and shewing as its south boundary a "road allowance" of which the southern boundary is quite clearly indicated as Rat Creek. I say it is clearly indicated because the words "road allowance" stand equidistant from the southerly boundary of the 10 acres and Rat Creek and no southern boundary of the road allowance is indicated unless it

ALTA.

S. C.

ROWLAND v. CITY OF EDMONTON.

Beck, J.

be Rat Creek. Again, on June 22, 1903, the plaintiff transferred to McDougall & Secord the westerly 25 chains of section 9 "saving and excepting thereout 10 acres conveyed to one Sinclair and particularly described in certificate of title 65 x 1 issued by the Land Titles Office for the North Alberta Land Registration District (in the transfer from the plaintiff to Mrs. Sinclair) and saving and excepting thereout *a surveyed road running through the land hereinbefore* described.

McDougall & Secord, on June 26, 1905, filed a plan of subdivision of the portion of section 9 transferred to them. It contained a very large number of lots and blocks, with streets and lanes, and shewed the surveyed trail with, quite clearly, Rat Creek as its southerly boundary; and a great number of these lots have, during the subsequent years, been sold and built upon. Furthermore, Mrs. Sinclair's certificate of title shews that she, too, not only made sales to several different persons of 5 or 6 acres of her 10 acres, but also subdivided the rest, or some portion of it, into lots and has sold several of them.

It may be said that the McDougall & Secord plan of subdivision—and also that of Mrs. Sinclair, which, presumably, corresponds—ought not to have been registered while shewing the surveyed trail as they did; but they were, in fact, registered, and I think that the registrar could well justify their registration, notwithstanding any objection on this score, on the ground that the plaintiff had, by at least two transfers then on record in his office—those to Mrs. Sinclair and McDougall & Secord—approved of the surveyed trail. At all events, I think the plaintiff's conduct was such as to estop him from saying that he was not bound by these plans because they were not signed by him, as required by sec. 124 of the Land Titles Act (ch. 24 of 1906). The result being, in my opinion, that these plans of subdivision must be taken as if properly and regularly registered.

Then it is said that all this can have no effect with regard to the southerly boundary of the surveyed trail. It seems to me, however, that—even apart from the statutory provision, to which I shall refer—it has some effect—that those persons whose lands abut on the north side of the road would have a right to say we bought on the representation—made by the plan—that our land abutted on a street 100 feet wide; we object to its being reduced to a width of 66 ft.

Sub-section 2 of sec. 124 of the Land Titles Act is as follows:—

In no case shall any plan or survey, although filed and registered, be binding upon the person so filing or registering the same, or upon any other person, unless a sale, mortgage, encumbrance or lease has been made according to such plan or survey; and in all cases cancellation in whole or in part or amendments or alterations of any such plan or survey may be ordered to be made at the instance of the person filing or registering the same or of any person deriving title through him of any land shewn on such plan or survey, by a Judge, if on application for the purpose duly made and upon hearing all parties concerned it be thought fit and just so to order and upon such terms and conditions as to costs and otherwise as may be deemed expedient, and the Judge may make such order as to the vesting or revesting of any land included in such plan as he may think fit.

This clearly means that a plan once properly registered—and I have held that the plaintiff cannot be permitted to say that it was not properly registered—is binding on everybody if a sale, mortgage, encumbrance or lease has been made according to it unless and until it is cancelled in whole or in part or amended or altered by order of a Judge. As I have already intimated, I think that an owner of land abutting even on the north side of the surveyed trail would be in a position to object to the width of the trail being reduced. There is, however, much evidence that both the city of Edmonton and individual owners whose lands abut on the south side of the trail supposed that the bed of the creek was the south boundary of the trail, and acted upon this supposition. The city repaired the road by grading it, putting soil on it and levelling it, and by putting a double street railway line and telephone and electric lighting poles and lines on it. The city also put a trunk sewer along the bed of the creek.

In 1888 a plan of subdivision of river lots 12 and 14 had been registered shewing lots abutting on the south side of Rat Creek.

The defendant McPhail in 1906 or 1907, bought lot 3, block 38, river lot 12. This lot lies south of Rat Creek, a distance of 460 ft. westerly from the west boundary of Namayo Avenue, and has a frontage of 100 ft. on the trail as surveyed by Driscoll—that is, his lot abuts on the south side of Rat Creek. He bought after making a search in the Land Titles Office and there seeing a plan. He made the search in order to ascertain whether the lot abutted on the Boulevard—the name by which this surveyed trail has latterly become known—and, having ascertained that it did, he bought it. He built two or three buildings on the land, one costing $17,500. It faces on the Boulevard. The defendant

ALTA.
S. C.
ROWLAND v. CITY OF EDMONTON.
Beck, J.

Hoffman, in 1902, bought a number of lots abutting on the Boulevard between Kinistine and Syndicate Avenues. He made no search in the Land Titles Office, but was shewn a plan on which it appeared that these lots abutted on the creek, and saw that it appeared so on the ground. Numbers of other persons —some parties defendant—acted virtually in the same way.

It is clear that dedication by estoppel may arise in favour, not only of a grantee, but of the public and of the local governing authorities. See Elliott on Roads, 2nd ed., secs. 123 *et seq.*, and secs. 150 *et seq.*

Having held that the plaintiff was bound by the McDougall & Secord plan filed in 1905, I think that alone is sufficient to defeat the plaintiff's claim, but, assuming that it is not, I am of opinion that the plaintiff is estopped by reason of the following things, which have been already referred to; the apparent approval of Driscoll's plan in the transfers to Mrs. Sinclair and to McDougall & Secord; the authorizing of its deposit in the Land Titles Office; the naturally consequent action of the registrar in registering McDougall & Secord's plan shewing the trail as Driscoll had surveyed it without requiring the plaintiff's signature; this latter plan being registered; the sale of lots according to it; the action of the city in laying out moneys in improving it and in placing the utilities—railway tracks, telephone and electric light poles, and sewers, having regard to its supposed width; the action of persons owning lots abutting on the south side of the creek after having knowledge from search in the Land Titles Office of Driscoll's plan and the McDougall & Secord plan and the condition of the locality brought about by the city authorities and others who had similarly relied on a condition of things which the conduct of the plaintiff naturally led to. In either of these views, the absence of the plaintiff is immaterial.

He went away to Battleford in 1887. He left his friend, Henry Fraser, authority to sell. Fraser sent to him for signature the transfers to Mrs. Sinclair and to McDougall & Secord. In consequence, apparently, of having sold to McDougall & Secord at so much an acre, and finding that they proposed to pay him for three acres less than he supposed, and that this shortage was said to be owing to a roadway being taken, the plaintiff wrote to the Commissioner of Public Works at Regina asking for pay-

ment of $375, "for three acres appropriated by the Government for right-of-way through section 9–53–24–W. 4th." He was told, in reply, April 14, 1904, that the Commissioner had been advised that the Edmonton-Fort Saskatchewan trail had been surveyed through this land "*as shewn on accompanying blue print*": that the survey was made under instructions of the Department of the Interior and the land vested in the Crown *as an old trail*, and that, therefore, he was not entitled to compensation. The accompanying plan must be presumed to be Driscoll's. Belanger did not touch the property. He then wrote to the Department of the Interior "requesting to know if the Department intends to cancel the survey of that trail," and, in reply, is referred back to the Territorial Government. After that he did nothing until just before the commencement of the present action. But, five years before, *i.e.*, 1908, he was back in Edmonton for a week, visited his old place, and "hardly knew it." The process of change and improvement, of course, went on during those five years, thus, in my opinion, increasing the evidence in support of estoppel and adding evidence upon the element of knowledge. The result of my consideration of the case is that I think the plaintiff has no claim in law or justice for any portion of the land in question or any compensation for it or any part of it.

It must be added that the evidence at the trial was supplemented before us by the production and admission of some plans and also of the extract from the plan attached to the transfer to Mrs. Sinclair. This additional evidence makes some things clear which were not made clear to the trial Judge.

For this reason I would, while dismissing the plaintiff's action with costs, direct the defendants, the city of Edmonton, to pay the costs of the appeal.

McGUIRE v. BRIDGER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. May 18, 1914.

1. NEGLIGENCE (§ I C—50)—DANGEROUS PREMISES—BUILDING IN COURSE OF CONSTRUCTION—DUTY TO LICENSEE.

A person seeking employment on the construction work of a new building and entering on the works under the permission to be implied from a notice reading "laborers wanted," is a licensee while waiting for the arrival of the foreman in charge of the hiring of labourers; and is entitled as against the various contractors to reasonable protection from unseen dangerous conditions in the premises in course of construction; and the contractor whose foreman had supervised the placing

CAN.
S. C.
McGUIRE
v.
BRIDGER.

of a boiler-plate in a dangerous position leaning against a pillar of the building and projecting over a cartway so that it fell over and killed such licensee is properly held liable in damages for the death, where the boiler-plate remained in such contractor's care up to the time of the accident.

[*Bridger* v. *Robb Engineering Co.*, 13 D.L.R. 49, affirmed on appeal; *Lucy* v. *Bawden*, [1914] 2 K.B. 318, referred to.]

Statement.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of Greenshields, J., in the Superior Court for the District of Montreal, whereby, upon a verdict in favour of the plaintiff, judgment was entered for the plaintiff for $5,000 damages, apportioned between the plaintiff and her minor children with costs.

The action was brought by the respondent, plaintiff on her own behalf and as tutrix for her minor children, against the present appellants and the Robb Engineering Company, claiming from them, jointly and severally, damages sustained in consequence of the death of Joseph Tunley, deceased husband of the respondent and father of her minor children, his death having been caused, as alleged, on account of the negligence of both defendants.

The trial took place before Mr. Justice Greenshields and a special jury, to which questions were submitted and answered, as follows:—

"Question.—1. Was Joseph Tunley, the plaintiff's husband, the victim of an accident, on or about the 9th November, 1909, while within or upon the premises known as the Jacobs Building, on St. Catherine Street in Montreal?

"Answer.—Yes.

"Question.—2. Was the plaintiff's husband lawfully in the place where he was injured at the time of the said accident?

"Answer.—Yes.

"Question.—3. Did the said Joseph Tunley die, on the 18th December, 1911, as a result of the said accident?

"Answer.—Yes.

"Question.—4. Was the accident due to the sole fault, negligence and want of care of the said Joseph Tunley, and, if so in what did such fault and negligence consist?

"Answer.—No.

"Question.—5. Was the accident due to the sole fault and negligence of:—

"(*a*) The Robb Engineering Company, Limited?

"Answer.—No.

"(*b*) Meldrum Bros., Limited?

"Answer.—No.

"(*c*) W. J. McGuire & Company, Limited?

"Answer.—No.

"(*d*) Emile Gellin?

"Answer.—No.

"(*e*) One or more of them, and, if so, in what did their respective fault and negligence consist?

"Answer.—Due to the neglect, fault, want of care and lack of supervision of the Robb Engineering Company, Limited, and W. J. McGuire & Co., Limited, by placing the piece of iron in a dangerous position.

"Question.—6. Was the accident due to the combined fault and negligence of the said Joseph Tunley and

"(*a*) The Robb Engineering Company, Limited?

"Answer.—No.

"(*b*) Meldrum Bros., Limited?

"Answer.—No.

"(*c*) W. J. McGuire Company, Limited?

"Answer.—No.

"(*d*) Emile Gellin?

"Answer.—No.

"And, if so, in what did their respective fault and negligence consist?

"Answer.—No.

"Question.—7. Has the plaintiff, as well personally as in her quality of tutrix to her two minor children, suffered damage by reason of the said accident, and if, so, in what amount?

"Answer.—Yes, $5,000 (five thousand dollars).

"Question.—8. If you have answered question 6 in the affirmative, that the accident was due to the combined fault and negligence of the late Joseph Tunley and any of the four defendants, in what amount do you fix the contribution of the said Joseph Tunley in the damage assessed by you in answer to question No. 7 and to what amount do you fix the contribution of the defendants or of any of them?

"Answer.—All unanimous."

CAN.
S. C.
McGUIRE v. BRIDGER.

Upon the answers so given by the jury, His Lordship, Mr. Justice Greenshields, ordered judgment to be entered in favour of the plaintiff, for the damages assessed, apportioned, as follows: $2,500 to the plaintiff personally, and $1,250 to each of her minor children, and condemned the defendants the Robb Engineering Company and the W. J. McGuire Company to pay the said sums jointly and severally, with interest and costs. This judgment was affirmed by the judgment now appealed from.

The appeal was dismissed, ANGLIN, J., dissenting.

Mann, K.C., for the appellants.

Atwater, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J., agreed with DUFF, J.

Idington, J.

IDINGTON, J.:—There are two questions raised by this appeal. The first is as to the right of the deceased to be where he was when the metal fell upon him. This is hardly arguable upon the facts shewing an invitation to be there. The jury has passed upon it, as they were entitled to upon such facts.

The other question is as to the scope of the authority which one Finlay had from appellants when he directed the placing of the metal where it was placed.

The appellant had a contract from the proprietor to do the work upon the building, and it was in the doing of such work that this accident was caused whereby the deceased was injured.

Part of the work undertaken by appellant had been sub-let by it to the Robb Engineering Company. If nothing more had transpired for consideration, possibly appellant might have relied upon this sub-contract to exonerate it. The case is, however, by no means so simple in its character as that.

The appellant contracted with the proprietor:—

> To assume all liability for damage or injury occurring to any persons or property through neglect or illegal acts of the said party of the second part, his contractors, sub-contractors, agents or servants, and to indemnify and save harmless the party of the first part all claims caused by reason of said damage or injury.

As between the proprietor and deceased, it might well be said that the invitation by which deceased came there was in last analysis what the proprietor authorized. Whether in law the proprietor could have been held liable need not be passed upon. He desired appellant should take all that risk and it did so. It

was thus, as well as by implication of law in executing its contract with the proprietor, bound to take due care that the execution thereof should not lead to injury to others. It became the duty of its foreman in charge to do all that his master and his master's interest in the premises might call for in order to avert any possibility of risk to the master by reason of anything happening within the scope of the master's plenary authority as to the execution of the contract with the proprietor.

If the sub-contractor had attempted to do anything in execution of its share of the work which might have tended in any way not merely to render the appellant liable to an action upon its undertaking with the proprietor, but tended to involve it in the risk thereof, I think appellant would in such event have been entitled to insist upon desistment from such attempts so far as could reasonably be required.

Suppose the appellant, instead of being a corporation, had been a person then in the building under such circumstances at the time the metal in question was brought by the carters, he would have had a perfect right to have insisted upon the metal being placed back out of the way of doing any damage to any one. And even if there was no legal obligation resting upon such a man to interfere actively, regarding which I say nothing, his right, nevertheless, to interfere as against a sub-contractor insisting upon running such risks, would be undoubted, unless, of course, he had contracted specifically not to do so; and in some classes of cases he might find he had rendered himself liable for the acts of his sub-contractor.

What I wish to make clear is that, though there is a line, yet it is by no means a well-defined line, in law, which renders it safe for any man sub-letting his work to overlook the delinquencies of his sub-contractor in this regard.

Then, in view of all this and the reasonable expectations of a contracting employer to have his foreman look after his interests, how can I say that one who did so under such circumstances as existed here could be disavowed as acting without authority and beyond the scope thereof? And when we find that this foreman exercised his authority on more than one occasion by taking the gang under his charge, or four or five of them, to do the very thing now complained of, to help the sub-contractor, is it not

CAN.
S. C.
MCGUIRE
v.
BRIDGER.
Idington, J.

drawing it rather fine to say he had authority on several occasions to do this, but yet none to direct how these men of the appellant should assist in such work? Is it not asking too much when appealing here to ask us to say he had authority to spend his master's money in this way, but none to direct the proper use of such service? To say he had authority to take the appellant's men to do the work, but none to insist upon its being done in a proper manner, seems illogical.

Now, there was one of these occasions on which the appellant's foreman induced the carter's men to place the goods in a proper place, but on this latter occasion the foreman neglected this duty or part of his duty. As to this later occasion, he denies interfering in any way but by helping with his men acting in obedience to his orders. The carter's man says, not only did he interfere, but actually directed where the gang, including his own, were to put the metal in question.

It was for the jury to say which of these men they believed, and I assume they believed the carter's man.

And when we are asked to accept such denial of authority as the foreman did make, I must assume on the facts that this jury had to act upon they had a right to discredit this part of his story and did so. Moreover, no one over this foreman has ventured to appear in the witness box and add to the force of his denial or give more definite meaning to the limits of his authority than what we may gather from the course of conduct he manifests and the definition he gives in his evidence quoted hereafter.

The jury were then face to face with such narrow line of authority as is implied in the substantial leading facts relative to appellant's relation to the whole matter in ways I have set forth and in addition thereto as appears in the following evidence of the foreman:—

Q. In the month of November, 1909, you were foreman for the W. J. McGuire Company, Limited, were you not? A. Yes.

Q. In the Jacobs Building on St. Catherine Street? A. Yes.

Q. You had been foreman for a long time before that?

Witness: Foreman for the McGuire Company?

Counsel: Yes, in that building?

A. Since the building started.

Q. When would that be? A. About May, 1909. No, I think it started in the fall.

CAN.
S. C.
McGuire v. Bridger.
Idington, J.

Q. Were you present in the month of November, 1909, when a delivery was made of a part of the end of a boiler? A. Yes.

Q. What time of the day was that? A. That was just about ten minutes to twelve, or so.

. . . . . .

Q. Did the lorry that brought this piece of iron in stop near this column? A. A little bit from it. Pretty near it, but a little bit away.

Q. When it came in was it lying flat on the lorry? A. Yes.

Q. Then your men with the Meldrum men canted it up and slid it down off the lorry? A. Yes.

Q. You did not lift it clear? A. We had to slide it off the rig.

Q. There was only one passage for a cart to come in from Alexandra Street into the building? A. One passage, yes.

. . . . . .

Q. You were McGuire's principal foreman on the building, were you not? A. Yes.

. . . . . .

Q. You and your men were present during the whole time this boiler front was being put into the position described by you? A. Yes.

Q. Did you not advise them at all in any way as to the manner in which this boiler plate should be placed against the pillar? A. Yes. It was placed against the column, and I suggested that they had better move it a little farther back from the position that we had placed it. I thought it might make it a little safer.

Q. You suggested, I think, that they should give it a little more cant? A. A little more cant.

And, speaking of the part taken in the unloading of the piece of metal which later fell on deceased, he says:—

Q. You had it taken off? A. Yes.

Q. Did you have some of your men there to help you? A. Yes.

Q. How many? A. Well, I cannot say exactly how many.

Q. Did you have ten of them? A. Oh, no. There were three or four of us, anyhow.

Q. You and the men of the W. J. McGuire Company, Ltd., helped the Meldrum people to take that piece of boiler out of the wagon? A. Yes.

Q. And, altogether you placed it where?

Witness: The second piece?

Counsel: Yes, that big piece of iron?

A. We placed it against the column.

I think this evidence, together with the circumstances I have adverted to shewing the relation of appellant to the work in question, form such evidence as could not be withdrawn from the jury.

Upon their verdict so submitted the judgment rests and must be upheld.

I, therefore, think the appeal should be dismissed with costs.

Duff, J.

Duff, J.—The question of agency is a question of fact, and the point to be considered in this connection is whether there

CAN.
S. C.
McGUIRE
v.
BRIDGER.
Duff, J.

was evidence upon which the jury could reasonably find that, in taking charge of the boiler ends, Finlay acted as servant or agent for the appellants. Consider the facts:—Jacobs, the owner, who was constructing the building, had let various contracts; one was a contract for doing the concrete work, that is, for putting up the frame of the building; another was a contract with the appellants for the plumbing. Under the latter contract the appellants were obliged to have certain boilers in operation according to a certain specification on a named date.

The appellants let to the Robb Engineering Co. a sub-contract for the erection and completion of these boilers, which the Robb Company agreed to finish by November 30, 1909. There can be no doubt, of course, that McGuire & Co. were entitled to sub-let a part of their contract with Jacobs, their relation to Jacobs being that of contractors merely who had undertaken to produce a certain result. The contract with Jacobs, which is in the evidence, obviously contemplated the letting of sub-contracts. On the other hand, McGuire & Co. specifically covenant to

> indemnify and save harmless the owner from all claims, loss, or cost by reason of damage or injury to any persons or property through the negligence

of these sub-contractors.

The Robb Engineering Co. had their factory at Amherst, N.S., where the parts required for the execution of their contracts were made. These they shipped to Montreal, and they appear to have been in the habit of sending these parts to the building without making any express provision for their reception. Of this the appellants appear to have been complaining. It was obviously in the interest of McGuire & Co. to see that these parts were received and properly taken care of. In the first place, they were under a contract to complete their work by a given time. In the next place, they were bound by the covenant to which I have already referred, and pieces of heavy machinery, carelessly placed by carters without proper directions, may cause damage. In the third place, it might cause inconvenience to other contractors working in the same building, and all the contractors so situated would be naturally interested in mutually accommodating one another in order to avoid unnecessary delays in executing the work; while Robb & Co. were sub-contractors, for whose actions they would not be directly responsible in a legal sense, still these

sub-contractors had been engaged by McGuire & Co. to perform a part of their contract, and it was altogether natural that they and their workmen should take an interest in seeing that the sub-contract was not carried out in such a way as to give unnecessary trouble to others. All these points lend weight to the probability that McGuire & Co. would expect their foreman, in their interest, to exercise some supervision in the absence from the premises of anybody having authority from Robb & Co. in the placing of these pieces.

Coming now to the particular circumstances:—the boiler ends in question were shipped by Robb & Co. to McGuire & Co. It is not explained why this was done in this particular case unless it was in accordance with the usual practice. At the request of Robb & Co.'s manager in Montreal, the McGuire Company gave to a carter furnished by Robb & Co. the shipping documents shewing the articles directed to McGuire & Co., with instructions to obtain them from the railway company and deliver them at the premises in question. In the circumstances the carter naturally treated these goods as goods deliverable to McGuire & Co., and I think the jury would be entitled to find that they were so treated with the concurrence of McGuire & Co. When they reached the premises, there being nobody there representing Robb & Co., Finlay, McGuire & Co.'s foreman, assumed control of them, and it is upon Finlay's negligence, assuming there was negligence, that McGuire & Co. are charged.

Taking all the circumstances I have mentioned together, it appears to me that the jury would be entitled to find—and I must say that I do not think that it would be a conclusion in the least unreasonable—that Finlay was acting in the interest of and for McGuire & Co. with their authority, and not either giving his services to the Robb Co. or simply acting gratuitously in general interest.

I have only one more word to add on this point, and that is with the object of emphasizing this:—That the question as to whether Finlay was acting within the scope of some authority he had from the McGuires is simply a question of fact, and for the purpose of determining this question I do not think that judicial decisions upon other states of fact can be of much value. The point upon which the jury had to pass was whether, in view

CAN.
S. C.
McGUIRE
v.
BRIDGER.
Duff, J.

of all the circumstances, Finlay was doing something which he and his employers understood he was there to do. That question was, I think, put to the jury with entire fairness and in such a way that I believe they could not fail to understand the nature of the question they were called upon to decide, and being, indeed, far from certain that I should not have taken the same view as the jury did upon this question, I think there is here no good ground for setting aside their verdict.

Then comes the question as to whether there was evidence of negligence. Now, I think the test to be applied is this. The owner of the building as occupier owed a certain duty to persons invited to come upon the premises in the ordinary course of business. I think that, as regards positive acts, the responsibility of the concrete contractors would be the same as that of the owner, and I think, also, that any other person engaged in the work of construction, as the appellants were, would be under precisely the same responsibility as to his own positive acts in relation to such persons as the owner would be. To put the point a little more concretely:—McGuire & Co. were, in my judgment, bound, as regards such acts, to use the same care, that is to say, they were under the same duty to persons properly on the premises in the course of their business with any of the contractors engaged in the construction of the building as the owner would be obliged to use with regard to persons invited by him or as any particular contractor would be obliged to use with regard to the safety of persons invited by that contractor himself. I am now speaking, let me repeat, of positive acts only. What, then, is the measure of that duty? The nature of the situation with which we are dealing must not be left out of sight. Here is a building in course of erection. Different contractors are engaged at one and the same time in carrying on different operations. In the very nature of things the possibilities of injury are numerous. It would be most unreasonable that anybody going into such a place, in the ordinary way of business, should expect to find himself at every point protected against these possibilities as if he were a person incapable of taking care of himself. A person going into such a place assumes a certain amount of risk. He himself assumes the responsibility of exercising vigilance of a person of ordinary faculties and judgment in order to avoid the reasonably probable

CAN.

S. C.

McGuire v. Bridger.

Duff, J.

dangers of such a place, and the responsibility of the occupier must be considered in relation to this responsibility of the invitee. The result, I think, has been summed up by Mr. Justice Atkin in *Lucy* v. *Bawden*, [1914] 2 K.B. 318, in the proposition that the duty is to avoid setting traps.

Coming to the particular case before us, Bridger, so long as he kept to the way provided for persons coming on the premises, or apparently provided, was entitled to assume that there were no traps. I have had a great deal of difficulty in satisfying myself whether there was evidence in this case to convict Finlay of doing what could be fairly called setting a trap. I think the point is a very doubtful one, and I do not feel justified in going further than saying that I am not satisfied that there was not sufficient evidence to support the finding of the jury.

Brodeur, J.

Brodeur, J.:—It is stated by the appellant company that the respondent's husband was a trespasser in the Jacobs building. The evidence shews, on the contrary, that the deceased had an implied invitation to go into that building to get employment. He was waiting for that purpose when he was struck by the end of the boiler in question. The jury were justified in finding that the respondent's husband was lawfully in the place where he was injured.

As to the question of negligence charged against the appellant company, the jury found that the accident was

due to the fault, want of care and lack of supervision of the Robb Engineering Company and W. J. McGuire & Co., Limited, by placing the piece of iron in a dangerous position.

The appellant, the W. J. McGuire Co., had the contract for the whole heating system in the Jacobs building. They could not sublet their contract without the written consent of the proprietor. They assumed also by their contract with Jacobs

all liability for damage or injury occurring to any persons or property through the negligence or illegal acts of the said party of the second part, his contractors, sub-contractors, agents or servants.

The appellant made a sub-contract with the Robb Engineering Co., of Amherst, N.S., to supply and install the boilers that formed part of the heating system. One of the clauses of that sub-contract was to the effect that the appellant was

to provide right-of-way, openings in buildings, fences etc., and *space necessary for the delivery and installation of the machinery.*

CAN.

S. C.

MCGUIRE v. BRIDGER.

Brodeur, J.

The boilers were sent from Amherst to Montreal and consigned to the appellant company. It was, however, on the instruction of the local agent of the Robb Engineering Co. that the boilers were carted from the railway station to the Jacobs building. But there was nobody else representing the Robb Engineering Co. to receive the goods on the premises; and, as they were consigned to the McGuire Company, the carter applied to the McGuire Co.'s foreman to get the place where those goods should be placed, and the employees of the McGuire Co. also helped in unloading the goods and in negligently placing them in a part of the building where carts were constantly passing by.

The jury seems to have been properly charged by the Judge presiding at the trial, since the counsel representing the appellants stated, in answer to the Judge's inquiry:—

My Lord, I am thoroughly satisfied with your Lordship's charge.

The jury, with all those facts and circumstances in evidence, have found that the appellants were guilty of negligence. That verdict has been upheld by the unanimous judgment of the Court of Review.

The jury could find the verdict they have rendered; and, in view of articles 498 and 503 of the Code of Civil Procedure, the appellants would not be entitled to have the plaintiff's action dismissed or a new trial granted.

I would refer to the case of *Harold* v. *City of Montreal*, 3 L.C.L.J. 88.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. GRAND TRUNK R. CO.

(Myrtle Bridge Case.)

Supreme Court of Canada, Idington, Duff, Anglin, and Brodeur, JJ. March 23, 1914.

1. RAILWAYS (§ II B—16)—CROSSINGS—CROSSING BY OTHER RAILWAY—CONTRACT TO "MAINTAIN"—FUTURE INCREASED TRAFFIC—EFFECT.

The obligation of the junior railway which, on obtaining by contract with the senior road the right to cross its line by a subway or undercrossing, covenanted to construct the crossing according to specifications approved by the chief engineer of the senior road, to repair it and keep it in a good and safe state, and to repay to the latter the cost of necessary work done in the event of the junior road failing to "maintain" the crossing to the satisfaction of said chief engineer, is not restricted to the keeping of the crossing in repair merely as it was when it was first passed upon by the chief engineer, but, in view of an intention to be gathered from the entire contract, may be interpreted as covering repair and maintenance which is requisite for the heavier traffic incident to the increased business which time had developed on the senior road.

[*Atty.-Gen.* v. *Sharpness*, 30 Times L.R. 273; *Leek Improvement* v. *Stafford Justices*, 20 Q.B.D. 794; *Sevenoaks* v. *London C. & D.*, 11 Ch.D. 625, referred to.]

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. GRAND TRUNK R. CO.

Statement

CASE stated by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada on the question of law raised by the parties.

The following is the case stated by the Board, omitting the portions not material on this appeal:—

1. For the purpose of the construction of the Ontario and Quebec Railway Company's line (now controlled by appellants), that company entered into an agreement with the Midland Railway Company (controlled by respondents), providing for four crossings of the line of that company, three of which, under the agreement, were to be effected by means of structures built over the line of the Midland, and one (the crossing now in question) by a structure carrying the Midland track over the line of the Ontario and Quebec Railway.

2. The following is a true copy of said agreement:—

"This deed made this twenty-first day of February, in the year of Our Lord, 1883.

"By and between:

"The Midland Railway Company of Canada, hereinafter called the Midland Company, of the first part, and

"The Ontario and Quebec Railway Company, hereinafter called the Ontario Company, of the second part.

"Whereas the Ontario Company propose with their line to cross the lines of the Midland Company at the points and in the manner following, that is to say:

"The Whitby section by an undercrossing at or near Myrtle station.

. . .

"And whereas the Ontario Company desire the Midland Company to assent to the said respective crossings, and the Midland Company is willing to do so, but only upon and subject to the terms and conditions hereinafter expressed, and the performance of which forms the consideration for the said consent.

"Therefore, this deed witnesseth that in this deed the words 'The Ontario Company' shall mean the party hereto of the first part, and the words 'The Midland Company' shall mean the party hereto of the second part.

"That in consideration of the premises and of the covenants and agreements hereinafter contained on the part of the Ontario Company to be by the Ontario Company observed, kept and performed, they, the Midland Company, have and by these presents do grant unto the Ontario Company, their successors and assigns forever, the easements, rights, and privileges of crossing with their railway the lines of the Midland Company as follows, that is to say.—

"4. At Myrtle, on the Whitby and Port Perry section of the Midland Company's line, by an undercrossing

"With respect to the said undercrossing of the Midland Company's Whitby section or line, it is expressly covenanted and agreed that the Ontario Company shall prepare and submit to the chief engineer of the Midland Company the detailed plans and specifications for the work to be done.

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. GRAND TRUNK R. CO.

Statement

"That these plans and the specifications for the work shall, before the work is commenced, be settled and approved by the said chief engineer of the Midland Company, and when approved by him shall be signed by him, and his signature shall be the only evidence receivable of his said approval.

"That the whole of the material used in the work of every kind, and the workmanship, shall be in accordance with the plans and specifications, so after the execution of these presents to be settled, agreed upon, and signed, and shall be done to the entire satisfaction of the said chief engineer of the Midland Company.

"That the said several crossings above mentioned shall all be maintained at the cost of the Ontario Company, and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company; and against all damage because of the construction or non-maintenance of the said crossings, and each of them, the Ontario Company shall and will save the Midland Company harmless.

"That, if at any time the Ontario Company fail or neglect to maintain the said crossings respectively to the satisfaction of the chief engineer for the time being of the Midland Company, the said last-mentioned company may cause such repairs to be made, or said maintenance to be done, as by their said chief engineer may be deemed necessary, and the cost of so doing shall, on the account therefor, certified by the said chief engineer of the Midland Company, being presented, be paid in cash."

4. The Canadian Pacific Railway Company, in operating a steam shovel used in making betterments in its line, damaged the bridge carrying the Midland line over its tracks (the crossing in question), and on February 6th, 1913, made application to the Board for its approval of temporary false work to support the bridge.

5. The Grand Trunk Railway Company (owning and operating the Midland Railway), then made application to the Board for an order directing the Canadian Pacific Railway Company, at its expense, to reconstruct, in accordance with stress sheet, dated March 5th, 1913, and submitted therewith, and thereafter maintain in a good and proper condition of repair, the bridge in question (which provides the undercrossing referred to in the agreement), so that the same shall be safe for the passage thereover of the traffic on the Grand Trunk Railway. It is on this application that Order No. 19298 has been made by the Board.

6. Under the ordinary practice of the Board, the Canadian Pacific Railway, as the junior line, would have to provide a bridge sufficient for the present proper and reasonable requirements of the Grand Trunk, as ordered by the Board.

7. The crossing in question having, however, been constructed under the above agreement, and not under the Board's order, the issue between the parties is determined by the agreement.

The question reserved at the request of the Canadian Pacific Railway Company for determination by the Supreme Court of Canada is:—

Whether or not, under the agreement, the obligations of the Canadian Pacific Railway Company are confined to maintaining the bridge as originally constructed, irrespective of the increased requirements of traffic carried on the Grand Trunk Railway.

8. Should the opinion of the said Court be that the liability of the

Canadian Pacific Railway Company is so limited, the Grand Trunk Railway Company will pay to the Canadian Pacific Railway Company the sum of Two Thousand Two Hundred and Fifty Dollars (2,250), the additional cost of a bridge to carry the increased load, and one-eighth of the annual cost of up-keep.

The appeal was dismissed.

E. W. Beatty, for the appellants.

W. H. Biggar, K.C., for the respondents.

Idington, J.

IDINGTON, J.:—The dispute in question herein turns upon the construction of the following clause in the agreement between the respective predecessors in title of the parties hereto.

That the said several crossings above mentioned shall all be maintained at the cost of the Ontario Company, and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company; and against all damage because of the construction or non-maintenance of the said crossings, and each of them, the Ontario Company shall and will save the Midland Company harmless.

It is the crossing that is to be maintained and evidently in perpetuity. To interpret the word "maintained" (a word of varying and doubtful import) as used here we must look at the scope and purpose of the whole agreement, and bear in mind the relation of the parties to each other, and why and how that came about. We must also bear in mind that the parties must have observed and known in 1883 (what every person having to do with railway building and maintenance then knew so well) that there was a continuous tendency to increase the load and consequent strain put upon such structures as this, and we must, therefore, assume that they anticipated the possibility of reconstruction to meet such emergency.

When we bear all these things in mind, I think we must conclude that the party covenanting became bound to provide against each and all such emergencies, and undertook with the other to bear whatever expenses were necessary to maintain the crossing in such manner as to enable that other safely to pass over with such load as at the time and occasion of its doing so might reasonably be used in the course of its business.

I do not think that the reference made to the manner in which other crossings were to be then executed can determine anything relative to this, or that the manner in which this one was to be constructed or the method by which the temporary

CAN.
S.C.
CANADIAN PACIFIC R. CO. v. GRAND TRUNK R. CO.
Idington, J.

agreement for executing the work was specified can have anything to do with the matter now arising. The parties were very properly trying in an amicable manner to produce by such details being inserted in the agreement what would suit the then time and occasion and be satisfactory for use for a reasonable length of time at least.

The time seems to have come, after thirty years of development, that the structure is no longer adapted for the service now demanded. Of course, we have nothing to do with the facts relative to the necessity. All that we have to do is to assume that such a necessity has arisen by reason of the increased requirements of respondent's traffic, and determine whether or not the agreement is to be interpreted and construed as an undertaking against such possible necessity. I think it is to be so interpreted and construed, and that the submission must be answered accordingly.

I do not see any provision made for the costs of this appeal. Of course, if there is none or understanding relative thereto, the usual rule of costs being borne by the unsuccessful party will have to prevail.

Duff, J.

DUFF, J.—There were two observations in the able argument of Mr. Tilley which I fully accept: First, that, in construing an agreement of this character, one should be cautious in taking for granted that the circumstances immediately surrounding the transaction give the clue to all the considerations by which the contracting parties were actuated; and exceedingly cautious also in allowing such circumstances to suggest ambiguity in clauses not otherwise difficult to construe. Second, the agreement ought to be construed as a whole—in the sense that one ought not to assume that an apparently leading provision is an overruling provision.

[The terms of the agreement were here set out.]

The principal point made by Mr. Tilley in support of the appeal is that (as the undercrossing at Myrtle was to be constructed conformably to plans and specifications "settled and approved" by the chief engineer of the Midland Company, and "to his entire satisfaction,") the whole duty of the Ontario Company was to maintain the undercrossing and keep it in sufficient repair and in a "good and safe state," as it was when it was

passed on by that officer. That, no doubt, is a possible construction. But it is not by any means the only construction. The specific provisions with respect to the Myrtle crossing may without difficulty be read as establishing simply a condition precedent to the right of the Ontario Company to cross the line of the Midland Company at that place, and not as limiting, in relation to that crossing, the subject matter of the general provision of the contract requiring the Ontario Company to maintain all the crossings "in a good and safe state so as in no way to endanger the property of the Midland Company." I think the latter is the preferable view, because, observing strictly the cautions above indicated (as I think they ought to be observed in construing this agreement), both parties must be presumed to have acted in view of the probability, as the learned Chief Commissioner remarks, of the load being increased from time to time; and it is manifestly improbable that the Ontario Company could have intended that the chief engineer of the Midland Company should be under a duty to his principals requiring him to insist that the initial design and construction of the undercrossing should be sufficient to provide for any increase of load that might take place in the future; and such, obviously, would be the effect of the construction the appellants, as successors to the Ontario Company, now contend for. I think the more satisfactory reading of the provision last referred to is to construe the words

> shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company

as stipulating for maintenance according to a varying standard sufficient to permit the safe passage of traffic as the conditions of traffic over the Midland Company's line might from time to time require. I concur in the view of the majority of the Board of Railway Commissioners as expressed in the judgment of the learned Chief Commissioner.

Anglin, J.

ANGLIN, J.:—In my opinion the scope and character of the obligation of maintenance assumed by the appellants, under the agreement of February 21, 1883, in respect of the crossing at Myrtle, as well as the other crossings with which that instrument deals, is to be found in the provision that

> said several crossings above mentioned shall all be maintained at the cost of the Ontario Company, and shall each always be maintained in a good and safe state, and so as in no way to endanger the property, fixed or movable, of the Midland Company.

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. GRAND TRUNK R. CO.
Anglin, J.

This clause entailed in respect of the other crossings, where the right-of-way of the Ontario and Quebec Ry. Co. is carried over the Midland Railway, the duty of maintaining bridges adequate to bear any increased weight of the rolling stock which the Ontario and Quebec Ry. Co. or its lessees might see fit to use in the future; it entailed a corresponding obligation to provide and maintain a bridge at Myrtle sufficient to carry in safety such rolling stock as the G.T.R. Co. might, in meeting the requirements of future traffic, find it economically necessary or advantageous to employ on its railway. Apart from agreement, there can be little doubt that the G.T.R. Co., as senior road, could have obtained an order imposing this obligation on the Ontario and Quebec R. Co. when it sought the right of crossing. It is most improbable that it was the intention of the parties, by their agreement, to deprive the G.T.R. Co. of any benefit which it might derive from its seniority. There is nothing to indicate an intention to abandon any such advantage. Read in the light of the circumstances under which it was entered into, I think the agreement makes sufficiently clear the obligation to which the Board of Railway Commissioners have held the appellants to be subject.

The appeal should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—The right of one railway company to cross the track of another is as undoubted as its right to cross the land of the original owner. The senior road is then entitled as the original owner to proper compensation. In this case the right to cross was secured by the junior road undertaking to maintain the four crossings mentioned in the agreement,

> in a good and safe state, and so as in no way to endanger the property, fixed or movable

of the senior road.

No compensation in money or otherwise was stipulated. All those four crossings were high level. In three cases subways were to be used by the senior road, and in the other case the subway was to be used by the junior road. Four bridges then were to be constructed and maintained by the junior road.

The appellant, the C.P.R. Co., is the successor in title of the junior road, and the senior road is represented by the G.T.R. Co.

It is pretty clear by the provisions of the contract that the parties contemplated not only the then existing requirements of

the traffic, but also the reasonable improvements consistent with the good administration of a railway.

Heavier engines and trains having required the laying of stronger bridges, the C.P.R. Co. proceeded to build them at the three crossings where their track was passing above the G.T.R. Co. But, having refused to give a similar strength to the bridge that was utilized by the G. T.R. Co., the C.P.R. Co. was ordered by the Railway Commission to do it.

The obligation of the junior road is to see that the crossings should always be kept in such a way that the property of the senior should never be endangered, and even in the case where the subways were utilized by the G.T.R. Co., the C.P.R. Co. is bound to change its height if the alterations made in the size of the cars required it. The contracting parties had not in view then only the present, but also the future, and they thought that the provision of the contract was sufficiently clear to cover stronger bridges if the necessities of the traffic required it.

"Maintenance" would, in the ordinary sense, mean "keep in repair"; but it must vary according to the instrument in which it is found and the circumstances in which it has been used.

It was decided in the case of *Sevenoaks, Maidstone and Tunbridge R. Co.* v. *London, Chatham and Dover R. Co.*, 11 Ch.D. 625, that

> under power to maintain a railway and works, *reasonable improvements, consistent with the purpose* of the undertaking, are included.

Mr. Justice Killam, in construing a contract between the Intercolonial Railway and the G.T.R. Co., said:—

> It appears to me, therefore, that the term "maintenance" *was not limited to keeping the railway and works in the condition in which they were when the contract was made;* and that there was no implied condition that the railway was then in a thorough working condition for the purpose of the future traffic; and *it appears to me that the parties must also have contemplated that these changes would be constantly going on, and that they were going on at the very time the contract was made—as the evidence shewed to have been* the fact, to the knowledge of a number of officials of the Intercolonial Railway. And it must also have been within the contemplation of the parties *that the company should not wait until a portion of the line or some structure or appliance connected with it was wholly unfit for use before repairing, replacing or improving it.* In a work of this kind it is necessary to anticipate and to prepare in advance, in order that it may be kept in a thorough efficient working condition. *The cost of anything reasonably required for this purpose appears to me to be part of the cost of maintenance to which the Crown is bound to contribute.*

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. GRAND TRUNK R. CO.

Brodeur, J.

Among the authorities cited in support of this opinion, Mr. Justice Killam cites the case of *The Leek Improvement Commissioners* v. *Justices of the County of Stafford*, 20 Q.B.D. 794, in which Lord Esher said, at p. 796:—

> It might be that if, owing to the increasing traffic, it became necessary to use harder stone than had been used previously to repair such a road, so as to provide a better macadamized road to meet the requirements of the traffic, the highway authority in so doing would only be maintaining the road.

We have a very recent case decided by the Court of Appeal in England, on January 28 last, *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.*, 30 Times L.R. 273, bearing on the question at issue in this case. By an Act passed in 1791, a company was empowered and directed to make bridges to carry highways over a certain canal. The Act provided that all such bridges should from time to time be *supported, maintained* and kept in sufficient repair by the company. It was held

> that the company was under the obligation to *repair the bridges according to the standard* of the traffic requirements of the present day.

These authorities are conclusive, and, in my opinion as to the provisions of the contract, the circumstance of the case, where a junior road obtains the use of a senior road without any compensation, the fact that a railway company has no right to cross the track of another so as to impair the exercise of its franchise shews that the G.T.R. Co. had the right to require that the bridges should be of such a character as to properly carry on its business.

The appeal should be dismissed with costs.

SASK.

S. C.

BAXTER v. ELLIOTT.

Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. November 28, 1914.

1. COSTS (§ II—28)—SCALE; CLASS OF ACTION—DISTRICT COURT—"SMALL DEBT PROCEDURE."

> Where a counterclaim filed in a district court (Sask.) is for a debt or liquidated amount and properly a matter of set-off, the dismissal of such counterclaim with costs carries costs to the plaintiff on the district court scale and not under the small debt procedure if the excess claimed by the defendant over the admitted portion of the plaintiff's claim was over $100.
>
> [*Amon* v. *Bobbett*, 22 Q.B.D. 543, 58 L.J.Q.B. 219, applied.]

SASK.

S. C.

BAXTER v. ELLIOTT.

APPEAL from a District Court on a question of taxation of costs.

Appeal allowed.

T. F. Morton, for the appellant.

C. W. Hoffman, for the respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—The plaintiff brought action against the defendant on a promissory note for $50 and interest, an account for work done and materials provided, and for goods sold and delivered, amounting to $81.05, or together, including interest on note, $5.25, for the sum of $136.30. The defendant admitted the note but denied owing the rest of the claim, and he counterclaimed for work done, goods sold and delivered, board and lodging furnished the plaintiff's wife and daughter, and care and feed of the plaintiff's horse, making together, $176.35, or after deducting the amount admitted, the sum of $121.10. At the trial, judgment was entered for the plaintiff for $55.25 and costs, and the counterclaim dismissed with costs.

Under rule 18 of the District Court Rules, plaintiff taxed his costs of action under the small debt tariff, and his costs on dismissal of the counterclaim were taxed under the same tariff. An appeal was taken from the taxing officer to the District Court Judge, who, on a review of the taxation, decided that the plaintiff could only tax his costs on dismissal of the counterclaim under the small debt tariff, which would be 10 per cent. of the amount of the counterclaim, from this decision the plaintiff appeals.

The question under what scale the plaintiff can tax his costs of defence to the counterclaim depends upon the construction to be placed upon r. 18 of the District Court Rules. This rule is that if in an action in the District Court the plaintiff recovers $100 or less "he shall recover only such costs as he would have recovered had the action been brought under the provisions of the small debt procedure." The English rule marginal No. 987, says that if the plaintiff recovers a sum not exceeding £50 "he shall be entitled to no more costs than he would have been entitled to had be brought his action in a County Court."

SASK.

S.C.

BAXTER v. ELLIOTT.

Newlands, J.

These rules being practically the same, the decision of the Court of Appeal in England in *Amon* v. *Bobbett*, 22 Q.B.D. 543, 58 L.J.Q.B. 219, will apply. The following citation from the judgment of Bowen, L.J., gives the facts of that case and the reasons for the decision of the Court that the plaintiff's costs of his successful defence of the counterclaim should be taxed on the High Court scale. On p. 546, he says:—

> The facts are simple. There was a claim for £48, which might have gone to the County Court, but was brought in the Superior Court; the defendant had a counterclaim (a real counterclaim, not a set-off) in the nature of a cross-action for over £100, which, as a separate action, he could only have properly brought in the Superior Court. The plaintiff succeeded on his claim, in fact it was not disputed; the counterclaim failed; therefore the plaintiff succeeded both on the original claim, and the counterclaim. Then arose the question of costs. The plaintiff admits that, having recovered only £48 on his claim, he is touched by Order LXV., r. 12, and as regards his claim, can only get costs on the County Court scale. But the defendant seeks to go further, and says that as the plaintiff was suing in the High Court for a sum which could have been recovered in the County Court, he is only entitled to costs on the counterclaim on the County Court scale, although that counterclaim was for a sum exceeding £100.
>
> We have a simple question to decide; whether a plaintiff, who recovers less than £50 on his claim, and admits that in respect of it he is not entitled to costs on the High Court scale, and who also succeeds on a counterclaim, is to be limited as regards the counterclaim to County Court costs. This question depends entirely on Order LXV., r. 12, upon which there are two opposite contentions. The plaintiff admits that the rule applies, but says that the counterclaim is not part of his action, and that the rule only cuts down the costs of his action. The defendant says that the counterclaim is part of the litigation, and that the costs of the whole litigation are cut down by the rule when the plaintiff might have commenced proceedings in the County Court. Which is the true construction? It is true that in many of the rules the counterclaim is spoken of as though it were part of the procedure in the plaintiff's action; but it has been held in many cases that for the purposes of taxation on a counterclaim should be treated as though it were a cross-action. It is obvious that the view which is to be taken of a counterclaim must depend upon the particular rule in which it is dealt with; and if we find that the mixing up of the claim and counterclaim together (so to speak) would work injustice, then we must adopt the other view, and disconnect the counterclaim from the claim, so far as may be necessary for the purposes of justice. Here, the plaintiff has, it is true, chosen the forum; but a plaintiff who has proved successful on a counterclaim can hardly suppose when he brings his action that a shadowy counterclaim is about to be waged against him; he is not responsible for its being set up. As to the costs then which belong to the choice of forum (if I may so phrase it), the plaintiff can only get County Court costs; but why should he only get County Court costs on an issue for which he is not responsible, an issue which could not have been brought in the County Court, and upon which he has proved successful? Why

should his right to costs be so limited? To cut down the plaintiff's right to costs in this fashion would be to work injustice; and moreover, the rule does not require that interpretation; it uses the word "entitled"; entitled where? It can only mean entitled "in his action," and the language of the remainder of the rule shews that these words should be read in this place; the rule really deals with the costs appurtenant or appendant, so to speak, to the plaintiff's own action.

If the facts in this case are the same, the rules being practically the same, the reasoning of Bowen, L.J., will apply, and the plaintiff would be entitled to tax his costs of defence to the counterclaim on the District Court scale and not on the small debt scale.

In only one particular do the cases differ, and that is in the nature of the counterclaim. Both the learned Judges who delivered judgments in *Amon* v. *Bobbet*, *supra*, Lord Esher, M.R., and Bowen, L.J., emphasized the fact that it was a real counterclaim and not a mere set off. In this case the counterclaim, being for a debt or liquidated amount, is properly a set-off or defence to the plaintiff's action, and not a counterclaim, if it were not for the fact that it exceeds the amount of the plaintiff's claim and the defendant asks for judgment for the excess. After admitting a part of the plaintiff's claim the defendant claims $121.10 in excess. This amount could only be recovered under the general procedure of the District Court. I am of the opinion, therefore, that this case is similar to *Amon* v. *Bobbett*, and the reasoning of the learned Judges in that case applies.

The case of *Cox* v. *Christie*, 5 Terr. L.R. 475, cited by the defendant has no application to this case. That action was brought under the small debt procedure, and the only question there was whether the plaintiff having succeeded on the counterclaim, could tax costs of the counterclaim as well as his costs of action. R. 617 of the Rules of the Supreme Court, which was then in force and which was similar to District Court r. 18, was not in question.

I think, therefore, the appeal should be allowed. The bill of costs which the plaintiff claims will have to be referred to the clerk for taxation, as plaintiff has charged a large number of items which are not properly costs of the counterclaim, but costs of the action, and he has put in a number of items for which there is no provision in the tariff.

The plaintiff should have the costs of the appeal.

CAN.

S. C.

UPLANDS, LTD. v. GOODACRE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. June 1, 1914.

1. CONTRACTS (§ II D—188)—BUILDER'S CONTRACT—CONDITION; CERTIFICATE OF ABANDONMENT—NECESSITY OF CERTIFICATE.

Where a building contract stipulates as a condition precedent to the owner's right to take over the contractor's plant for use in completing the works that the manager of the owning company shall certify that, in his opinion, the contractor has abandoned the contract, such certificate is necessary to give the owner the right to the possession and use of the contractor's plant as against a sheriff's execution against the contractor, although the latter had written the owner giving notice of the stoppage of the works on account of alleged unjustifiable interference therewith.

[*Uplands* v. *Goodacre*, 13 D.L.R. 187, 18 B.C.R. 343, affirmed on other grounds.]

Statement

APPEAL from the judgement of the Court of Appeal for British Columbia (18 B.C.Rep. 343, 13 D.L.R. 187, affirming the judgment of Gregory, J. (12 D.L.R. 407), at the trial, by which an interpleader issue to determine the ownership of goods seized by the sheriff under an execution issued by the respondent, as judgment creditor of the Anderson Construction Company, was decided against the present appellants.

The appeal was dismissed, DUFF, J., dissenting.

Nesbitt, K.C., for the appellants.

Ewart, K.C., for the respondent.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J., agreed with ANGLIN, J.

Idington, J.

IDINGTON, J.:—This appeal turns, I think, upon the true construction of the application to the facts of the following part of paragraph 5 in the contract between appellant and the Anderson Construction Company:—

5. Upon the insolvency of the contractor, or upon an execution being levied on his goods, or upon a judgment in a Court of British Columbia being obtained against him, which shall not be satisfied or secured within fourteen days, or upon his making arrangements for assignment in favour of his creditors, or upon the manager certifying under his hand to the company that, in his opinion, the contractor

(*a*) Has abandoned the contract, or . . .

Then the company, without in any wise prejudicing any other of the rights or remedies of the company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the company and manager thereby.

The contractor, by a letter of remonstrance with regard to the alleged unjustifiable interferences of the appellant, wrote appellant notifying it of the stoppage of the work. Thereupon the appellant's president had directed some of his men to take possession of the goods in question, but, instead of adopting the methods specified in the contract for expelling the contractor therefrom, and thereby determining the contract, entered into correspondence with the contractor's surety to induce it to proceed with the contract. Meantime the sheriff seized the goods, which were thus, in my view of the facts and reading of the contract, merely held tentatively in possession. To speak of such a possession as that which might have ensued upon a determination of the contract within and according to the terms thereof and a possible bar to a sheriff's seizure, seems a misinterpretation of what actually happened.

It is beside the question to set up the doubtful state of solvency or insolvency. For, even if insolvent, the contractor was not *ipso facto* by the terms of this contract, to be considered as expelled from the contract and the right of property or possession in its tools and material changed.

It is the election beyond doubt to actually expel it from and terminate the contract that is the right given.

The method of doing this, if intended before the seizure, certainly fell far short of what the contract had in contemplation. And as a result the sheriff's seizure cannot be displaced or the claim that it was irregular, and such as only a trespasser might have effected, be upheld.

The appeal must, therefore, I think, be dismissed with costs.

Anglin, J.

ANGLIN, J.:—While unable to accept the construction of the agreement, under which the appellants assert a right to possession of the property in question as against the sheriff, which would give them the right to take possession only if they intended to proceed themselves to complete the works and not to do so through other contractors, I am of the opinion that this appeal fails on other grounds.

The agreement prescribes certain alternative conditions precedent to the appellants' right to take possession of and use the plant and materials of their contractors, the execution debtors. Two of those conditions which they claim to have been fulfilled

CAN.
S. C.
UPLANDS, LTD. v. GOODACRE.
Anglin, J.

are insolvency of their contractors and abandonment of the contract.

Insolvency, though by no means improbable, has not been proved.

The contract requires that its abandonment shall be certified under the hand of the manager of the company before the right to take possession of and use the contractors' materials arises. I cannot accept the suggestion that this stipulation was so wholly in the interest of the contractors that it could be and was waived by their letter stating that for certain reasons they would be unable to proceed with the work. Having chosen to make the procuring of this certificate a condition precedent to their right to take possession on abandonment, I am of the opinion that without it the appellants cannot establish a right to possession as against the sheriff.

Moreover, I am not satisfied that there was in fact an abandonment by the contractors within the meaning of the provision of the contract which is invoked. I would, on these grounds, dismiss the appeal with costs.

CAN.
Ex. C.

PICHON v. THE "ALLIANCE No. 2."

Exchequer Court of Canada, B.C. Admiralty District, Martin, Local Judge in Admiralty. June 12, 1914.

1. ADMIRALTY (§ II—8)—FISHING TACKLE ON VESSEL—"NECESSARIES"—WHAT CONSTITUTES.

Fishing stores such as hooks, gaffs, nippers, and knives used by a boat in the halibut fishing trade are as much "necessaries" in admiralty law as are sailing stores to a vessel engaged only in transportation.

[*Victoria Machinery Co.* v. *The "Canada,"* 17 D.L.R. 27, 18 B.C.R. 511, referred to; *The "Dundee,"* 1 Hag. Adm. 109, 2 Hag. Adm. 137, followed.]

Statement.

CLAIM for fishing tackle which it is alleged come within the term "necessaries."

A. J. Patton, for plaintiff.

F. C. Elliott, for ship.

Martin, J.A.

MARTIN, LOCAL JUDGE IN ADM.:—This is a claim for fishing tackle, such as hooks, gaffs, nippers, and knives used by the fishing schooner "Alliance No. 2" in her business as a halibut fishing boat, which it is alleged come within the term "necessaries," lately considered by me in the case of the *Victoria Machinery*

Depot Co. v. *The "Canada"* (1913), 17 D.L.R 27, at 30, 18 B.C.R. 511, wherein the leading authorities are collected. After a further consideration of them and others, cited chiefly in Roscoe's Admiralty Practice (3rd ed.) 266, I have reached the conclusion that these fishing-stores, as they are properly called, are just as much necessaries as are sailing-stores, to a vessel engaged in that occupation. In the case of the whaler "*Dundee*" (1833-7), 1 Hag. Adm. 109, 2 Hag. Adm. 137, the fishing-stores she had on board, viz., "boats, fishing-tackle, such as harpoons, lines and rockets, casks and various other implements," independently of her sailing stores, were held to be "appurtenances" within the meaning of the 53 Geo. III. ch. 159, and there is no distinction, for the purposes of the present case, between necessaries and appurtenances, because unless she were provided with them she could not sail for the fishing grounds. The subject is considered by Lord Stowell, 1 Hag. Adm. at pp. 126-7, with his customary lucidity, and he summarizes it in saying that:—

> A ship may have a particular employment assigned to her, which may give a specialty to the apparatus that is necessary for that employment. A ship built for the reception of galley slaves must have such a peculiar apparatus. Whether a whaler is originally built with any peculiarity of construction for that service, is more than I know; but this is clear, that unless she has various appurtenances not wanted in other ships, as well as a crew peculiarly trained, she had better stay at home, than resort to the Arctic regions, where alone her function can be exercised.

I hold, therefore, that these fishing stores are necessaries to this fishing vessel and judgment will be entered for the amount already agreed upon.

Judgment accordingly.

MAXWELL v. CAMERON.

Manitoba King's Bench, Galt, J. October 28, 1914.

1. MORATORIUM (§ I—1)—FORECLOSURE DECREE—ITS FORM UNDER ACT.

   A foreclosure decree as to the purchaser's interest under a land purchase agreement will, since the Moratorium Act, 1914, Man., be conditional upon the non-payment of the principal, interest and costs within one year from the taxing officer's certificate, together with subsequent interest to the date of payment.

2. JUDGMENT (§ I E—35)—FORM AND SUBSTANCE—CONFORMITY TO PLEADINGS AND PROOF—RELIEF NOT SPECIFICALLY CLAIMED.

   A general claim for further and other relief made in the plaintiff's statement of claim, will not, upon a motion for judgment in default of defence entitle the court to award any relief beyond that which is specifically claimed.

   [*Faithfull* v. *Woodley*, 43 Ch.D. 287, applied.]

MAN.

K. B.

MAXWELL v. CAMERON.

Galt, J.

MOTION for judgment.

Order accordingly.

E. F. Haffner, for plaintiff.

GALT, J.:—Motion for judgment.

In this action the plaintiff issued his statement of claim on July 7, 1914; the defendant was personally served on July 8; interlocutory judgment was signed on July 27, and the action came before the Court on motion for judgment on September 23.

The plaintiff alleges that under an agreement for sale dated November 15, 1913, the defendant agreed to purchase from the plaintiff certain lands in the city of Winnipeg for the sum of $4,500, payable as follows: $700 in cash; $1,650 by the defendant assuming and keeping harmless the plaintiff from the payment of moneys due or accruing due by virtue of a certain mortgage to the Toronto General Trusts Corp., and the balance of $2,150, in eight consecutive half-yearly payments of $268.75 each on the 15th day of May and November in each of the years 1914, 1915, 1916, and 1917, with interest at the rate of 7 per cent. per annum from the date of said agreement to be paid on the said sum of $2,150 or so much thereof as should from time to time remain unpaid, the first of such payments of interest to be made on May 15, 1914. It was a term of said agreement that all interest on becoming overdue should be forthwith treated as purchase money and should bear interest at the rate aforesaid. It was a further term of the said agreement that in the event of default being made in the payment of principal, interest, taxes or premiums of insurance or any part thereof, the whole purchase money should become due and payable. The defendant covenanted to pay the various amounts mentioned, but made default in the payment of the sum of $268.75, purchase money and $75.25 interest, which became payable to the plaintiff on May 15, 1914, and no part of the said instalment or interest has been paid, by reason whereof the whole of the said purchase money has now become due and payable to the plaintiff.

It was further provided in the said agreement that in default in prompt payment the plaintiff should be at liberty to

determine the said agreement by mailing a notice to the defendant at Winnipeg.

The particulars of claim are as follows:—

Purchase money	$2,150.00
Interest	75.25
Additional interest	19.20
Total	$2,244.45

The plaintiff claims that a time be appointed by the Court for payment by the defendant to the plaintiff of the said sum of $2,244.45, with interest thereon at seven per cent. and costs of action, and in default, that the agreement may be cancelled and the defendant foreclosed, and that the defendant be ordered to give up possession of the lands. The plaintiff also claims further and other relief and costs.

On September 18, that is to say, a few days before this motion was heard, the legislature passed an Act respecting Contracts Relating to Land, commonly known as the Moratorium Act.

I have had occasion to consider the effect of most of the various provisions of this Act in the case of *Fisher* v. *Ross*, 19 D.L.R. 69. I have in that case decided:—

Firstly, that sec. 4 stays all proceedings to enforce any judgment for principal moneys charged on land under an agreement of sale; but does not interfere with a plaintiff's right to enter up judgment; Secondly that the first clause of sec. 3 provides that the period to be allowed for redemption shall be one year, and that this clause is applicable as well to actions which were pending at the date of the Act, but in which no time had yet been fixed for redemption, as to actions brought subsequently; Thirdly, that sec. 5 should be construed as dealing only with a claim to possession, and that it leaves untouched any personal or other remedies sought in the action, which are dealt with in the earlier sections of the Act.

As regards the relief to which the plaintiff is entitled, the statement of claim does not ask for payment of either principal money or interest due to him, but only that a time be appointed by the Court for payment of the amount due, and in

MAN.

K. B.

MAXWELL v. CAMERON.

Galt, J.

default that the agreement may be cancelled and the defendant foreclosed. At the time when the statement of claim was issued, the time appointed by the Court was usually three months. The plaintiff does not ask for any earlier payment. The defendant was entitled to rely upon this when he allowed judgment to go by default. It is true the plaintiff claims "further and other relief." In England the Courts grant this additional relief without any claim for it. But in cases of default, the relief to be granted cannot go beyond what is specifically claimed. The point is fully covered by the decision in *Faithfull* v. *Woodley*, 43 Ch.D. 287, which appears to be indistinguishable from the present case. But the plaintiff is entitled to:—

(1) Judgment for the sum of $2,244.45, as shewn by the statement of claim. Proceedings to enforce payment are expressly stayed by section 4 of the Act. (2) Foreclosure of the agreement in the statement of claim mentioned unless the amount due for principal and interest as mentioned in the statement of claim, together with plaintiff's costs of action, with interest on said several amounts to date of payment, be paid within one year from the date of the certificate of the taxing officer.

Leave will be reserved to the plaintiff, as directed in *Fisher* v. *Ross*, *supra*, to apply to vary this judgment, and for further and other relief, in case the Act in question be repealed by the Lieutenant-Governor-in-Council, as provided for in sec. 10 of the Act.

B. C.

S. C.

Re CARR; CARR v. CARR.

British Columbia Supreme Court, Hunter, C.J. June 9, 1914.

1. WILLS (§ III G—139a)—NATURE OF ESTATE OR INTEREST CREATED—"RESTRAINT ON ALIENATION"—FEE.

A devise in fee simple stated to be "upon the express condition" that the devisee shall not sell or dispose of the land during her lifetime, but only by will or deed to take effect after her death, will pass the fee with its incident power of alienation, and the attempted restraint on alienation is inoperative and void.

[*Blackburn* v. *McCallum*, 32 Can. S.C.R. 65, and *Re Rosher*, 26 Ch.D. 801, followed; *Re Macleay*, L.R. 20 Eq. 186, criticized; *Earls* v. *McAlpine*, 6 A.R. (Ont.) 145; *Re Porter*, 13 O.L.R. 399; and *Re Martin and Dagneau*, 11 O.L.R. 349, referred to.]

Statement

ORIGINATING summons for the construction of a will. Richard Carr, by a codicil to his will, dated March 23, 1887, devised as follows:—

I give to my daughter, Edith, the following described lands . . . but upon the express condition that my said daughter shall not sell or dispose of the said land during her lifetime, but only by will or deed to take effect after her death.

The question for the opinion of the Court was whether the said devise was an unconditional devise in fee simple or whether the devisee was restrained from disposing of the land during her lifetime.

Judgment was given holding the devise an unconditional fee.

Argument

Mayers, for the devisee. There is no doubt as to the law on this subject in England, but the Courts in Ontario appear to have ignored or misunderstood the rule, and adopted the opposite course; in doing so, they appear to have misconstrued the case in the Supreme Court of Canada which confirmed the English rule and adopted that rule as governing in Canada. The English rule is that a condition in absolute restraint of alienation annexed to a devise in fee or to an absolute bequest, even though its operation is limited to a particular time, is void as being repugnant to the nature of the gift: *In re Rosher* (1884), 26 Ch.D. 801, *per* Pearson, J., at 811, citing Co. Litt., sec. 360; to that rule an exception has been allowed to the effect that a restriction upon alienation prohibiting it to a particular class of individuals is good: *Re Macleay* (1875), L.R. 20 Eq. 186; this exception was strongly criticised by Pearson, J., in *Re Rosher, supra*, and is probably not law in England to-day: *Corbett* v. *Corbett* (1888), 14 P.D. 7.

In Ontario the current of decision has been the other way, beginning with the case of *Earls* v. *McAlpine*, in 1881, 6 A.R. (Ont.) 145, and culminating in the case of *Re Porter* (1907), 13 O.L.R. 399, following the case of *Re Martin and Dagneau* (1906), 11 O.L.R. 349. In these cases, however, the decision in *Blackburn* v. *McCallum*, 32 Can. S.C.R. 65, seems to have been misunderstood; this case was decided in 1903, and the very point decided was that a restraint on alienation restricted as to time is, nevertheless, bad; moreover, Mr. Justice Davies, at pp. 80 and 81, in discussing the English cases, expressly follows *Re Rosher* (1884), 26 Ch.D. 801, and accords but a grudging recognition to *Re Macleay;* while specifically stating that a limitation as to time will not enlarge the exceptions to the general rule;

B. C.

S. C.

RE CARR: CARR v. CARR.

Argument

Mr. Justice Mills, at p. 92, also affirms the general principle in unqualified terms.

Secondly, there is in this will no provision for forfeiture on breach of the condition, and this, on the authority of *Renaud* v. *Tourangeau*, L.R. 2 P.C. 4, as explained by the Chief Justice, in *Blackburn* v. *McCallum*, in 32 Can. S.C.R. 65, at 77, renders the condition nugatory: *Evanturel* v. *Evanturel*, L.R. 6 P.C. 1, 29.

Davie, for the heirs-at-law. The language of the will in *Blackburn* v. *McCallum*, *supra*, is quite different to the language of the will in this case. *Re Rosher* was a decision of a single Judge and cannot over-rule *Re Macleay*.

Mayers, in reply. *Re Macleay* merely established an exception in the case of a prohibition of disposition to a person or a class; whereas in this case there is a total prohibition of disposition during the lifetime of the devisee, and so this case is brought within the exact language of Davies, J., in *Blackburn* v. *McCallum*, *supra*.

Hunter, C.J.

HUNTER, C.J.B.C.:—Where there is a condition in restraint of alienation, the burden is upon the party supporting the condition to shew that it is not void as being repugnant to the well-established principles of law. No doubt the exception sanctioned in *Re Macleay*, founded upon sec. 361 of Coke upon Littleton, owed its origin to the instinctive desire of owners of land to perpetuate their title in their own families. Such a spirit is alien to the laws administered in this province, and it may be that the exception itself will, one day, have to be reconsidered. It is sufficient, however, for the decision of this case to consider the language used in *Blackburn* v. *McCallum*, *supra*, where *Re Rosher* was expressly followed, and where Mr. Justice Davies laid down the rule that a limitation as to the time will not take a case out of the general rule against restraints upon alienation attached to an estate in fee simple. I, therefore, hold that the condition is repugnant and void, and that the devisee is entitled to exercise all the powers of alienation inherent in the owner of an estate in fee simple.

Judgment accordingly.

TOWNSEND v. NORTHERN CROWN BANK.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Duff, Anglin, and Brodeur, JJ. February 23, 1914.

1. BANKS (§ VIII C—189)—LOANS BY—"WHOLESALE PURCHASER" OF "FOREST PRODUCTS"—PURCHASER IN CAR LOTS AS.

One who purchases lumber in carload lots, both for use in his business as a building contractor and for re-sale in small lots, is a "wholesale purchaser" of "forest products" from whom a bank may take a statutory receipt pledging his stock as security for a present advance by virtue of sec. 88 of the Bank Act, R.S.C. 1906, ch. 29.

[*Townsend* v. *Northern Crown Bank* (No. 2), 13 D.L.R. 300, 28 O.L.R. 521, affirmed.]

2. BANKS (§ VIII C—189)—LOANS BY—STATUTORY SECURITY—"FOREST PRODUCTS"—SAWN LUMBER.

Sawn lumber is a "forest product" on which a bank may take a statutory receipt under sec. 88 of the Bank Act, R.S.C. 1906, ch. 29, from a customer who is a "wholesale purchaser" of lumber, as security for a loan made to him.

[*Townsend* v. *Northern Crown Bank*, 13 D.L.R. 300, 28 O.L.R. 521, affirmed; *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212, dissented from.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (13 D.L.R. 300, 28 O.L.R. 521) affirming the judgment of a Divisional Court (10 D.L.R. 149, 27 O.L.R. 479), which maintained the judgment for the defendants at the trial (4 D.L.R. 91, 26 O.L.R. 291).

The appellant is assignee of one Brethour, who carried on business as a builder and contractor, and as such applied to the respondent bank for a line of credit and advances "on the security of the cordwood, lumber, cement, nails, glass and other articles used in the business of building and contracting, etc." In carrying on his business Brethour bought his lumber by the carload, selling some to other persons in the village and using the rest in his business. Having become insolvent he made an assignment for benefit of his creditors, and the assignee brought action to set aside the security held by the bank on the assets. The main grounds on which he relied in this action were, that Brethour was not a "wholesale purchaser," and that the lumber purchased by the insolvent was not a "product of the forest" both within the meaning of sec. 88 (1) of the Bank Act. The trial Judge and both Appellate Courts below held in favour of the bank on both grounds, and decided other points raised mainly in the same way.

The appeal was dismissed.

Laidlaw, K.C., and *Atwater*, K.C., for the appellant.

Arnoldi, K.C., for the respondents.

CAN.

S. C.

TOWNSEND v. NORTHERN CROWN BANK.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed for the reasons given in the Court below.

Davies, J.

DAVIES, J.:—I concur in dismissing this appeal, though I confess with much doubt on the question as to whether the advances made by the bank and for which the security under the Bank Act was taken were really *bonâ fide* contemporaneous advances as required by the Bank Act.

Being in doubt on the point, I confirm the judgment appealed from.

Duff, J.

DUFF, J.:—Considering the facts of this case, together with the course of the proceedings in the Ontario Courts, I think the only points requiring discussion are the points raised by the appellant relating to the construction of sec. 88 of the Bank Act, R.S.C., 1906, ch. 29. These questions arise upon the first (unnumbered) paragraph of that section, which is in the following words:—

> 88. The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live stock or dead stock and the products thereof.

The loans in question were made upon the security of certain lumber, the property of one Brethour, and the first question is whether Brethour was a "wholesale purchaser, or shipper of, or dealer in" these commodities. The evidence shews that Brethour purchased in carload quantities, storing the lumber purchased in his yard, making use of it very largely in his own business, which was that of a builder, and selling in comparatively small quantities to the general public. Whether Brethour was strictly a wholesale "dealer" may be open to question. But "wholesale purchaser" is used in contradistinction to "wholesale shipper" and "wholesale dealer," and I think that, the circumstances being such as I have mentioned, Brethour is within the intendment of the phrase "wholesale purchaser."

The second question is whether lumber is an article which falls within the phrase "products of . . . the forest" as the words are used in this enactment. I may say at the outset that I have been unable to read the section in the manner in which it is read by the Chief Justice of the Common Pleas. I think

the words "products thereof" in the last line are connected both grammatically and by the general sense of the paragraph with the words "such live stock or dead stock" immediately preceding them. Is lumber, then, a "product of the forest" for the purposes of this section? According to the narrow construction which the appellant asks us to give effect to when pressed to its logical conclusion, timber ceases to be a product of the forest as soon as it has been subjected to any process of manufacture. That is almost a *reductio ad absurdum*, and Mr. Laidlaw, of course did not assume any such untenable position; rather he tried to escape from it. He did not, as I understood him on the oral argument before us, dispute that what are commonly known as saw-logs would be "products of the forest," within the meaning of the Bank Act. But why draw the line at the saw-logs? Logs are frequently reduced to lumber at the very place, or, at all events, within a short distance of the very place, where they are felled, by means of portable saw-mills. The appellant's answer, of course, to this mode of argument is that the line must be drawn somewhere, and that, if you admit dressed lumber as a "product of the forest," you cannot logically stop short of admitting the articles into which the lumber is further manufactured.

I concur with much that is said as to the difficulty of drawing an abstract line. This is only one example of the class of cases in which the Court, being loath and refusing to attempt to draw an abstract line, finds itself compelled to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits. In this particular case I prefer to say that, according to the common understanding, the articles in question would fairly be comprised within the description "products of the forest," and I think they are within the contemplation of the enactment we have to interpret.

I may add a sentence respectfully recording my inability to agree with the decision of the majority in *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212.

The appeal should be dismissed with costs.

ANGLIN, J.:—On the two questions as to the construction of sec. 88 of the Bank Act (R.S.C. 1906, ch. 29) involved in this

Anglin, J.

CAN.
S. C.
TOWNSEND
v.
NORTHERN
CROWN
BANK.
Anglin, J.

appeal, I respectfully agree in the conclusions reached in the Appellate Division of the Supreme Court of Ontario.

Sir William Meredith, C.J., who tried this action, was of the opinion that

> part of the business which (the insolvent) Brethour carried on was that of a wholesale dealer in lumber.

While, because of the limitations resulting from the fact that the community in which he did business is comparatively small, Brethour's transactions were not as extensive as a wholesale dealer in a large centre of population would naturally be expected to have, the evidence discloses that his purchases were not of a retail character. They were by the carload, and his yard at times held from 200,000 to 300,000 feet of lumber. Most, if not all, of his sales were, no doubt, by retail, and it may be that he could not properly be described as a "wholesale dealer in lumber." But the statute uses the word "purchaser" apparently in contradistinction to the word "dealer," and it was, no doubt, intended to cover the case of the man who purchases by wholesale, although he may either himself use the material which he purchases in his business as a contractor or may dispose of it by retail sale. In my opinion, Brethour was properly held to be a wholesale purchaser of lumber.

While I am, with respect, unable to accept what I understand to have been the view of Meredith, C.J., that the words "and the products thereof," which occur in the 5th line of sub-sec. 1 of sec. 88, and again in the last line,

> apply to all the articles previously mentioned in the sub-section and, therefore, apply to the products of the forest,

and think that, upon their proper grammatical construction, and read in the light of the context, they relate only to "live stock or dead stock," I am of the opinion that the other words in the sub-section, "products of the forest," are wide enough to include lumber, which is sometimes sawn in a portable saw-mill situate at or near the limits where the trees from which it is made grew, and sometimes in a permanent mill situate at some other convenient point. I have fully considered the judgment of the Quebec Court of Appeal in *Molsons Bank* v. *Beaudry*, Q.R. 11 K.B. 212, relied upon by counsel for the appellant. With great respect, I cannot agree with the conclusion there reached. The construction of sec. 88, which excludes planks or boards

because they are not "products of the forest," is, in my opinion, too narrow.

Counsel for the appellant further urged that the evidence established that the debt for which the bank obtained the securities in question was then past due, and that the loans for which such securities were taken were, therefore, not within sec. 88. He stated that this point was taken in the provincial Courts. No allusion is made to it either in the judgment of the learned trial Judge or in the opinions delivered in the Divisional Court and the Appellate Division, and counsel for the respondent insisted that it was urged for the first time at bar in this Court. However that may be, assuming this ground of appeal to be open, it is, I think, sufficiently clear from the copy of the bank account in evidence that the indebtedness in respect of which the bank claims to hold the impeached securities is for advances made at or subsequently to the respective dates at which such securities were taken, and that the loans were made upon such securities.

I agree with the views expressed by Mulock, C.J., as to the re-pledging of the securities when renewal notes were given.

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

BRODEUR, J.:—The trial Judge having found that the business which Brethour carried on was that of a wholesale purchaser in lumber, and that finding having been confirmed by the Divisional Court and the Appellate Division, we should accept it. Brodeur, J.

The question has been raised by the appellant that that lumber was not a product of the forest within the meaning of sec. 88 of the Bank Act, and that no valid security could be given by Brethour to the respondent under that section. It is contended also by the appellant that the power to pledge products of the forest should reasonably be limited to the original resources, and should not be extended to the product of a product.

Section 88, in my view, never contemplated that security should be given on standing lumber, and, if there was any doubt as to that, we will find the answer in the Bank Act of last session, which, in sec. 84, made a special provision authorizing banks to lend money upon the security of standing timber. That power to the banks to lend money on the security of natural resources has reference specially to the nature or to the volume

CAN.
S. C.
Brodeur, J.

of the trade carried on by one who gives the security. In view of the fact that Brethour was a wholesale lumber purchaser, I think the respondent was entitled to receive from him the security in question.

The appeal should be dismissed with costs.

B. C.
C. A.

ELLIS v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 2, 1914.

1. MASTER AND SERVANT (§ II A—56)—DUTY TO WARN—WORKMEN AT TRAMWAY CROSSING—APPROACHING CARS—"DEFECTIVE SYSTEM."

The work of laying planks at a tramway crossing may properly be found to have been done under a "defective system" when the foreman, whose duty it was to watch and warn the men of approaching cars passing at high speed at about fifteen-minute intervals, was also required to do manual work along with the men in his charge, thus distracting his attention from the watching which was necessary for their protection.

Statement

THE appeal was dismissed.

L. G. McPhillips, K.C., for appellant, defendant.

J. McDonald Mowat, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The deceased was one of a gang of four men working under a foreman laying down planks at a tramway crossing. Passenger cars were passing to and fro over the double track every fifteen minutes, and freight cars sometimes passed at indefinite intervals. These cars were being operated at a high rate of speed. The crossing in question was approached from one direction around a sharp curve. The foreman was, to the knowledge of the defendants' roadmaster, and, I think, of themselves, allowed to assist in the manual labour. Indeed, the fair inference which the jury might draw is that he was required to do so. What his instructions were with regard to the safety of the men is a matter of some controversy. The jury might well find that they were, in effect, that the men should look out for their own safety, subject only to this qualification, that it was the foreman's duty to warn them of approaching cars, but, as his attention, like that of his men, would be taken up primarily with his manual labours, he was in no better position to warn them than they were to look to their own safety.

These men were put to work at an exceptionally dangerous crossing, owing to the existence of the said curve,without any

safeguard by way of warning of approaching cars other than that I have referred to, their own wits, and those of the pre-occupied foreman.

The jury attempted to answer questions. They found the defendants' negligence to consist of "insufficient precautions"; the foreman, in answer to the learned Judge, explained this by saying:—

> The jury look at it as if proper precautions were not taken in that place on account of the curve. . . . The jury don't feel as if they are able to find whether the system was defective or not.

During further discussion between the Court and the jury it was made to appear, I think, that the jurors were confused as to the meaning of the term "system," and, after some further instructions from the Judge, and after ascertaining that they might bring in a general verdict, they retired and brought in such a verdict in favour of the plaintiff.

The argument before us was confined to the question of whether or not there was evidence of a defective system of warning the men, and whether the jury, having stated, as they at first did, what, in their opinion, defendants' negligence consisted of, the general verdict could properly have been acted upon.

If I understand aright the contention of appellants' counsel on the general question of system, it was that no other system of warning men working on railway tracks is in vogue; that his clients were not bound to provide a system to meet the dangers at crossings situated as this one was near a curve other than to put the men in charge of a competent foreman to watch and warn them of approaching danger; that the men were in charge of such a person, and that, in adopting a good general system, they had discharged their obligations to their servants. This would appear to have confused the jurors. A system which requires or permits a person charged with the duty of giving a warning to incapacitate himself from doing that effectually is a defective system, and when the jury found that the precautions taken were insufficient, owing to the existence of the curve they, in effect, found that the system was defective, and it does not, in my opinion, matter whether it be regarded as a general system or as a particular one. I think there was evidence upon which the jury could properly find negligence at common law.

Instead of criticising the course adopted in sending the jury

B. C.

C. A.

ELLIS
v.
B. C. ELECTRIC R. CO.

Macdonald, C.J.A.

back to reconsider their verdict, I would commend that course. In negligence cases it is very desirable, in the interests of both parties, that the issues of fact should be found in the form of answers to questions. That practice is to be encouraged, and the jury assisted by the Judge and counsel as far as possible to that end, as was done in this case. To declare a jury at fault because they had failed to make their meaning clear in their answers, and, when sent back, had brought in a general verdict, unless the general verdict was not an honest one, would be to discourage juries from attempting to answer questions. There is nothing repugnant to the general verdict in the answer that defendants had not taken "insufficient precautions." The only thing that is repugnant to it is the statement of the foreman that the jury could not say whether the system was defective or not, but that answer was the result of misapprehension as to the meaning of the term "system," which, I think, must be assumed to have been removed before they were sent back.

I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal.

The final answer of the jury is binding. It agrees with their original answer that the company were negligent in not taking sufficient precautions. The presumption is that the jurors were doing their work honestly, and I see nothing to justify a suggestion that the final verdict is not an honest verdict.

The change from a special to a general verdict may be attributed to their inability to express their meaning to their own satisfaction. There was, in my opinion, evidence to justify a finding that the system of warning adopted was defective.

This is not a case of fellow workmen, but of defective system. This man got a warning, but, there being nothing to tell him from what direction the train was coming, he stepped right in front of the approaching train. In my opinion, the system was defective in two respects: (1) In permitting the foreman charged with the duty of warning to work as one of the gang; (2) in not giving any indication as to the track on which the approaching car was coming.

Martin, J.A.

MARTIN, J.A.:—There was, in my opinion, evidence upon which the jury could find that the system of personal warning

B. C.

C. A.

ELLIS v. B. C. ELECTRIC R. Co.

was defective in the circumstances in that the duties that the foreman was knowingly permitted, or, in truth, expected, according to custom (Pressey's evidence, p. 102) to perform in working with his small gang of five men (including himself) occupied him to such an extent that he could not keep a safe look-out so as to protect the workmen in his charge, and no other person was detailed to watch and warn them. On this occasion he was actually holding a heavy plank, with the others, which they dropped when the car came upon them (pp. 23-5). The system, in short, was too lax to be effective, and it was liable to become specially defective when the gang was working, as at the time of the accident, at a curve in the track, where the range of vision was restricted (A.B., p. 73).

Martin, J.A.

GALLIHER, J.A.:—I think the company's system of warning, although sufficient in its inception, was rendered inefficient and defective by the company knowingly permitting the foreman, whose duty it was to give the signals, to engage in work with the other men, thereby distracting his attention from the approach of trains, which occurred in the case at bar.

Galliher, J.A.

I feel much more doubt on the question as to whether this accident was caused by such defective system, but I am unable to say the jury could not reasonably have come to that conclusion. I think we must accept the general verdict finally brought in by the jury as a finding in the plaintiff's favour on all points necessary to support that verdict.

The appeal will, therefore, be dismissed.

McPHILLIPS, J.A., concurred with MACDONALD, C.J.A.

M. Phillips, J.A.

HOGG v. HOGG.

MAN.

K. B.

Manitoba King's Bench, Macdonald, J. June 16, 1914.

1. DIVORCE AND SEPARATION (§ V A—45)—ALIMONY—HUSBAND DESERTING WIFE—WIFE'S ANTE-NUPTIAL CHASTITY.

A husband is not entitled to be relieved from liability to alimony to the wife whom he has deserted by setting up in defence to an alimony action that the child born shortly after the marriage was not his by reason of the wife's alleged intercourse with another before the marriage, although he further claims that at the time of the marriage he believed himself to be the father of the child of which she was then *enciente*.

[*Mason* v. *Mason*, 61 L.T. 304, and *L.* v. *L.*, 104 L.T. 462, referred to.]

MAN.

K. B.

HOGG
v.
HOGG

Macdonald, J.

ACTION for alimony.

Judgment was given for the plaintiff.

H. F. Maulson, for plaintiff.

W. H. Trueman, for defendant.

MACDONALD, J.:—This is an action for alimony, the facts connected with which are most distressing. Both parties are quite young, with a reasonable expectation of many years of life blighted by the circumstances surrounding their ante-nuptial relationship. They were married on September 9, 1913, and on October 23, 1913 a child was born.

The wife contends most emphatically that the child is her husband's, although she admits the first sexual intercourse was not earlier than April 20, 1913. The husband, in his evidence, says that the first intercourse was on May 18, 1913. Taking the wife's evidence, the child would be a six months and three-day child, which, according to medical testimony, would be so weak and puny as to cause astonishment if it lived; that it would shew signs of imperfect and incomplete gestation to a remarkable degree, and great care with artificial appliances would be necessary to save and prolong its life. Whereas, the evidence of the doctor who attended the accouchement is to the effect that it was a full-timed child, strong and nothing out of the ordinary. Dr. Smith examined the child last fall, and he says it must have been an eight and a half or nine months' child; a child of six months, he says, would not weigh more than about one and a half pounds, and to live would be almost impossible. The doctors, however, differ. Dr. Harrison had a case of a child under seven months which lived, but it was wrapped in cotton batting and covered with olive oil for six weeks. A child of six months, he says, would require more attention, and small chances of its living without artificial assistance, such as an incubator.

Dr. Andrew attended a case of child-birth where the child was but six months and twenty days in gestation, and the child is now ten years old and in good condition, and there were no special appliances; but he says that a child six months and three days he would not expect to be alive. The husband, coming to the conclusion that the child was not his, deserted his wife. For the purposes of determining this case, I do not deem it necessary

to decide upon the legitimacy of the child. Is it possible the parties are mistaken in their dates? Is it possible the woman may truthfully assert, by being mistaken in dates, that her husband is the father of her child? This is a matter that must be left to the parties themselves, and I trust they may arrive at a conclusion that may effect a reconciliation.

In *Mason* v. *Mason*, 61 L.T. 304, it was held that evidence of alleged incontinence on the part of the wife before marriage with a view of shewing that the child born after marriage was not the husband's child, was inadmissible on the ground of irrelevance to the issue. What followed was not the result of adulterous intercourse.

In *L.* v. *L.*, 104 L.T. 462, it was argued that the wife procured the marriage by fraudulent representations, but it was held that, if this were so, it would not, of course, in any way affect the validity of the marriage,

> the wife was convicted and sentenced to penal servitude, she was still his wife and he is still by law her husband. If she receives no alimony, she may either have to beg or to become a burden upon the public or be driven to vice or to starve.

The language in the above case applies here with equal force.

It is urged, for the defence, that the child should not be considered in fixing the amount, and with this I agree. Alimony is not maintenance to the child, but to the wife.

The defendant is a farmer, with a half-section of land in his mother's name. This half-section is not all good arable land, and a goodly portion of it is non-productive. Care must be taken that the husband is not over-burdened, and I agree with counsel for the defence that $20 per month is, under the circumstances, all that the defendant can afford and should be made to pay, and I do, therefore, allow alimony to the plaintiff, and fix the amount at $20 per month, to be payable on the first day of each and every month commencing with June 1, 1914.

The costs will follow the event and be paid by the defendant.

Judgment for plaintiff.

SASK.

S. C.

SAWYER-MASSEY CO. v. STAHL.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ. July 15, 1914.

1. APPEAL (§ VII J—415)—QUESTIONS NOT RAISED BELOW—REFUSAL OF LEAVE ON APPEAL TO AMEND PLEADINGS—TEST.

On an appeal from the judgment against defendant at trial, he will be refused leave to amend his pleadings to raise a question not in issue before the trial judge which would necessitate the plaintiff being given leave to adduce further evidence.

Statement

APPEAL by defendant from judgment at trial.

Appeal dismissed.

G. E. Cruise, for appellant, defendant.

F. L. Bastedo, for respondents, plaintiffs.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—The plaintiffs, by agreement in writing dated September 28, 1911, sold to one J. W. Smith, a threshing engine, and by the terms of the agreement the plaintiffs retained the ownership and title in the engine. Smith was to have possession of the engine until he should make default in payment of the purchase-price, and in the event of default the plaintiffs were entitled to re-take possession of same. Smith did make default in payment, and the plaintiffs thereby became entitled to repossess themselves of the engine; and in the fall of 1913, during such default, the plaintiffs insisted that if Smith was to retain possession they were to get a proportion of the threshing bill from each farmer whose grain was to be threshed. In carrying out this arrangement, Smith got the defendant to sign the following document, and delivered the same to the plaintiffs:—

I, Jacob Stahl, in consideration of the Sawyer-Massey Co. allowing J. W. Smith to take his engine on to my place for the purpose of threshing my job, hereby promise and agree to pay to the Sawyer-Massey Company on completion of the job the sum of two hundred dollars ($200.00).

Witness: "Roderick Forbes." Sgd. "JACOB STAHL."

In consequence of the execution of the document, Smith did the defendant's threshing with the aid of this engine. The plaintiffs' action is to recover the $200 provided for in the document referred to. The defendant, by his defence, denies the making of the document, and alternatively alleges that it was obtained by fraud and misrepresentation. He alleges—to quote from par. (6) of the statement of defence—that the plaintiffs

represented to him that it was a document which the plaintiffs required before it would allow the said J. W. Smith to take the said engine on to the defendant's premises, or thresh his grain, and was to enable it to keep trace of the said engine from time to time and did not in any way bind the defendant further than an acknowledgment on his part that the said engine was to be taken on to his premises for the purpose of threshing his grain.

SASK.
S. C.
SAWYER-MASSEY CO. v. STAHL.
Brown, J.

The learned trial District Court Judge before whom the action was tried, after reviewing the evidence given by the various witnesses on the point, finds that the document was executed by the defendant, and that "there was no misrepresentation about the document, but that it was signed with the intention for which it purports to be." The evidence quite justifies the trial Judge in so finding, and this finding, in my opinion, disposes of the case. The defendant was willing to pay the plaintiffs some $117, stating that such was all he had left after paying the wages of the men who worked on the threshing gang. Counsel for the defendant sought before us to amend his pleadings and raise the point that the document was only intended to apply to so much of the threshing account as remained after paying those wages. As this point was not in issue before the trial Judge, I do not see how it can be allowed to be raised at this stage of the case, even assuming that it is a good defence in point of law. The plaintiffs should have the right on such an issue to go fully into the question of the amount of wages paid and the parties to whom paid; and this matter was not gone into at all by them at the trial.

In the result the appeal should be dismissed, with costs.

DAVISON LUMBER v. WENTZEL.

Nova Scotia Supreme Court, Ritchie, J.

N. S.
S. C.

1. ASSIGNMENT (§ I—1) — REAL PROPERTY — TRANSFER BY OFFICIAL ASSIGNEE UNDER INSOLVENCY ACT—VALIDITY—TESTS.

A quit claim deed from an official assignee under the Insolvent Act of 1869 (Can.), does not have the effect in Nova Scotia of dispensing with proof that there was a valid statutory sale and that the requisite advertising for a period of two months under sec. 47 of that Act had taken place, where such deed is not in the statutory form "L" to the Insolvent Act and does not recite a due compliance with the statute; and this objection is available against a claim for trespass brought by a person not in possession whose paper title is dependent upon such quit claim deed.

Statement

ACTION against defendants Wentzel and Wentzel for trespass on lands, or, in the alternative, against certain other defendants for breach of covenant of title.

N. S.
S. C.
DAVISON LUMBER v. WENTZEL.
Ritchie, J.

The action as to trespass was dismissed; judgment was given for the plaintiff as to breach of covenant of title.

Paton, K.C. and *Robertson*, for plaintiffs.

McLean, K.C. and *Margeson*, for defendants, Wentzels.

McInnes, Mellish, Fulton & Kenny, for other defendants.

RITCHIE, J.:—This action is for trespass to timber lands alleged to have been committed by the defendants, Joseph M. Wentzel and Melbourne Wentzel.

Damages, a declaration as to title, and an injunction are claimed. The defence on this branch of the case consist of a denial and sets up title in the defendant, Joseph M. Wentzel.

There is an alternative claim against the defendants, E. D. Davison & Sons, Ltd., Archie F. Davison and Ella Davison, executor and executrix of Francis Davison. The lands in question were purchased by the plaintiff company from E. D. Davison & Sons, Ltd., and Francis Davison and the claim is for breach of covenant of title and warranty contained in the conveyance to the plaintiff company. The defence to this alternative claim consists of a denial and sets up that the defendants had good title to the lands at the time of the conveyance.

It was contended at the trial that the claim against the last named defendant was improperly joined in this action. I decided against this contention.

The plaintiff's title is as follows: 1. Grant from the Crown to John George Jodrey. 2. Deed George Jodrey to Joseph M. Wentzel. 3. Assignment under the Insolvent Act 1869 from Joseph M. Wentzel to the official assignee. 4. Deed W. H. Owen and wife to Simeon Wentzel. 5. Deed Simeon Wentzel to E. D. Davison & Sons. 6. Deed E. D. Davison & Sons to E. D. Davison & Sons, Ltd. 7. Deed E. D. Davison & Sons, Ltd., to the plaintiff company.

A contention was made at the trial that John George Jodrey, the grantee from the Crown, was not the same man who under the name of George Jodrey conveyed to Joseph M. Wentzel. I find against this contention. Mr. Owen was appointed creditors' assignee in the estate of Joseph M. Wentzel and therefore everything that was vested in the official assignee under the assignment became vested in him. It is claimed on the part of

Joseph M. Wentzel and Melbourne Wentzel that there is fatal defect on the plaintiff's claim of title, viz., that the title acquired by the official assignee did not pass under the deed from Mr. Owen. In this connection it is important to note that there is a deed of the lot in question from the sheriff (reciting a judgment of the Bank of Montreal against S. P. Benjamin), to Mr. Owen. It does not appear that Benjamin ever had any title to the lands. If he had, he conveyed it to Joseph M. Wentzel and the deed was recorded before the Bank of Montreal recovered the judgment against him. The deed was recorded on May 12, 1873, and the judgment was recovered on July 28, 1873. It therefore never became a lien on the lands and I do not see that Mr. Owen ever had any title except that which became vested in him as creditors' assignee. The question is, did the deed from Owen pass the title which he had as creditors' assignee under the Insolvent Act of 1869? If this question is answered in the negative then there is a break in the plaintiff's chain of title and there being no evidence in this case of possession they cannot recover damages for the trees cut on the lot by the Wentzels. I answer the question in the negative. Mr. Owen as assignee advertised the lands for sale on October 12, 1875. The advertisement is dated September 4, 1875. Sec. 47 of the Insolvent Act of 1869 requires the advertisement to be for 2 months. It was therefore short and a valid sale cannot be made under a statute unless its requirements are complied with.

The quit claim deed from Owen to Simeon Wentzel was 17 years later. If Mr. Owen ever sold the land under Sec. 47 and 48 of the Act, the only way in which he could sell as assignee, it is difficult to understand why the plaintiff did not call him and prove it.

The plaintiffs are attempting to make title under a statute. Sec. 47 provided that the assignee can only sell after advertising for a period of 2 months. Sec. 48 provides as follows:

> All the sales of real estate so made by the assignee shall vest in the purchaser all the legal and equitable estate of the insolvent therein and in all respects shall have the same effect as to mortgages hypothecated or privileges then existing thereon as if the same had been made by a sheriff in the province in which such real estate is situate. Under a writ of execution issued in the ordinary course, but no other greater or less effect than such sheriff's sale; and the title conveyed by such sale shall have equal

N. S.
S. C.
DAVISON LUMBER v. WENTZEL.
Ritchie, J.

validity with a title created by a sheriff's sale, the deed of such sale (Form L) shall have the same effect as a sheriff's deed has in the province within which the real estate is situate, etc.

In this province by statutory enactment a sheriff's deed of real estate *purporting to convey land sold under execution* is *primâ facie* evidence that the statutory requirements have been complied with. Without this statutory enactment, a man making title under a sheriff's deed would be obliged to prove that the requirements of the statute had been complied with.

In this case if the plaintiffs had a deed in Form L, p. 135 of the Insolvent Act of 1869 reciting compliance with the statutory requirements a good title would be made. I do not know that an assignee's sale was ever made. Without it, there would be no valid deed. In the absence of a deed Form L or substantially so the burden is on the plaintiff to prove that the statutory sale took place after being advertised for two months. The quit claim deed from Mr. Owen and his wife does not have the effect of dispensing with proof that there was a statutory sale, but Mr. Owen's evidence in the witness box would have been useful. In my opinion the plaintiffs have failed to make a good title and the action so far as the Wentzels are concerned must be dismissed with costs.

From the conclusion which I have arrived at, it follows that the plaintiffs must succeed with costs on the alternative claim against E. D. Davison & Sons, Ltd., and Archie F. Davison and Ella Davison, executor and executrix of Francis Davison. The only remaining question is as to the amount of damages on this branch of the case and as to this I desire to hear counsel.

Judgment accordingly.

CAN.
S. C.

WESTERN CANADA POWER CO. v. VELASKY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 23, 1914.

1. NEGLIGENCE (§ I C—40)—DANGEROUS PLACE—INSECURE ELECTRIC POLE—INJURY TO SERVANT OF INDEPENDENT CONTRACTOR—LIABILITY OF OWNER OF POLE, HOW LIMITED.

Where the poles intended for transmission wires of a power company had become insecure by the washing away of earth before the wires were strong, and the company gives to an independent contractor the work of first strengthening and securing the poles and then of stringing wires upon them, the power company is not responsible for personal injuries to the contractor's workman by reason of the falling of a pole which he had climbed for the purpose of stringing the wires

before it had been strengthened and without knowing that it was unsafe; the workman is not entitled to claim against the power company as owners or occupants of the property that he was an invitee thereon to whom there was a holding out on their part that the premises were safe as it was a part of his master's undertaking to strengthen the poles before stringing the wires, and it was the collateral negligence of his master, the contractor, in not notifying him that the poles were not safe that was the cause of the injury.

[*Velasky* v. *Western Canada Power Co.*, 12 D.L.R. 774, 18 B.C.R. 407, reversed; *Marney* v. *Scott*, [1899] 1 Q.B. 986; *Indermaur* v. *Dames*, L.R. 2 C.P. 311, and *Lucy* v. *Bawden*, [1914] 2 K.B. 318, distinguished.]

CAN.
S. C.
WESTERN CANADA POWER CO. v. VELASKY.

APPEAL from the judgment of the Court of Appeal for British Columbia, 12 D.L.R. 774, 18 B.C.R. 407, affirming, by an equal division of opinion, the judgment of Murphy, J., at the trial, by which, upon the findings of the jury, judgment had been entered in favour of the plaintiff for $3,200, with costs. Statement

The appeal was allowed.

Tupper, Kitto & Wightman, for the appellants.

Russell, Mowat, Hancox & Farris, for the respondent.

FITZPATRICK, C.J.:—In this case the relation of master and servant did not exist between the plaintiff and the defendants. Fitzpatrick, C.J.

Lockwood, in whose service the plaintiff was at the time of the accident, was an independent contractor, and to his collateral negligence the injury to the plaintiff is attributable. It is quite true that the contract with the company was to string wires on the poles, and, if limited to that, a great deal might be said in favour of the view urged upon us so strenuously at the argument that the company would be liable as owner in occupation of the pole-line for having invited the workman to enter upon unsafe premises. But here, by his contract, Lockwood, the plaintiff's employer, assumed a duty to examine the poles and to make them safe before attempting to string wires upon them and to his breach of that duty the accident is attributable. In such circumstances there is no recourse against the company appellant, and the appeal should be allowed with costs.

DAVIES, J.:—I concur in the allowance of this appeal with costs for the reasons stated by Mr. Justice Anglin. Davies, J.

IDINGTON, J.:—The respondent was not in any sense the servant of the appellant and hence all that has been said relative to care of him as a workman is beside the question. Idington, J.

CAN.

S.C.

WESTERN CANADA POWER CO. v. VELASKY.

Idington, J.

There was, in fact, no contractual relation of any kind between appellant and respondent.

Appellant never invited the respondent to the place he calls a dangerous place. Not until the respondent's master had so fixed the pole that wires could be properly strung upon it was there any permission, much less an invitation, to respondent to touch the pole. And the respondent as an expert linesman, must have known that when he attempted to string wires on such a pole he was doing that which was sure to prove useless or worse, and that he ought, instead of trying to do so, to have pointed that out to his master. I need not dwell on the case at length. I fail to see the slightest resemblance in all this to the invitation to stevedores, which was in question in *Marney* v. *Scott*, [1899] 1 Q.B. 986, so much relied upon.

The appeal should be allowed with costs.

Duff, J.

DUFF, J.:—The facts of this case can be stated in a sentence or two. The appellants are an electric power company and, in 1911, they erected a line of poles to support their transmission wires, but, before the wires were strung, the appellants became aware that some of the poles were not securely set and they, thereupon, entered into a contract with one Lockwood by which Lockwood agreed both to secure the poles and put the wires in place. The respondent was a linesman in Lockwood's employ and, while engaged in the work of wiring, was thrown to the ground and injured owing to the instability of the pole on which he was working at the time.

The question on this appeal is whether the appellants are answerable for the condition of the pole. The respondent says they are answerable on the principle in *Indermaur* v. *Dames*, L.R. 2 C.P. 311. I think this contention cannot be sustained and that the appeal ought to be allowed.

The principle invoked may be stated, I think, in the language of Mr. Justice Atkin, in delivering judgment in *Lucy* v. *Bawden*, [1914] 2 K.B. 318. At 322, he says:—

> This obligation was expressed in *Indermaur* v. *Dames*, L.R. 1 C.P. 274, at p. 288, *per* Willes, J.:—"And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damages from unusual danger, which he

knows or ought to know." Those words are adopted in the judgment of the Exchequer Chamber, L.R. 2 C.P. 311, at p. 313. In *Smith* v. *London and St. Katharine Dock Co.*, L.R. 3 C.P. 326, where the defendants were sued for providing a gangway from dock to ships insufficiently secured whereby the plaintiff, who had business on the ship, was damaged, Bovill, C.J., said: "The case then comes within the principle that persons inviting others on to their premises are answerable for anything in the nature of a trap." Then Byles, J., said: "there was a duty, on the part of the defendants to the plaintiff, not to permit the gangway to be insecure without warning the plaintiff of it."

And then again, at 325, he refers to the obligation resting upon the occupier under such circumstances as "an obligation to avoid traps."

It seems to me that this principle can have no application whatever in the circumstances of this case. Where a contractor is engaged, as here, to make safe something that is known to be unsafe, it would be absurd to suggest that, on this principle, the employees of the contractor could hold the occupier responsible for the very condition of affairs which they are employed in rectifying. The principle invoked can have no application where the existence of the danger complained of is one of the ordinary risks of the particular business which the invitee comes on the premises to do.

Nor can the invitee (whose only invitation is that implied in the fact that he is engaged in the service of a contractor employed by the person who is sought to be charged as occupier) be said to be exposed to a trap for which the occupier is responsible within this principle where the danger arises from the negligent default of his own employer in relation to that which he has contracted to do. The implied invitation must be taken to be given and accepted upon the footing that the invitee knows as well as the occupier the risk of negligence by his own employer or his own fellow-servants, and, as between himself and the occupier, he must be taken to have assumed that risk.

On this short ground I think the appeal should be allowed and the action dismissed.

ANGLIN, J.:—I am, with respect, of the opinion that this appeal should be allowed. Anglin, J.

The plaintiff while engaged as a linesman, employed by a contractor, one Lockwood, in stringing wires, was injured by falling with a pole of the defendant company, which was insecurely planted.

CAN.

S. C.

WESTERN CANADA POWER CO. v. VELASKY.

Anglin, J.

The ground on which he seeks to hold the defendants liable to him is that he went upon their property to string wires by their invitation and that they owed him the duty of having their poles in such a condition that he could safely ascend them for that purpose.

The uncontradicted evidence establishes — and it was admitted at bar—that it was part of Lockwood's undertaking that the defendants, before stringing the wires, should strengthen certain poles, from which the supporting earth had been washed away, one of them being that with which the plaintiff fell. Lockwood or his employees failed to do this, and the plaintiff's misfortune was due to that failure. The case was not one of an unqualified invitation to the workmen of Lockwood to come upon the defendant's premises involving a representation or holding out on their part that those premises were safe for the purpose for which the invitation was given. The only invitation to the plaintiff, as a workman of Lockwood, was to ascend the pole in question after it had been properly strengthened or secured. Taking this view of the case, two of the learned Judges of the Court of Appeal would have set aside the verdict for the plaintiff rendered at the trial. I concur in that conclusion. In the circumstances the defendants owed no duty to the plaintiff in respect of the security of the pole from which he fell.

Brodeur, J.

BRODEUR, J.:—Velasky, the respondent, was injured by falling from a pole of the appellant company. He was then in the employ of an independent contractor who had undertaken to strengthen that pole. He was entirely under the control of that contractor.

The pole to be made use of by Velasky was unsafe to the knowledge of his master, the contractor, since he had undertaken to repair it. That contractor was then bound to give notice of that fact to his employee. He neglected to do so. No negligence has been established against the appellants. When a person employs an independent contractor to do a specified work he does not thereby render himself liable for injuries caused by the sole negligence of such contractor.

The action should have been dismissed.

This appeal should be allowed with costs of this Court and of the Courts below. *Appeal allowed with costs.*

RUTLEDGE v. ANDERSON.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 8, 1914.

1. MORTGAGE (§ V—63)—FRAUDULENT DISCHARGE—FRAUD BROUGHT HOME TO MORTGAGOR'S AGENT—ONUS ON BENEFITED PARTY.

A person will not be allowed to avail himself of what has been obtained by the fraud of another unless he not only is innocent of the fraud but has given some valuable consideration.

[*Rutledge* v. *Anderson*, 16 D.L.R. 29, varied.]

2. MORTGAGE (§ V—63)—FRAUDULENT DISCHARGE—MORTGAGOR BENEFITED BY, THOUGH WITHOUT KNOWLEDGE OF THE FRAUD—EFFECT.

On setting aside a discharge of mortgage which had been obtained by the fraud of another by which the defendant benefited although not chargeable with any direct knowledge of it, allowance must be made to him for disbursements made on the faith of the discharge being effective.

[*Rutledge* v. *Anderson*, 16 D.L.R. 29, varied.]

Statement

APPEAL from decision of Curran, J., 16 D.L.R. 29.

Judgment below varied.

C. P. Fullerton, K.C., *F. G. Taylor*, K.C., and *A. E. Jacob*, for defendant, appellant.

A. B. Hudson and *F. L. Davis*, for plaintiff, respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—The learned Judge at the trial evidently accepted the story of the plaintiff rather than that of the defendant. He, however, does not find that the defendant Anderson is chargeable with any direct knowledge of the fraud of Laurie, or of participation therein; but he was to be benefited thereby at the expense of the plaintiff.

Because of the plaintiff signing the receipt and also the discharge, the defendant swears he paid Laurie in cash the sum of $1,100 and surrendered to him notes with interest amounting to $900 and transferred to him the collateral security held for these notes. And, further, upon the signing of the discharge, the defendant paid Mr. Hull's account and agreed to pay the account of Beliveau & Co., which accounts the plaintiff's counsel admit should be charged against the mortgage.

Counsel for the plaintiff on the argument, upon being asked by the Court what position he took as to the cash payments sworn by the defendant to have been made to Laurie because of the discharge and the receipt, and as to the surrender of the notes to Laurie, stated that he was willing to have the amounts thereof credited on the mortgage.

MAN.

C. A.

RUTLEDGE v. ANDERSON.

Howell, C.J.M.

According to the defendant there was no contract made between himself and the plaintiff securing the discharge, and he does not pretend that he paid or satisfied the mortgage. By a trick of Laurie the discharge was executed, and, if the defendant is allowed for his change of position to Laurie, which he swears happened, then no harm is done him.

It was agreed by all parties that on January 31, 1913, the plaintiff's mortgage should be considered as reduced to $6,500 so that the sale might go through, and I think the judgment should so declare. Then this sum should be reduced by the payments to Mr. Hull and to Beliveau Co. It should also be further reduced by $2,000, the cash and notes paid and delivered to Laurie. With these credits the defendant has been generously treated.

The judgment below must be varied to comply with the credits and declarations above referred to, and in all other respects the judgment is affirmed.

There will be no order as to costs of appeal.

Richards, J. A.
Perdue, J.A.
Cameron, J.A

RICHARDS, PERDUE, and CAMERON, JJ.A., concurred with HAGGART, J.A.

Haggart, J.A.

HAGGART, J.A.:—After an exhaustive analysis of the evidence and lengthy and carefully considered reasons, the trial Judge comes to the conclusion that "there has been an entire failure of consideration under the agreement to be contributed by Laurie" that "he had in fact no title to the lands mentioned in ex. 2, or ex. 6, and fraudulently entered into those agreements to deceive the plaintiff and benefit his co-defendant Anderson," and further holds that there was but one agreement. After carefully perusing the evidence and the trial Judge's reasons, I would hesitate before interfering with those findings. To come to those conclusions he must, when there was any contradiction between the testimony of the plaintiff and that of the defendant, have given credence to the evidence of the plaintiff.

It would seem strange if the meeting with Laurie in the Queen's Hotel, Winnipeg, was accidental. The plaintiff never knew of the existence of Laurie. The defendant Anderson had

for several months previously had dealings with his co-defendant Laurie, and also for some time after the date of the interview in Winnipeg, while the plaintiff never saw that gentleman excepting on the two days while the negotiations were going on, after which he disappeared from the face of the earth so far as the plaintiff was concerned.

I do not agree with the contention that there were two distinct contracts, one between the plaintiff and the defendant Anderson, and one between the plaintiff and the defendant Laurie. There was one contract between the plaintiff on the one part and both the defendants Anderson and Laurie on the other part. There was one consideration moving from the plaintiff to the defendants, namely, the discharge or release of the mortgage in question, and one consideration moving from the defendants to the plaintiff, namely, the lands and the notes. The plaintiff was giving nothing to Laurie himself.

In the negotiations for the Tully house, which was offered first to the plaintiff, the defendant Anderson said, "I was getting the house from him (Tully) to give it to Rutledge" and in substance I believe he was getting, or was to get the British Columbia fruit lands and the Lansdowne Ave. house from the defendant Laurie to give to the plaintiff Rutledge, although for convenience the conveyance might be made direct to the plaintiff by the person in whom the title stood.

I must say there are some suspicious circumstances in connection with the alleged payments by Anderson to Laurie. There are no books of account shewing any entries, and in any event, it was the plain duty of the defendant Anderson, before he made these payments or delivered up the alleged notes, to ascertain whether the defendant Laurie, his co-contractor, had fulfilled his obligation.

Seeing that the defendant Laurie was a fraudulent defaulter, so far as he was concerned in the transaction, his signature to the documents is very poor evidence of the facts stated in the documents themselves.

A very pertinent observation was made by plaintiff's counsel that the defendant Anderson was not truthful when he stated that he could not pay $1,000 in cash to the plaintiff because

MAN.

C. A.

RUTLEDGE v. ANDERSON.

Haggart, J.A.

he did not have the money, when, about the same time according to his own evidence, he says he paid $1,100 in cash to his co-defendant Laurie. To say more would be practically repeating the reasons of the trial Judge. I would hold that the mortgage is a valid subsisting security upon which I would credit the amounts mentioned in the reasons of the Chief Justice.

I would affirm the judgment of the trial Judge in other respects, and dismiss the appeal.

Judgment below varied.

ALTA.

S. C.

FORBES v. SIMMONS.

Alberta Supreme Court, Simmons J. September 8, 1914.

1. JUDGMENT (§ I C—16)—NON-RESIDENT—DEFENDANT CASUALLY WITHIN LAW DISTRICT"—SERVICE—SUFFICIENCY OF.

The circumstance that the defendant's presence in the province was casual only, as upon a short visit, does not create any exception from liability to service of process of the courts of such province in a civil action against him; territorial jurisdiction is effective against him on account of his presence in the territory when action was begun and process served upon him.

[*Sirdar, etc.* v. *Rajah, etc.*, [1894] A.C. 670; *Emanuel* v. *Symon*, [1908] 1 K.B. 302, applied; See also Annotations on Foreign Judgments, 9 D.L.R. 788, and 14 D.L.R. 43.]

Statement

MOTION for judgment against a non-resident defendant served while casually within the law district.

Judgment was given for the plaintiff.

Short, Cross, & Biggar, for plaintiff.

W. J. Mustard, for defendant.

Simmons, J.

SIMMONS, J.:—This is a motion for judgment under Rule 103 Judicature Ordinance upon a foreign judgment recovered against the defendant in British Columbia. When action was brought in British Columbia, the defendant was domiciled in the Province of Alberta but was served with the writ while on a casual visit in the Province of British Columbia. On the material filed there is a dispute as to whether an appearance filed by solicitors was authorized by the defendant and I am not able to find that it was authorized and I, therefore, deal with the matter on the basis that no appearance authorized by the defendant was filed. The defendant contests the validity of the British Columbia judgment on the ground of absence of jurisdiction as the defendant did not enter an appearance and did

not agree to submit to jurisdiction of the foreign Court. The defendants rely on *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670, and *Emanuel* v. *Symon* [1908] 1 K. B. 302, Lord Selborne in delivering judgment in the East Indian Case above cited, discusses very fully the law governing the extent to which territorial legislation can give jurisdiction which any foreign Court ought to recognize against any foreigner who owes no allegiance or obedience to the power which so legislates; and the expression of Blackburn, J., in *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155 at 161 that

> if at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued.

is commented upon by Lord Selborne in these words:

> upon this sentence it is to be observed that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned Judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit on the footing of the contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad; that question was not argued and did not arise in the case there before the Court, and if this is what Blackburn J. meant, their lordships could not regard any mere inclination of opinion on a question of such large and general importance, on which the Judges themselves would have desired to hear argument, if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority.

In the same judgment Lord Selborne observes:

> Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it and when they are living within another independent territory. It exists always as to land within the territory and it may be exercised over movables within the territory, and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who, when living, were domiciled within the territory. As between different provinces under one sovereignty (e.g. under the Roman Empire), the legislation of the sovereign may distribute and regulate jurisdiction; *but no territorial legislation can give jurisdiction of any foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the power which so legislates.*

In a personal action to which none of these cases of jurisdiction apply a decree pronounced *in absentem* by a foreign Court to the jurisdiction of

ALTA.
S. C.
FORBES v. SIMMONS.
Simmons, J.

which the defendant has not in any way submitted himself is by international law an absolute nullity.

The defendant seeks to come under the effect of this rule on the ground that he should not be considered as a resident of British Columbia, either temporary or otherwise as his presence there was casual and for the purpose of visiting his wife who was ill in the hospital at Vancouver. I am not able to give effect to this contention. The essence and foundation of the jurisdiction is the fact that the person or property, as the case may be, is within the territory. If the defendant could succeed on this ground it would have the effect of curtailing in a considerable degree the well established doctrine of the supremacy of a state within its own territory. An exception, however, is made in accordance with international law in favor of the person of the Sovereign, Ambassador or diplomatic agent of the foreign country. See Dicey on the Conflict of Laws, 360, and Hall on International Law, secs. 49-53.

I cannot find any authority for the proposition that the special circumstances under which the defendant was present in the foreign jurisdiction where action was begun and service made upon him would have the effect of modifying the general rule that territorial jurisdiction is effective against him on account of his presence in the territory when action was begun and process served upon him.

The plaintiff is entitled to succeed on his motion for judgment and costs of this application.

Judgment for plaintiff.

B. C.
C. A.

BRITISH COLUMBIA HOP CO. v. FIDELITY PHENIX FIRE INSURANCE CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. July 14, 1914.

1. INSURANCE (§ III D—65*a*)—THE POLICY OR CONTRACT—CONSTRUCTION—OF POLICIES ON PROPERTY—COLLATERAL INSURANCE — STATUTORY CONDITIONS.

Where a policy of fire insurance was issued to a bank on cotton warp in bales "their own or held by them in trust or on commission or sold but not delivered or in which they may have an interest or a liability" and such insurance was for an amount in excess of the bank's claim for advances to the owners of the goods, recovery cannot be had in respect of the excess over the bank's claim at the time of the loss by the parties beneficially entitled to the goods who held collateral policies

of which no notice had been given to the insurance companies but who were not named in the policy as having an insurable interest.

[*Keefer* v. *Phoenix Ins. Co.*, 31 Can. S.C.R. 144; *Keighley* v. *Durant*, [1901] A. C. 240; *Reliance Marine* v. *Duder*, [1913] 1 K.B. 265, referred to.]

Appeal by plaintiff from judgment of Murphy, J.

The appeal was dismissed, McPhillips, J.A., dissenting.

Charles Wilson, K.C., for appellant, plaintiff.

E. C. Mayers for respondent, defendant.

Macdonald, C.J.A.:—The policy sued on in terms insures the goods—not any particular interest in them. The intention of the parties, or more strictly speaking, the intention of the bank to insure for the benefit of all parties concerned, is not, I think, in doubt when all the oral and documentary evidence is considered in the light of the circumstances of the case. That conclusion is greatly strengthened by the fact that the policy is for $3,300 the insurable value of the goods, and not for $2,000 the sum advanced by the bank. It would seem to me to be absurd to say that the bank's interest alone was insured when the owner was paying a premium on an insurance of $1,300 in excess of the bank's interest for which, if the opposite contention be accepted as the correct one, no protection at all was afforded.

The case is therefore within *Keefer* v. *Phoenix Insurance Co.* (1901), 31 Can. S.C.R. 144.

But there is another defence pleaded, and I think proven, namely, that other insurance was taken without notification to the defendants and without their consent. The other insurance is alleged to consist of floating policies taken out in the United States and supposed to cover any balance of loss on the B. C. Hop Co.'s assets situate anywhere in Canada or the United States except the State of New York, but limited in cases where the company's goods are specifically insured to the excess of value beyond such specific insurance.

It seems to be common ground that these policies cover the goods in question here; but it was argued by Mr. Wilson, counsel for the appellants, that because these policies covered only the value of the goods in excess of the specific insurance, that is to say, in excess of the value insured under the policy in question in

B. C.

C. A.

BRITISH COLUMBIA HOP CO. v. FIDELITY PHENIX FIRE INSURANCE CO.

Macdonald, C.J.A.

this action, statutory condition No. 8 had no application to it, and hence did not bar the plaintiffs from recovering in this action. I find myself unable to accede to that contention. The policies are intended to cover the loss on the goods by fire, the one up to $3,300, the others as to the excess in value above that sum. It is not in dispute that these floating policies were either in existence and undisclosed at the time the policy in this action was obtained, or were procured or extended to cover those goods after said policy was obtained, and without the knowledge and consent of the defendants. That being so, there seems to me to be no escape from the conclusion that the plaintiffs are precluded from recovering by reason of said condition No. 8. Mr. Wilson cited and relied upon *Australia Agricultural Co.* v. *Saunders* (1875), L.R. 10 C.P. 668; 44 L.J.C.P. 391, but in my opinion that case is clearly distinguishable from this. It inferentially supports my conclusion.

I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—The case was argued by Mr. Wilson on the basis that the intention of the parties as well as the language used in the policy shewed that the insurance was for the benefit of the plaintiffs, by which expression I shall hereafter refer to Clements-Horst & Co.

The description of the subject-matter of the insurance and the insurable interest therein is certainly wide enough to include the insurable interest of the plaintiffs, but according to *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366, whether the intention was to include them is a question of fact. The onus of proof would be on the plaintiffs.

Mr. Bremner for the bank as a condition to making the advance required the goods to be insured for the benefit of the bank—and the broker who obtained the insurance acted for the bank. No instructions were given as to including the plaintiffs in the contract, and, notwithstanding that Mr. Eder, for the plaintiffs, fixed the amount of the insurance, and the plaintiffs were charged with the premium, I am unable to say that the plaintiffs have satisfied the onus which I think was upon them. If the wide language "on trust etc." would shift the onus, I do not think we ought to interfere with the findings of fact

reached by the learned trial Judge. There must be grave reasons for interfering with the inferences drawn by the trial Judge: per Lord Loreburn in *Sweeney* v. *Coote*, [1907] A.C. 221; 76 L.J.P.C. 49.

Sec. 86 of the Bank Act does not prevent the plaintiffs having an insurable interest.

The condition precedent in the 10th condition requiring the insurable interest of any person other than the bank to be stated in the policy was not satisfied so as to make the plaintiffs a party to the policy.

The case of *Keighley Maxsted & Co.* v. *Durant*, [1901] A.C. 240; 70 L.J.K.B. 662, where it is laid down that undisclosed intentions will not make a contract, has apparently made it doubtful whether the intention of those who have contracted with the insurance company—not appearing in the policy and not communicated—is to be binding on the insurance company: see *Reliance Marine Ins.* v. *Duder*, [1913] 1 K.B. 265; 81 L.J.K.B. 870, per Kennedy, L.J. at p. 276, citing a remark by Lord Atkinson in *Boston Fruit Co.* v. *British & Foreign Marine Ins. Co.*, [1906] A.C. 336 at 343; 75 L.J.K.B. 537.

On the second point, which can only arise if the policy of August 3 does include the plaintiffs' interest, as to the insurance effected by the floating policy of August 27—the subsequent facts establish that this was additional insurance contrary to the 12th condition. There is no evidence of mutual mistake in omitting the clause allowing concurrent insurance. Mr. Bremner said the bank must be protected, and no other instructions were received by the insurance company.

I would dismiss the appeal.

Martin, J.A.:—I have reached the conclusion that the appeal herein should be dismissed, substantially for the reasons given by the learned trial Judge.

Martin, J.A.

McPhillips, J.A., dissented.

McPhillips, J.A.

Appeal dismissed.

SASK.

S. C.

BRODER v. GLENN.

Saskatchewan Supreme Court, Haultain, C.J., Newlands and Lamont, JJ. July 15, 1914.

1. VENDOR AND PURCHASER (§ I C—10)—DEFECTIVE TITLE—ADVERSE CLAIMS FOR TAXES—ABSENCE OF FRAUD—EXECUTED CONTRACT—REMEDIES, HOW LIMITED.

Where everything has been done that was necessary to vest the title in the purchaser of an outstanding interest in land already registered in his name and the contract has become an executed one, the purchaser cannot, on the ground of adverse claims for taxes or otherwise, recover money which has been paid, but must rely on the covenants for title; in the absence of covenants or agreements of that nature he is without remedy except in case of fraud.

Statement

APPEAL by defendant from district court.

The appeal was allowed.

F. L. Bastedo, for appellant, defendant.

F. W. Turnbull, for respondent, plaintiff.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The plaintiff, prior to November 1, 1906, was, and still is, the registered owner of block 63, Broder's Addition, Regina. On November 1, 1906, by an agreement in writing, he agreed to sell the said block to one J. R. Gayton. On October 19, 1910, Gayton sold to one W. R. Thomson; and on January 4, 1912, Thomson sold to the defendant. On January 20, 1913, the defendant and the plaintiff entered into the following agreement, which was endorsed upon the agreement between the plaintiff and Gayton:—

Regina, January 20, 1913.

In consideration of $10,000 this day received, I hereby sell the within-described property to George Broder, together with all my right, title and interest in the within agreement.

J. GLENN.

The agreement with said endorsement was then handed to Broder. Broder paid the $10,000 above-mentioned. At that time there was due to Broder under the original agreement with Gayton $1,410.50. In his evidence, Broder says he bought the block back from Glenn for $11,400 (he having made a mistake of $10.50), $1,400 of which he applied on the amount due him, and $10,000 which he paid over to Glenn. After the deal was closed and the money paid, the plaintiff discovered that the taxes for 1912, amounting to $63, had not been paid. These

he paid, and brought this action to recover the amount from Glenn. He admits that nothing was said about taxes between himself and Glenn. Glenn's defence is that he sold to the plaintiff the interest which he had in the land, and there was no covenant, express or implied, that the land should be clear of incumbrance. The matter was tried before the Judge of the District Court, who gave judgment for the plaintiff. From that judgment the defendant now appeals.

For the appellant it was contended first, that on the evidence all the plaintiff purchased was the interest of the defendant in the land, and secondly, that even if this were not so, the agreement was an executed one and the plaintiff consequently could not recover in the absence of a covenant by the defendant for title. Both points are, in my opinion, well taken. The evidence of Broder and the memorandum of the transaction taken at the time clearly establish, to my mind, that the plaintiff was buying the interest which the defendant had. The plaintiff had the registered title. He had also an interest of $1,410.50 in the land. The value of the land, he says, was $11,400. He paid the defendant $10,000; and the memorandum sets out that in consideration of that $10,000 the defendant sold him the property. As the consideration mentioned was just the value of the defendant's interest, that interest is, in my opinion, just what the plaintiff purchased. The defendant was, therefore, under no obligation to pay the taxes.

On the second point taken by the defendant, the law is laid down in 25 Hals. 462, as follows:—

> While the contract remains executory, the purchaser can decline to complete unless a proper title is made out; but after the property has been conveyed, and the purchaser has accepted the conveyance and taken possession, the vendor becomes absolutely entitled to the purchase-money. The purchaser cannot, on the ground of adverse claims, recover money which has been paid or detain money unpaid, but he must rely on the covenants for title. In the absence of covenants, or so far as these do not apply, he is without remedy, except in case of fraud.

Here everything had been done that was necessary to vest the title in the plaintiff free from all claims on the part of the defendant. The memorandum conveyed to the plaintiff all the defendant's interest in the land, and there was no covenant for title, express or implied, on the part of the defendant. The

SASK.

S. C.

BRODER v. GLENN.

Lamont, J.

plaintiff must, therefore, hold the land with such incumbrances as attach to it. See *Foster* v. *Stiffler*, 12 W.L.R. 60.

The appeal should be allowed, with costs; the judgment of the Court below set aside, and judgment entered for the defendant with costs.

Appeal allowed.

ONT.

S. C.

Re MONARCH BANK OF CANADA.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, and Magee, JJ.A. November 27, 1914.

1. BANKS (§ II—9)—STOCKHOLDERS—WHO LIABLE AS—BANK WITHOUT TREASURY CERTIFICATE—ALLOTMENTS.

Subscribers for shares in a bank which never went into operation because of failure to get the necessary amount of subscriptions to obtain a certificate from the Treasury Board (Can.) and to whom the provisional directors had made allotments, may be placed on the list of contributories on the winding-up of the bank; a subscriber who has paid his entire subscription may be placed on the list of contributories for the purpose of apportioning the amount returnable to him over and above the amount which may be found to be his proper share.

[*Atty.-Gen.* v. *Great Eastern*, 5 App. Cas. 473, and *Re Anglesea Colliery*, L.R. 1 Ch. 555, applied.]

Statement

APPEAL by four persons, whose names were placed by an Official Referee upon the list of contributories in the winding-up of the bank, from an order of MIDDLETON, J., dismissing an appeal from the Referee's order so placing their names.

The appeal was dismissed.

W. M. Douglas, K.C., for the appellants.

C. A. Masten, K.C., and *W. K. Fraser*, for the liquidator, the respondent.

Maclaren, J.

The judgment of the Court was delivered by MACLAREN, J.A.:—

The bank was incorporated on the 20th July, 1905, by ch. 125 of the Dominion statutes of that year (4 & 5 Edw. VII.), which is in the short form prescribed by schedule B of the Bank Act, R.S.C. 1906, ch. 29. The bank not having secured within a year the $500,000 stock necessary to enable it to obtain the certificate of the Treasury Board to begin business, the time was extended to the 20th July, 1907, by ch. 127 of the Dominion statutes of 1906 (6 Edw. VII.); default still continuing, a winding-up order was taken out and a liquidator named on the 29th May, 1908.

Mr. Douglas based his appeal on the ground that the appellants never became shareholders, and consequently could not be made contributories.

The four appellants, Murphy, Choat, Foster, and Beasley, signed separate applications under seal for 30, 5, 3, and 32 shares respectively, promising to pay $125 in certain instalments for each share of $100 which the provisional directors might allot to them. The whole number were allotted, and the parties notified. All the instalments were payable before the charter expired on the 20th July, 1907. Murphy paid no cash, but gave a demand note, bearing interest, for the full amount, $3,750; Choat paid $125, and gave a note for $500; Foster paid up in full, $375; and Beasley paid $800, and owed $3,200.

These four claims were selected as typical of the different classes of subscribers to the stock of the bank; and, by the direction of the Official Referee, they were consolidated in one test case in order to equalise the position of the different subscribers *inter se* with reference to their contributing to the preliminary expenses of the bank, so that those who had paid nothing or less than their share might be compelled to contribute, and those who had paid more than their share might be recouped.

Mr. Douglas contended that the appellants, not being shareholders, were consequently not liable to be placed upon the list of contributories, even though they might each be liable in an action brought against them to recover their proper shares of the preliminary expenses of the bank. He referred to sec. 51 of the Winding-up Act, R.S.C. 1906, ch. 144, as the only section under which it could be claimed that they should be placed upon the list.

The word "contributory" in the Winding-up Act, R.S.C. 1906, ch. 144, is defined in sec. 2.

It is quite true that the word "shareholder" is not used in the Bank Act until a later stage in the history of a bank than that attained by the Monarch Bank. The term used in the preliminary stage is "subscribers." And yet there is no magic in the mere name; one should look at the real substance of the matter. On the 20th July, 1905, by ch. 125 of the statutes of that year, the six persons named as provisional directors were con-

ONT.

S. C.

RE MONARCH BANK OF CANADA.

Maclaren, J.A.

stituted a corporation. In addition to the powers conferred upon them in the Bank Act, they had, by virtue of their incorporation, those conferred by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 30, such as the "power to sue and be sued, to contract and be contracted with by their corporate name, . . . to acquire and hold personal property," etc. Their special Act provides that later the corporation shall be composed of the six persons named and "such others as become shareholders in the corporation."

The Bank Act, R.S.C. 1906, ch. 29, sec. 13, provides that at the first meeting of subscribers they shall *inter alia* elect directors, and thereupon (sub-sec. 4) "the functions of the provisional directors shall cease."

Now, if the theory of the appellants be correct, the corporation could not possibly be composed as the Act says it shall be, as the subscribers, according to that view, would not become shareholders until after the provisional directors had ceased to exist as such.

Again, sec. 20 of the Bank Act provides that no person shall be elected a director at such meeting unless he hold stock on which $3,000 or more has been paid-up. If he holds such stock, he is surely a stockholder or shareholder within the meaning of the Act, and every other subscriber who has been allotted stock by the provisional directors is in the same position.

The Bank Act, as it stood while the charter of the Monaren Bank was in force, contained singularly few provisions as to the powers and duties of provisional directors. The provisions are all, practically, comprised in secs. 11, 12, and 13. The provisional directors are appointed "for the purpose of organising the bank," and are authorised to cause stock-books to be opened at the head office and elsewhere at their discretion, and to keep them open as long as they deem necessary. As soon as $500,000 has been subscribed, and $250,000 paid thereon and remitted to the Finance Minister, they may by public notice call a meeting of the subscribers, at which they shall fix the date of the annual meeting, determine the number of directors (not less than five), and elect these from the qualified subscribers. For anything that appears in the Act, these

six provisional directors, or any five of them, might, if they were financially able and so chose, subscribe the whole $500,000, paying $250,000, and elect themselves directors. Of course, banks are not organised in this way; but it shews what power has been put into the hands of the provisional directors and how much is left to their discretion.

This would seem to be pre-eminently a case for the application of the rule or maxim as to implied powers, viz., that where a certain result is authorised to be attained, and the means are not clearly indicated, the power of doing all such acts, or employing such means, as are necessary to its execution, is impliedly granted.

The learned Judge cited from *Small* v. *Smith*, 10 App. Cas. 119, at p. 129.

It is not necessary in the present case to go so far, because the usual procedure for the organization of a joint stock company is so well understood. In my opinion, what is declared in sec. 12 of the Bank Act to be the purpose of that portion of the Act, and which is authorised to be done in sec. 13, could not properly be carried out unless the directors had power to allot stock and to make the subscribers members of the corporation. Does not the right to choose the directors of the bank of itself imply that they are members?

It is also worthy of note that there is nothing in the Act to suggest that the directors have any right to interfere with the list of subscribers or shareholders prepared by the provisional directors for the first meeting, or that they require to do something in order to change subscribers into shareholders. Indeed, their power over the original stock of the bank is very circumscribed. They have no power over it except such portion as may not have been subscribed, and even this they must allot *pro ratâ* to the existing shareholders, that is, to the original subscribers and their transferees: sec. 34.

Sections 60 and 93 of the Winding-up Act would appear to have been designed to meet such a contingency as has arisen in this case, and they appear to have been admirably adapted to do justice to all parties.

The appellant Foster was properly placed upon the list of

ONT.

S. C.

RE MONARCH BANK OF CANADA.

Maclaren, J.

contributories, although he had paid for his shares in full, and there is no question of double liability: *In re Anglesea Colliery Co.* (1866), L.R. 1 Ch. 555. He is placed on the list simply in order that he may receive what he has paid, over and above his proper share, in accordance with secs. 60 and 93 of the Act; and I fail to see why he appeals.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

B. C.

S. C.

DAVIS v. ALVENSLEBEN.

British Columbia Supreme Court, Macdonald, J. June 10, 1914.

1. FORECLOSURE (§ I—5)—AGREEMENT OF SALE—JUDGMENT FORECLOSING —TIME FOR REDEMPTION.

Subject to the right to apply for an extension on proper material, the ordinary judgment foreclosing the purchaser's rights under an agreement of sale of lands for default in meeting a deferred instalment of purchase-money should not allow a longer time than two months to redeem after judgment.

Statement

ACTION to foreclose an agreement for sale of lands.

Judgment accordingly.

D. G. Marshall, for plaintiff.

Fillmore & Todrick, for defendant, Gibb.

Macdonald, J.

MACDONALD, J.:—Upon this action for foreclosure under an agreement for sale coming on for trial no defence was offered on the part of the defendants. Counsel for the defendant, Gibb, contended that the time for redemption should be six months. It was pointed out that the action was analogous to foreclosure under a mortgage. The similarity of the two actions is referred to by Jessel, M.R., in *Lysaght* v. *Edwards*, 2 Ch. D. 499, at 506:—

It appears to me that the effect of a contract for sale has been settled for more than two centuries . . . Their positions are analogous in another way. The unpaid mortgagee has a right to say to the mortgagor, "Either pay me within a limited time or you lose your estate" and, in default of payment, he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of equity: he has a right to say to the purchaser "either pay me the purchase-money or lose the estate."

As to the rights and liabilities of the parties, this is the settled law in the matter, but the question for consideration is whether the time limited by the judgment for payment of the

purchase price should follow the practice in foreclosure proceedings under a mortgage. The established rule is that a mortgagor has "six months and six months only, to redeem." Chitty, J., in *Platt* v. *Mendel*, 54 L.J. Ch. 1145, 27 Ch. D. 246 at 248. The security afforded the vendor by the terms of the agreement for sale coupled with his right to enforce a vendor's lien should not, in my opinion, be treated as to time for redemption in the same way as a mortgage. Generally speaking the mortgagee has a substantial margin as between the amount of the mortgage and the value of the property provided as security. Whereas very often only a small amount is paid at the time of the execution of the agreement for sale and the balance of the purchase price is payable by instalments. If the first deferred payment should not be made at maturity, the defendant might, as in this instance was disclosed, by a flimsy defence, compel the vendor to go to trial to enforce his rights. He would thus ward off payment for a considerable period and retard the vendor in either recovering payment of the purchase price or resuming the absolute ownership of the property. Should a further period of six months then be granted it would, in a new country where the values are not ascertained, and, to say the least are fluctuating, jeopardize the security of the vendor. It would enable the purchaser to retain an equity and speculate on the market for real estate. He has retained, on equitable principles, an interest in the property of the vendor after his default in payment and I think in this province such a lengthy period for redemption would be unreasonable. Cyc. vol. 29, p. 1874, refers to the time stipulated by a decree within which the purchaser must make payment of the purchase money as follows:—

> No definite rule as to time can be laid down. In any case the time should be reasonable in view of the circumstances of the case.

Even in a judgment for foreclosure under a mortgage the rule as to six months for redemption does not appear to be a hard and fast one, as Street, J., in *Gibson* v. *McCrimmon*, 9 C.L.T. Occ. Notes, 40, granted immediate foreclosure and also immediate possession without any consent being given by the defendant, where it was shewn that the mortgage debt was in ex-

B. C.

S. C.

DAVIS v. ALVENSLEBEN

Macdonald, J.

cess of the value of the land. In *Ardagh* v. *Wilson*, 2 C.L.J. 270 at 302, three months was the time given for redemption where one of the encumbrancers had redeemed and was seeking foreclosure as against other encumbrancers.

There is a practice in this Court of allowing one month or at most two months as the time for redemption under agreements for sale, unless special circumstances are disclosed. I would have preferred before giving my judgment to have consulted with my brother Judges as to how this practice arose, but I have been prevented from such consultation by stress of their Court work. I think it well not to delay judgment as the defendant may desire to make application to the Court of Appeal at its present sittings.

I see no reason to depart from the practice thus established, and, as no special circumstances were suggested, two months from the date of judgment will be granted for redemption. I have not overlooked the fact that a defendant is entitled to apply, upon proper material, for further extension before the expiration of the limited time; especially, if he can shew a reasonable prospect of payment by further indulgence and that the property is worth more than the amount due the plaintiff.

Judgment accordingly.

CAN.

S. C.

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. March 23, 1914.

1. TAXES (§ I E—50)—WHAT TAXABLE—GRAZING LEASES.

The interest of a lessee of public lands under a grazing lease from the Crown is taxable under the Local Improvements Act, 1906, Sask. [R.S.S. 1909, ch. 88] and the Supplementary Revenue Act, 7 Edw. VII. ch. 3 [R.S.S. 1909, ch. 37].

[*Vermilion Hills* v. *Smith*, 13 D.L.R. 182, affirmed; *Calgary, etc., Land Co.* v. *Atty.-Gen.*, 45 Can. S.C.R. 170, applied.]

2. CONSTITUTIONAL LAW (§ II A—212)—TAXES AND ASSESSMENTS — LOCAL IMPROVEMENTS.

The provisions of the Local Improvements Act, Sask., 6 Edw. VII. ch. 36, and the Supplementary Revenue Act, Sask. 7, Edw. VII. ch. 3, authorizing the taxation of interests in Dominion lands held under grazing leases or licenses from the Crown, whether by residents or non-residents of Saskatchewan, is within the legislative powers of the province.

[*Calgary and Edmonton Land Co.* v. *Atty.-Genl.*, 45 Can. S.C.R. 170, applied; *Vermilion Hills* v. *Smith*, 13 D.L.R. 182, affirmed; see R.S.S. 1909, ch. 88 and R.S.S. 1909, ch. 37.]

CAN.

S. C.

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

APPEAL from the judgment of the Supreme Court of Saskatchewan, 13 D.L.R. 182, affirming the judgment of Newlands, J., at the trial, 10 D.L.R. 32, which maintained the plaintiff's action with costs.

The circumstances of the case are set out in the judgment of Mr. Justice Duff now reported.

The appeal was dismissed.

Knowles, Hare & Benson, for the appellant.

McKenzie, Brown & Co., for the respondent.

FITZPATRICK, C.J.:—I would dismiss this appeal with costs. Fitzpatrick, C.J.

IDINGTON, J.:—The facts in question herein as well as the substance of the enactments in question are set forth in the opinion judgment of the learned Chief Justice of the Supreme Court of Saskatchewan. Idington, J.

Upon these facts, which, by the way, appear to be admitted, I cannot see how this case in regard to the application of the statutes and principles of law which must govern our decision can be distinguished from the case of *The Calgary and Edmonton Land Co.* v. *The Attorney-General of Alberta*, 45 Can. S.C.R. 170. The statutes in question are substantially the same.

The right of respondent to sue for any taxes imposed by them or their officers or their predecessors seems clearly given.

The enactments upon which such taxation rest do not attempt to tax the land so far as vested in the Crown. In the absence of any such express attempt the statutes must be read as bearing only upon the interest of others in the lands and in this case of the appellant as lessee or occupant. The claim that these assessments are so excessive as to shew that they exceeded the value of the land cannot be raised herein.

The justice or injustice of the rating is something which we can have nothing to do with. The local Court for determining any such question can alone be appealed to, or default that, the legislative authority.

Then it is suggested that appellant was a non-resident and hence the attempt to tax his interest in the lands or him in re-

CAN.

S. C.

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Idington, J.

spect of such interest is *ultra vires*. There is no evidence of appellant's residence except his description in the grazing lease granted him by the Dominion Government. It does not follow that he was, therefore, not resident in the province at the times involved in the imposition of these taxes. Nor does it follow that he as occupant of the lands can set up any such contention in law or in fact.

And as at present advised I do not think the power of direct taxation given by the B.N.A. Act to the province can be circumscribed or limited in the case of taxation relative to lands by anything involved in the question of the owner's place of residence.

It may well be that in attempting to enforce by action in Courts beyond the province, claims for taxes the municipality might find some difficulty.

But the Courts of the province when duly constituted by its Legislature under and by virtue of the B.N.A. Act and given thereby jurisdiction to enforce such a claim as if a debt, must be bound by the law of the province in everything pertaining to direct taxation and to property and civil rights in the province.

For the purposes of this appeal we must assume that the taxation of land or any interest therein or of any person in relation to any land in the province, or interest in any such land is direct taxation within the meaning of the B.N.A. Act, and that if the legislature had declared taxes so rightfully imposed to be or constitute a debt within the province due by those who enjoy the protection relative to such land and advantages thereof, for which the taxation is a compensation, it has acted within its power over property and civil rights in the province and that the Courts duly constituted by the province to administer its laws must enforce them even if in doing so they may have to deal with people domiciled beyond the province and their property within the province.

The argument founded upon the provision of the statutes in question anticipating and providing for enforcement of the tax liens by way of sale of the lands seems to move in a circle for it is only that interest the owner taxed may have that can

be reached. And if that remedy by any mode of construction can be made to appear otherwise it would simply be in that view inoperative as the Crown is not made subject to these enactments.

The appeal should be dismissed with costs.

DUFF, J.:—I agree with the learned Chief Justice of Saskatchewan and, for his reasons, that if the taxes sued for in this action were lawfully imposed at all they can now be recovered by the respondent municipality. In 1909, the area comprised within the limits of the municipality was included in Large Local Improvement District C(3) and the appellant was assessed in that year for local improvement tax at the rate of 1¼ cents an acre by the Local Improvement Branch of the Provincial Government under sec. 73 of the Local Improvements Act of 1906. In December, 1909, the respondent municipality was organized and the appellant in the years 1910 and 1911 was assessed at the rates of 3½ cents and 3 cents an acre respectively under the authority of sec. 50 and 51 of the Act of 1906. In each of the years 1909, 1910 and 1911 the appellant was assessed at the rate of ½ cent per acre under the authority of the Supplementary Revenue Act. The lands in respect of which the appellant was assessed were, when the assessments were made, the property of the Crown in the right of the Dominion of Canada, subject to the grazing leases that had been granted to the appellant. It is admitted that in each of the years in question the appellant used these lands for grazing purposes under his leases; and it is further admitted that if he is assessable in respect of them such assessment was duly made. I think also that the result of the admission is that the appellant was an occupier of these lands within the meaning of the statute. I think, moreover, that sec. 50 (as amended by sec. 7, ch. 25, statutes 1909), sec. 55 and sec. 59 of the Act of 1906 taken together had the effect of making taxes levied within the limits of a local improvement district and unpaid a debt due to the district. It is admitted that the respondent municipality is entitled to recover these taxes unless the legislation under the authority of which they are levied is itself *ultra vires* or the taxing authority has exceeded the powers conferred upon it by

CAN.
S. C.
SMITH
v.
RURAL MUNICIPALITY OF VERMILION HILLS.
Duff, J.

the legislation. The first question is: Has the Legislature of Saskatchewan authority to tax the appellant as occupant of these lands, the appellant himself residing outside the province, and to provide effectively for the recovery of the taxes in the Courts of the province as a debt?

As to this point, very little need be said. *Primâ facie*, the authority of the province under sec. 92(2) of the British North America Act, 1867, to legislate in relation to the subject of direct taxation in the province includes the power to levy taxes upon the occupants of the property within the province in respect of their occupation, whether they are residents or non-residents.

It would appear also that as reasonably incidental to the authority of the province in relation to that subject there must be vested in the legislature the right to empower the taxing authority to recover as a debt any taxes assessed upon or in respect of property owned or occupied within the province. That is the view that has always been taken and acted upon in the Canadian provinces and until the argument of this appeal I do not think I have heard a doubt expressed as to the correctness of it. Of course, one ought not to lose sight of the fact that under sec. 92(13) and sec. 92(14) the province has exclusive legislative authority in respect to property and civil rights in the province and the administration of justice. I may further observe that we are not concerned with any question here whether provincial legislation, enacting that a tax assessed upon the property of non-residents, shall be recoverable as a debt, has or has not the effect of creating an obligation enforceable beyond the limits of the province. The general rule is that the revenue laws of one country are not taken notice of in another country and it appears to be on this principle that judgments proceeding upon such laws are not recognizable. *Planché* v. *Fletcher*, 1 Douglas 251. It is also on this principle that it has been held in the United States (*Henry* v. *Sargeant*, 13 N.H. 321, at 332, *per* Parker, C.J.) that the Courts of one state cannot be used as a means of collecting the taxes imposed by another. In *Municipal Council of Sydney* v. *Bull*, [1909] 1 K.B. 7, Mr. Justice Grantham dismissed an action brought by

the Municipal Council of Sydney to enforce the payment of a local improvement rate levied on the authority of an Act of the Legislature of New South Wales, whereby the Council was authorized to recover the amounts levied under the Act, by action. It was held that the action was analogous to an action brought in one country to enforce the revenue laws of another country and consequently would not lie.

It was, moreover, held in the last mentioned case that the enactment on its true construction established only a liability to be enforced in the Courts of New South Wales; and it may be that the true intendment and effect of the Act of 1906 is to create in respect of these taxes a debt recoverable by action in the Courts of Saskatchewan only. At all events it could be forcibly argued that this particular provision ought to be read in the light of the recognized principle of private international law to which I have referred and if when so read it offends against no limitation imposed by the B.N.A. Act upon the legislative powers of the province, one would not, of course, be justified in ascribing to it a construction and effect which would make it *ultra vires*.

The point the appellant really endeavours to make in this connection is that the legislation infringes the prohibition of sec. 125 of the B.N.A. Act,

> no lands or property belonging to Canada or any province shall be liable to taxation.

Now, first, it is beyond question that the appellant is assessed in respect of the occupation of the lands in question, which lands, as I have already said, are (subject to the interest vested in him by virtue of his leases) the property of the Crown in the right of Canada. If this legislation really and truly authorizes the taxation of the appellant in respect of the property of the Crown then I have no hesitation in saying that it does infringe this provision. If, on the other hand, what the Legislature has done is to tax the appellant in respect of his own interest or in respect of his occupation in right of his own interest, it appears to me to be unobjectionable. I think it is hardly arguable that sec. 125 prohibits the levying of taxation by the Dominion or by a province upon or in respect of a par-

CAN.
S. C.
SMITH
v.
RURAL MUNICIPALITY OF VERMILION HILLS.
Duff, J.

ticular interest held by a subject in Crown lands. The section may easily be read as exempting from taxation the interest of the Crown in Crown lands only. And the alternative reading suggested would have the effect of exempting from taxation a large variety of interests such, for example, as those arising under timber leases, mining leases, fishing leases, with which we are very familiar in this country, and it is not a construction which commends itself to my judgment.

Then does this particular legislation exceed the limits set by the enactment mentioned either in itself or in the manner in which the respondent municipality has professed to put it in operation? First, as to the legislation itself: I do not think it was seriously argued that the tax imposed by the Supplementary Revenue Act of one-half of one cent per acre upon lands held under grazing leases is *ultra vires*. At all events, I am quite at a loss to understand on what ground it could be plausibly contended that this particular enactment ought not to be read as imposing a tax upon the lessee or occupant in respect of his occupation or his interest. The provisions relating to local improvement tax are secs. 50 and 51 and secs. 73 and 74 of the Act of 1906. These sections are as follows:—

50. The council may cause to be levied in each year for the general purposes of the district a tax not less than one and one-quarter cents and not more than five cents per acre upon every owner or occupant in the district for land owned or occupied by him:

Provided that any person whose assessment would be less than fifty cents shall be assessed fifty cents.

51. The rate per acre of the said tax shall be fixed by a resolution of the council.

73. In large districts the rate of assessment shall be one and one-quarter cents per acre:

Provided that in any large district if the commissioner is satisfied that the said rate of assessment would raise a sum greater than would be necessary to effect the improvements required in such district the rate of assessment may be reduced to such less amount per acre as the commissioner may determine.

Provided further that any person whose assessment would be less than fifty cents shall be assessed fifty cents.

74. As soon as possible after the beginning of each year or after the organization of a large district an assessment roll shall be prepared for each large district upon which shall be entered as accurately as may be the following information:—

(*a*) Each lot or parcel of land owned or occupied within the district and the number of acres it contains;

(*b*) The name and post office address of the person assessed as owner or occupant of each lot or parcel;

(*c*) The amount of assessment;

(*d*) The amount of previous assessments which have not been paid.

First.—Of the secs. 73 and 74 under which the rate for the year 1906 was levied:—Is the tax thereby imposed a tax upon Crown lands within the meaning of sec. 125 of the B.N.A. Act? I think, perhaps, there was some misapprehension in relation to this point as to the effect of *Calgary and Edmonton Land Co.* v. *The Att.-Gen. of Alberta*, 45 Can. S.C.R. 170. It will be found, I think, that the decision in that case really rested upon the view taken by the majority of the Court that the whole beneficial interest in the lands in question (subject to a lien for a fee payable to the Department of the Interior) had become vested in the land company. In the present case the contention is that looking at the provisions of these enactments as a whole and especially the provisions relating to the proceedings for the recovery of the tax levied through the sale of the lands themselves one sees that the tax is intended to be levied against and made a charge upon the fee simple or the equivalent of the fee simple in all the lands in the province. In the case of lands in respect of which the legal title is vested in the Dominion, but the entire beneficial interest is vested in the subject there would seem, and that was the view taken in the *Calgary and Edmonton case*, 45 Can. S.C.R. 170, to be nothing to prevent such provisions having their full operation. But where the Crown in the right of the Dominion retains a substantial beneficial interest, as well as the legal title in the lands, then a different question entirely arises; and I have no manner of doubt that if the effect of the legislation in this respect is what the appellant contends for then it is obnoxious to sec. 125 of the B.N.A. Act.

I concur, however, in the view which was expressed in some of the judgments of the *Calgary and Edmonton case*, 45 Can. S.C.R. 170, to the effect that the interpretation clause entitles us where that is necessary to make the legislation effective and reasonably possible to read "land" and "lands" in these enactments as meaning "interest in land;" and, I think, we ought to give to these provisions a construction in so far as the lan-

CAN.

S.C.

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Duff, J.

guage of them is reasonably capable of it, consistent with the assumption that the Legislature did not intend to offend against the sec. 125 of the B.N.A. Act; and on the other hand, having regard to the circumstances of the province of Saskatchewan and the obvious injustice of exempting from taxation limited interests such as those in question here we must, I think, read these provisions in light of the strong probability that the Legislature did not intend to sanction such a sweeping exemption. In other words, the entire exclusion from the operation of these Acts of all interests in Dominion Crown lands would operate so unfairly that one really can not suppose the legislature to have contemplated it.

Whatever difficulties there may be in putting into operation some of the provisions of these statutes in respect of an assessment such as that in question here I can see no good reason against holding that the essential enactment by which the liability to pay the tax is created may be given effect to in proceedings *in personam* against the occupier, who is at the same time owner of a limited interest in Dominion Crown lands.

At first sight it appeared that a difficulty might arise by reason of the fact that the rate is a uniform one with reference to owners and occupiers. But if the rate be conceived as having been fixed primarily with reference to the occupation value which may very well have been the case, one can quite understand the Legislature having resolved that the owners of lands which are unoccupied should not by reason of that fact alone escape taxation.

Coming now to secs. 50 and 51, the only point necessary to refer to is that from admission No. 5 it appears that the rate imposed by the resolution of the respondent municipality was a uniform rate levied alike upon the owners and upon the occupants of land. Any objection founded on that circumstance must stand or fall with the objection just dealt with.

I think the appeal should be dismissed with costs.

ANGLIN, J.:—For the reasons given by the Chief Justice of Saskatchewan, in which I respectfully concur, I am satisfied that the respondent municipality had the right to collect the taxes in question if they were validly imposed.

Their validity is impugned on one ground only; namely, that they are in contravention of sec. 125 of the B.N.A. Act, which exempts from provincial taxation lands belonging to the Crown in right of the Dominion. In *The Calgary and Edmonton Land Company* v. *Attorney-General of Alberta*, 45 Can. S.C.R. 170, we held legislation similar to, if not identical with, that now impeached to be *intra vires* of a provincial legislature. We regarded it as authorizing, in the case of Dominion Crown lands, only the taxation of any interest in them with which the Crown had parted. It was suggested—indeed argued at some length—that in the present case the tax is not upon an interest so parted with, but upon the lands themselves. It may be that the tax on the defendant's interest as holder of a grazing lease is excessive, but that is not a matter with which we can deal. There is no evidence that it was intended to tax any interest in the lands still held by the Crown. Nor is it established that the tax in question will indirectly affect the interest of the Crown to any greater extent than that interest is necessarily affected by the prospect that when parted with it becomes subject to provincial taxation.

It is also urged that because the defendant is a non-resident the provincial legislature cannot make him liable to a personal action for these taxes. I see no reason why the legislature may not authorize the recovery in its own Courts of a personal judgment against the owner, wherever resident, for arrears of taxes levied upon an interest in lands situate within the province. That judgment will be enforceable only against property of the defendant within the province. It can be enforced against his person only if he should come within the provincial boundaries. If he should be sued upon it in any other jurisdiction it is quite possible that some very nice questions of international law would arise. But the purchaser of an interest in land buys it subject to provincial legislation, whether present or future, affecting it and the incidents of its ownership within the province, and cannot be heard to say in a Court of the province, or on appeal therefrom, that he is not bound by legislation which makes him personally liable within the province for taxes validly imposed in respect of such interest.

I would dismiss this appeal with costs.

CAN.

S. C.

SMITH v. RURAL MUNICIPALITY OF VERMILION HILLS.

Brodeur, J.

BRODEUR, J :—In my opinion the case of *Calgary and Edmonton Land Co.* v. *The Att.-Gen. of Alberta*, 45 Can. S.C.R. 170, disposes of the present appeal. That case determined that the provincial legislatures had the right and the power to authorize the taxation of beneficial or equitable interests in lands wherein the Crown in the right of the Dominion of Canada holds some interest and the legal estate. The interest of the appellant in the Dominion lands in question then can be taxed. It may be that in this case the municipal valuation of that interest is larger than it should be, but we have no evidence to guide us on that issue.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

ALTA.

S. C.

PURMAL BRICK CO. v. GENERAL ELECTRIC CO.

Alberta Supreme Court, Simmons, J., August 27, 1914.

1. FIXTURES (§ V—27)—EFFECT OF MORTGAGE — MACHINERY — CONDITIONAL SALE.

As the Real Property Act, Alta. provides that a mortgage or encumbrance under the Act shall not operate so as to create the mortgagee a "grantee" of the land, a stipulation in the mortgage that machinery and improvements thereafter put upon the land shall become fixtures and form part of the security will not be effective as against the conditional vendor of machinery reserving title to himself under a conditional sale agreement made after the mortgage but before its registration and without notice of same.

[*Hobson* v. *Gorringe*, 66 L.J. Ch. 114, distinguished; and see *Handrahan* v. *Buntain*, 15 D.L.R. 117.]

Statement

MOTION for judgment.

The motion was refused.

Hannah, Stirton & Fisher, for the defendants.

Laidlaw, Blanchard & Rand, for the plaintiffs.

Simmons, J.

SIMMONS, J.:—The plaintiffs are mortgagees of certain lands in the City of Medicine Hat in the Province of Alberta to secure the payment of $105,000, a part consideration for the sale by the plaintiffs to the Medicine Hat Brick Co., Ltd., of the lands and premises described therein and upon which a brick plant and machinery were installed. The mortgage is of date December 9, 1912, but was not registered in the Land Titles Office for the South Alberta Land Registration Dist. until August 4, 1913. The mortgage contains the following clause:—

And it is hereby declared and agreed that any erection, machinery, fixed or otherwise, building or improvements hereafter put upon said

premises shall thereupon become fixtures and be part of the realty and form part of this security.

Between the date of the execution of the said mortgage and the date of registration of the same, the defendants supplied the mortgagors, the Medicine Hat Brick Co., Ltd., with certain machinery and apparatus for the manufacture of brick, which said machinery was affixed to the said premises by means of bolts and screws in solid concrete, and would in my opinion, aside from any agreement to the contrary, become fixtures upon the soil and form part of the realty. The defendants, however, sold the said machinery and apparatus under agreements in writing with the Medicine Hat Brick Co., providing that the title and ownership in the said machinery and apparatus should remain in the vendors, the present defendants, until full payment had been made for the same, and that the said machinery and apparatus should not be considered fixtures until payment in full had been made according to the terms of the sales agreement and that in default of payment the defendants, the vendors, should have the right forthwith to remove the said apparatus and machinery from the said premises. The Medicine Hat Brick Co., Ltd., the mortgagors, having defaulted in their payments under the said mortgage, the plaintiffs under a separate action against the Medicine Hat Brick Co. have recovered judgment and an order for sale of the said premises, and pursuant to the said order the said lands and premises, including the machinery and apparatus affixed thereto are advertised for sale, pursuant to the order of the Court in said action. The defendants claim the right to remove the said machinery and apparatus under the sales agreements made between them and the mortgagor. The plaintiffs have applied for an injunction restraining them from doing so and counsel have agreed that the hearing of the said motion should be considered as a motion for judgment on the issues raised therein. If the plaintiffs' mortgage had been registered on the date of its execution and delivery and consequently prior to the lien agreement I am inclined to think that their case would rest on a firm foundation, as the registration of the mortgage would be a proper notice to any parties dealing with the mortgagor in the way of affixing improvements to the realty, essentially of the nature of fixtures. The mortgagors, the Medi-

ALTA.
S.C.
PURMAL BRICK CO. v. GENERAL ELECTRIC CO.
Simmons, J.

cine Hat Brick Co., have entered into an agreement with the defendants giving the defendants the right of removal of the machinery in question under certain circumstances, and also providing that the said machinery and apparatus shall not become fixtures until full payment be made for same. The mortgagors at a prior date have covenanted and agreed with the plaintiffs in this action that all erections and machinery, fixed or otherwise, should become fixtures and form part of the security recited in the said mortgage. It is quite clear that the mortgagor has bargained with the plaintiffs and with the defendants purporting to create rights which, as between the plaintiffs and defendants, are inconsistent, and the question of notice is, in my opinion, of prime importance. When the defendants sold their machinery under the sales agreement hereinbefore referred to there was no registration in the Land Titles Office of plaintiffs' mortgage and no notice that any charge such as the mortgage purports to create was in existence. There was at that time then, so far as the defendants were concerned, nothing to stand in the way of an agreement between them and the Medicine Hat Brick Co., that they should have the right to retake possession. A very full discussion of the authorities appears in a judgment of the Court of Appeal in *Hobson* v. *Gorringe*, 66 L.J. Ch. 114 at p. 118. A. L. Smith, L.J., who delivered the judgment of the Court says:

> That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold, upon the terms that the one shall be at liberty in certain events to re-take possession we do not doubt; but how a *de facto* fixture becomes not a fixture as regards the purchaser of land for value and without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced.

It is quite clear from the above dictum that if the plaintiffs can assert that they are entitled to the rights of a purchaser for value and without notice that they would be entitled to succeed. I do not see how they can successfully claim to stand in the shoes of a purchaser for value and without notice. Sec. 61 of our Real Property Act provides:

> A mortgage or encumbrance under this Act shall have effect as security but shall not operate as a transfer of the land thereby charged.

In *Hobson* v. *Gorringe*, *supra*, the mortgagee Gorringe was a mortgagee in fee of land without notice of the lien agreement in

which the fixtures were placed upon the land by the vendors thereof and the right of the vendor to the machinery was not an easement created by deed nor was it conferred by covenant running with the land, and the right therefore to remove the fixtures imposed no legal obligation on any grantee from the mortgagor of the land. It was not a right that could be enforced in equity upon any purchaser of the land without notice of the right. The Court of Appeal held that Gorringe was such a purchaser without notice. As already mentioned, our Real Property Act provides that a mortgage or encumbrance under the Act shall not operate so as to create the mortgagee a grantee of the land, and therefore I think the case does not come within the rule of *Hobson* v. *Gorringe*, *supra*, and I conclude therefore that the defendants are entitled to enforce their agreements with the mortgagor, which provides for the removal and sale of the said fixtures if the purchaser may default in payment therefor. The plaintiffs' application is, therefore, dismissed with costs.

Application dismissed.

HUYNCZAK v. B.C. ELECTRIC R. CO.

B.C.
C.A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 2, 1914.

1. MASTER AND SERVANT (§ II B—180)—VERDICT UNDER COMMON LAW LIABILITY — "DEFECTIVE SYSTEM," WHEN NEGATIVED — FELLOW SERVANT'S NEGLIGENCE.

A verdict under the common law liability of an employer for negligence in not maintaining an adequate system of warning the employees engaged in hoisting operations with a "skip," is not sustainable where the signalman employed was competent, careful and experienced and the system of verbal warning to the workmen to stand clear followed by a signal with the hand to the engineer to raise the skip was an adequate one if followed; the fact that the jury declined to find that the signal had or had not been given as sworn to, does not entitle the plaintiff to damages as even if the signal had not been given the injury was attributable to the negligence of the signalman a fellow-servant of the plaintiff and not a superintendent and the employer was not liable.

[*Garland* v. *Toronto*, 23 A.R. (Ont.), 238, referred to.]

Statement

APPEAL by defendants in a negligence action for damages for personal injuries to an employee.

The appeal was allowed.

L. G. McPhillips, K.C., for appellant, defendant.

J. McDonald Mowat, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The only question apart from that of contributory negligence is that of the adequacy of the defend-

B. C.

C. A.

HUYNCZAK v. B.C. ELECTRIC R. Co.

Macdonald, C.J.A.

ants' system of warning the men to stand clear of the skip before hoisting it. In my opinion the jury's finding that that system was a defective or negligent one is wholly contrary to the evidence. The instructions given to Clark, the signalman, who was a competent, careful and experienced signalman, were to warn the men to stand clear, and to give a signal to the engineer of the derrick to hoist the skip. He was not given other duties which would interfere with the due performance of these. I can conceive of no better system having regard to the work that the plaintiff and the other men were engaged in. Whether he gave the signal or not on this particular occasion does not affect the question. There is very positive evidence that he did give the signal, and the jury were unable to say that he did not do so. But if he did not, that was not the fault of the system, but his own fault, and being a fellow-servant with the plaintiff, defendants are not liable.

It is not necessary in this result to consider the question of contributory negligence, though I may say that, in my opinion, the jury were justified in coming to the conclusion that the plaintiff had not been negligent. It was one of those accidents which happen without fault on either side.

I would allow the appeal and dismiss the action.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal.

Clark in my opinion does not come within the definition of superintendent. He was hookman and signalman, and in the latter capacity exercised a certain amount of superintendence over the job of hoisting, but he had not that general superintendence over the men engaged about the machine as is exercised by a foreman, or by a person in like position to a foreman. The second sub-sec. of sec. 3 deals with the case of a foreman in his superintendence; the third subsection with the case of a person not given superintendence.

The B.C. statute differs from the English Act. Therefore the English cases do not assist us.

Garland v. Toronto (1896), 23 A.R. (Ont.), 238, has no application to this case, because the so-called superintendent had never been given any authority by the company.

B. C.

C. A.

HUYNCZAK v. B.C. ELECTRIC R. CO.

MARTIN, J.A.:—This verdict, which is definitely founded by the jury on a liability at common law, can only be upheld on the ground that there was a defective system of warning the defendant's servants. But I am unable to find any evidence in support of this contention. On the contrary it is clear that the system was that immediately after the hook was attached to the loaded skip a verbal warning was given by the signalman on duty to the workman to stand clear and a signal by his hand to the engineer to raise the skip at once. In what respect is this inadequate? The fact that in this particular case the jury could not (ques. 7) say that the signalman did give the signal he ought to have given does not entitle the plaintiff to maintain his action, and therefore this appeal should be allowed.

Martin, J.A.

GALLIHER, J.A., concurred in allowing the appeal.

Galliher, J.

MCPHILLIPS, J.A., concurred with MACDONALD, C.J.A.

McPhillips, J.A.

Appeal allowed.

REX v. HURST.

ALTA.

S. C.

Alberta Supreme Court, Simmons, J. December 23, 1914.

1. ARREST (§ I B—9)—ILLEGAL ARREST ON FIRST CHARGE—CONVICTION MADE ON SECOND CHARGE ONLY—DISMISSAL OF FIRST CHARGE.

The fact that the accused had been illegally arrested without a warrant on a charge which was dismissed, and that pending the hearing another charge was laid for a different offence, will not deprive the magistrate having jurisdiction in respect of time and place over the latter offence from proceeding to trial and conviction where objection was raised only in that case and not in the case upon the prior charge which was dismissed.

[*R.* v. *Hughes*, 4 Q.B.D. 614, *R.* v. *Paul*, 20 Can. Cr. Cas. 159, 7 D.L.R. 24, followed; *Pearks* v. *Richardson*, [1902] 1 K.B. 91, distinguished.]

Statement

MOTION on *certiorari* to quash defendant's conviction by a police magistrate for having opium in his possession contrary to the Opium and Drug Act, Can.

J. J. Barron, for the accused.

J. Shaw, for the Crown.

Simmons, J.

SIMMONS, J.:—This is an application by *certiorari* to quash a conviction of the police magistrate.

The defendant Joseph Hurst was arrested in the city of Calgary on the evening of November 7, 1914, on a charge of vagrancy under sec. 238 (1) of the Criminal Code. The arrest was made without a warrant, and it is admitted that for this reason the arrest was illegal. On November 9, the defendant

ALTA.

S. C.

REX v. HURST.

Simmons, J.

appeared (without protest) before Gilbert E. Saunders, police magistrate in the city of Calgary, and this charge was dismissed.

Before the said charge was disposed of a charge was laid against the defendant of having opium in his possession contrary to sec. 3 of the Opium and Drug Act. Upon this charge he was convicted and sentenced to two months' imprisonment.

On the trial of this charge the defendant's counsel objected to the jurisdiction of the magistrate on the ground that the defendant was illegally arrested without a warrant.

In *Rex* v. *Baptiste Paul*, 20 Can. Cr. Cas. 159, 7 D.L.R. 24, I expressed the view that if the magistrate had jurisdiction over the matter it was immaterial how the defendant was brought before him. In that case I followed *The Queen* v. *Hughes*, 4 Q.B.D. 614.

In *The Queen* v. *Hughes* the majority of the Judges held that the defendant having failed to object to the jurisdiction it could not be subsequently raised if the justices had jurisdiction over the matter. But the majority of the Judges went further and expressed the view that as soon as the defendant was brought before the justices, if they had jurisdiction over the subject matter it was immaterial as to how the defendant was brought before them.

"I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant is immaterial," being brought before them the Justices (however brought there), if they had jurisdiction, in respect of time and place over the offence, were competent to entertain the charge; per Lopes, J.

Hawkins, J., expressed a similar view, and Pallock, B., and Lindley, J., concurred.

In *Rex* v. *Baptiste Paul*, 20 Can. Cr. Cas. 161, 7 D.L.R. 25, my brother Beck took a different view, citing *Pearks Limited* v. *Richardson*, [1902] 1 K.B. 91.

With much respect, I do not think Lord Alverstone, C.J., asserts any principle in this judgment contrary to the views of the Judges in *The Queen* v. *Hughes*, 4 Q.B.D. 614,

Section 62 of the Companies Ordinance required service in a civil process to be made, in a certain way. The judgment in the case [*Pearks* v. *Richardson*] went no farther than to say that in

ALTA.

S. C.

REX v. HURST.

Simmons, J.

the absence of any legislative authority or any ruled practice made by competent authority the service of a summons upon a company in a summary prosecution for violation of a local statute should be made in the manner prescribed by sec. 62 of the Companies Ordinance. There was nothing more than the enunciation of rule of practice to the effect that legislation had provided for service to be made upon an incorporated company in a civil proceeding in a certain way, and that in a summary proceeding for violation of a statute the same practice should be followed. A company cannot be served in the way a person is served, and fo necessity some officer of the company must be served on its behalf.

In the case before me the material does not disclose that any objection was made to the jurisdiction of the magistrate when the defendant was charged with vagrancy.

The affidavit of James Duguid, police court clerk, merely says: "That the charge of vagrancy against the accused was disposed of and upon that charge he was dismissed."

Not having raised the question of the illegality of the warrant upon which he was arrested upon the charge of vagrancy when he came before the magistrate upon that charge, he cannot raise it now: *The Queen* v. *Hughes*, 4 Q.B.D. 614.

I would therefore dismiss the application with costs.

Conviction affirmed.

TAMBLYN v. WESTCOTT.

ALTA.

S.C.

Alberta Supreme Court, McCarthy, J. December 31, 1914.

1. EVIDENCE (§ IV E—411)—JUDICIAL RECORDS—TERMINATION OF CRIMINAL PROSECUTION.

The termination of a prosecution by withdrawal of the charge before the justice may be proved without any formal record or certificate as a basis for an action for malicious prosecution.

[*Atty.-Gen.* v. *Scully*, 6 Can. Cr. Cas. 167, 4 O.L.R. 394; *Fancourt* v. *Heaven*, 18 O.L.R. 192; *Beemer* v. *Beemer*, 9 O.L.R. 69; *Baxter* v. *Gordon, etc., Co.*, 13 O.L.R. 598; and *Mortimer* v. *Fisher*, 11 D.L.R. 77, discussed; *R.* v. *Ivey*, 24 U.C.C.P. 78; *Hewitt* v. *Cane*, 26 Ont. R. 133; *McCann* v. *Preveneau*, 10 Ont. R. 573; *Goddard* v. *Smith*, 6 Mod. 262, disapproved.]

2. MALICIOUS PROSECUTION (§ III—20)—TERMINATION OF PROSECUTION—PROOF WITHOUT PRODUCTION OF RECORD.

In the absence of proof that the withdrawal of the prosecution was brought about by a compromise or arrangement to which the accused was a party proof of such withdrawal is a termination of the prosecution in favour of the accused.

[*Mortimer* v. *Fisher*, 11 D.L.R. 77, applied.]

ALTA.

S. C.

TAMBLYN v. WESTCOTT.

Statement

THIS was an action brought by plaintiff to recover damages for malicious prosecution. Plaintiff is a commission agent, carrying on business in Edmonton. On the 30th of May, 1914, the defendant caused the plaintiff to be arrested and brought before the magistrate on a charge that the plaintiff on the 23rd of May, 1914, unlawfully obtained from Westcott the sum of $450.00 by false pretences and with intent to defraud. Tamblyn was obliged to secure bail, and upon appearing at the police court next day found that the charge had been withdrawn. Plaintiff then sued for damages of $1,000. Judgment was given for the plaintiff for $250 damages and costs.

John Cormack, for plaintiff.

S. S. Dickson, for defendant.

McCarthy, J.

MCCARTHY, J.:—This is an action brought by the plaintiff to recover damages for malicious prosecution. The action came on for trial before me at the sittings of the Court held at Edmonton on the 13th day of November, 1914. The evidence adduced by the plaintiff did, to my mind, prove malice and want of reasonable and probable cause on the part of the defendant. The plaintiff tendered as evidence of the termination of the proceedings the original information with the following words written immediately after the form of charge in the information: "Charge read, information withdrawn"; signed, "George Westcott." George Westcott is the defendant in this action.

It was contended by counsel for the defendant that this was not sufficient evidence of the termination of the proceedings.

The result of the more recent authorities is that the termination of the proceedings in favour of the accused may be proved by evidence other than the formal record or certificate of acquittal.

For a long time in the Province of Ontario it was held to be the law that it was necessary to produce the record of the proceedings where the trial had been on an indictment and that before the record could be made up it was necessary to procure an order of the Judge presiding at the criminal trial or the fiat of the Attorney-General before the Clerk of the Peace could make up the record. See *Regina* v. *Ivy*, 24 U.C.C.P. 78, and *Hewitt* v. *Cane*, 26 O.R. 133. These cases were in effect overruled by the decision in *Attorney-General* v. *Scully*, 6 Can. Cr. Cas. 167, 4 O.L.R. 394. It was during the time when the stricter view of

the law was adhered to that such cases as *McCann* v. *Preveneau*, 10 O.R. 573, was decided. But even during this time it had been held in *Sinclair* v. *Haynes*, 16 U.C.R. 247, where the charge had been before Magistrates, that it was unnecessary to shew any record or adjudication in writing.

At one time it was also held that the entry of a *nolle prosequi* was not a sufficient termination to found an action for malicious prosecution, for the reason that a new charge might subsequently be laid: *Goddard* v. *Smith*, 6 Mod. 262. The contrary view was, however, held in *Gilchrist* v. *Gardner*, 12 N.S.W.L.R. 184, and it has been held in Saskatchewan that the direction of the Attorney-General to his agent not to prefer a charge after a committal for trial has been had is a sufficient termination. (See *Mortimer* v. *Fisher*, 11 D.L.R. 77.)

In *Beemer* v. *Beemer*, 9 O.L.R. 69, oral proof of an informal termination of the prosecution was admitted and held sufficient. Indeed, in that case it was not at all clearly shewn how the proceeding had been in fact terminated.

The judgment of Anglin, J., in *Baxter* v. *Gordon Ironsides & Fares Company*, 13 O.L.R. 598, is not opposed to this view. In that case it was proved that the termination had been brought about by a compromise or arrangement between the parties, and the magistrate had indorsed on the information "settled out of Court." The ground of the decision was that such a termination was not one *in favour of* the accused. Anglin, J., at p. 600, however, says: "It is conceded by the defendants that the abandonment of a prosecution by the complainant or the entry of a *nolle prosequi* by the representative of the Crown—if not the result of some compromise or arrangement with the accused—is a termination of the proceedings."

In *Fancourt* v. *Heaven*, 18 O.L.R. 492, it was held that the withdrawal of the charge in open Court by the Crown Attorney was a sufficient termination.

On the reasoning in such cases as *Fancourt* v. *Heaven*, 18 O.L.R. 492, *Mortimer* v. *Fisher*, 11 D.L.R. 77, and *Beemer* v. *Beemer*, 9 O.L.R. 69, I think that, in the absence of proof that the withdrawal of the prosecution was brought about by a compromise or arrangement to which the accused was a party, the termination in favour of the accused (*i.e.*, the plaintiff) has

ALTA.

S. C.

TAMBLYN v. WESTCOTT.

McCarthy, J.

been shewn, and as in my view there was a lack of reasonable and probable cause for the institution of the proceedings and malice or at least an improper motive (see *Wood* v. *Newby*, 5 D.L.R. 486), I give judgment for the plaintiff.

As to the question of damages, apparently the plaintiff was detained in custody for a very short time. He appeared at the office of the Chief of Police, and was obliged to obtain bail on the Saturday evening in question, and he appeared for his preliminary hearing on the following Monday, when the charge was withdrawn.

I give judgment for the plaintiff for $250 damages and there will be costs to the plaintiff in accordance with column 2 of schedule "C" of the Rules as to costs without set-off.

Judgment for plaintiff.

ALTA.

S. C.

HARVEY v. MITCHELL.

Alberta Supreme Court, Ives, J. September 24, 1914.

1. CORPORATIONS AND COMPANIES (§ V C—195)—SHARES—DIRECTORATE—PRIOR RIGHT OF PURCHASE—FORMAL REQUIREMENTS—HOW CONSTRUED.

Where articles of association of a company required that before selling certain shares they should first be offered to the board of directors, an objection by an outside purchaser to closing the purchase for default of his vendor in submitting to the directors must fail if notice that the shares were for sale was given to the individual directors and they took no action towards exercising the privilege of buying.

Statement

TRIAL of action upon an agreement for sale of company shares.

Judgment was given for the plaintiff.

J. B. Roberts (*Lougheed, Bennett & Co.*), for the plaintiff.

Clifford T. Jones (*Jones, Pescod & Adams*), for the defendant.

Ives, J.

IVES, J.:—On January 25, 1912, the plaintiff and one McClintock were apparently agents for the Canadian Pacific Irrigation and Colonization Co. At this time they had in view new agency contracts with this company whereby certain territories were to be assigned to them. They also had offices and business connections established. In the agreement between them, filed as ex. 1, it is also recited that McClintock owned a business in Calgary conducted under the name of the

Canadian American Land Co. This document discloses an agreement to organize a joint stock company in Canada which should be in effect owned by the plaintiff, and McClintock equally and by which means the results of their individual businesses were to be equally divided between them.

Shortly after this and in pursuance of this plan outlined in ex. 1, the plaintiff and McClintock met in the city of Calgary in the office of Mr. Pescod, a solicitor, and a further agreement between them was drafted by Mr. Pescod upon their joint instructions and it was executed by them. This agreement, filed as ex. 2, is dated February 8, 1912. Under this agreement McClintock and the plaintiff undertook to assign to the limited company, then in contemplation, certain assets, the value of which is not stated, and in the same agreement McClintock undertook that at all times he would leave assets in the hands of the proposed company of a value not stated.

The proposed company was in due course incorporated on March 1, 1912, under the name of the Alberta and Saskatchewan Farm Land and Development Co., Ltd., with a capital of $100,000 divided into one hundred shares of which 48 shares each were issued to McClintock and the plaintiff and 2 shares to Mr. Pescod, and these three men were the directors and the only shareholders of the company.

It was urged that no consideration was given for these shares; that if there was consideration it was not a cash consideration, and that no agreement was filed with the registrar of joint stock companies as required where the consideration is other than cash.

In the first place I must presume that the properties mentioned in exs. 1 and 2 were transferred to the company. There is no suggestion that this was not done, and further there is evidence that some land at Red Deer, in Alberta, known as Englewood Sub-division, were transferred to the company. The value of the whole property delivered to the company by McClintock and the plaintiff seems to have been agreed upon by them with Mr. Pescod, and I must find for the purposes of this action in the absence of any evidence to the contrary that such value was sufficient to meet the issue of 98 shares of the com-

ALTA.

S. C.

HARVEY v. MITCHELL.

Ives, J.

pany's capital, and it follows therefore that the company was paid for the plaintiff's 48 shares of stock.

There is no evidence whatever that the transfer of this property to the company was or was not evidenced by a written agreement, nor that such agreement was not, or is not on file with the registrar of joint stock companies. We now come to the time when the agreement, sued upon, was made. There is absolutely no evidence that the defendant was induced to enter into this agreement, filed as ex. 3, by any fraud or misrepresentation. On the contrary the defendant must at this time, and before he made or executed the agreement with the plaintiff, have been fully aware of the state of affairs of the company. He evidently acted with the advice of his solicitor, Mr. Pescod, and as his solicitor had been a shareholder, and a director of the company from the time of its incorporation, he would be in a particularly good position to advise his client, the defendant, and I have no doubt he did give him all the facts within his knowledge. The plaintiff was represented by a different solicitor and an agreement, very clear in its terms, was executed by the parties and $300 paid down by the defendant.

It was urged by defendant's counsel that the 48 shares in question should not have been handed to the plaintiff out of escrow by the custodians, Messrs. Jones, Pescod & Adams, and therefore that there is no lawful delivery of them by the plaintiff. But they were held in escrow only by agreement between McClintock and the plaintiff, and the plaintiff obtained a release, ex. 6, from McClintock from that and all other agreements between them and on presentment of that document I think Jones, Pescod & Adams quite properly delivered to the plaintiff his shares. It was further urged by the defendant that the sale to him was illegal because there had been a technical breach of the articles of association of the company, in that the plaintiff had not first offered his shares to the board of directors. Even if the defendant, as an outsider, could urge this ground it must fail in view of the conditions existing on May 23, 1913. An offer had been made to McClintock, one director, the only other director excepting the plaintiff, if

there was any, was Mr. Pescod, and he, as the defendant's solicitor, had full knowledge of the plaintiff's desire to sell. The result is that there will be judgment for plaintiff as claimed with costs.

Judgment for plaintiff.

ALTA.
S. C.
HARVEY v. MITCHELL.

YONGE v. VINEBERG.

QUE.
C. R.

Quebec Court of Review, Archibald, Saint-Pierre, and Weir, JJ. January 10, 1914.

1. LANDLORD AND TENANT (§ III C 2—84)—APARTMENT HOUSE—TENANTS NOTORIOUSLY UNFIT—DAMAGE TO OTHER TENANTS—LIABILITY OF LANDLORDS.

If a landlord of an apartment house leases apartments to persons notoriously unfit to be trusted with the care of same, *ex. gr.*, because of drunken habits, the landlord may be held liable under Quebec law for damage caused the other tenants thereby, *ex gr.*, where the drunken tenant allows the water to overflow so that the rooms below are flooded.

THE judgment inscribed for review, which is confirmed, was rendered by the Superior Court, Fortin, J., on March 15, 1913.

Stephens & Harvey, for the plaintiff.

Jacobs, Hall, Couture & Fitch, for the defendant.

ARCHIBALD, J.:—In this case, Vineberg, a landlord, has been condemned to pay a sum of money to the plaintiff *par reprise d'instance*, in consequence of damages suffered by him while he was a tenant of the defendant, through the act of another tenant occupying the apartment just overhead of his. Archibald, J.

The parties, in their factums, have discussed exhaustively the law relating to the liability of landlords towards one tenant for abuse of enjoyment by another tenant, in the same building. It is admitted on both sides that, by the weight of French authority, the landlord is liable. On the one side, it is alleged that the same rule prevails in Canada. On the other side, that is denied. In this case, it is not necessary to decide that question. Without doubt the landlord is obliged to give his tenant peaceable, continuous and complete possession of the premises leased. If these leased premises do not constitute the whole of the building, the landlord is undoubtedly obliged to secure his tenant against any damage which may result from a preventable cause, which may happen to him through the vacancy of other premises in the building. When the landlord leases other premises in the building, I think he is obliged to exercise reasonable care that the persons to whom he leases will take of the premises the care of

QUE.
C. R.
YONGE v. VINEBERG.
Archibald, J.

un bon père de famille. If the tenant does not do so, the landlord has full right to eject him. If the landlord leases the premises in a building to persons notoriously unfit to be trusted with the care of such premises, surely he is guilty of fault and is liable for the damage which such tenants may cause to the other tenants in the building through the abuse of their enjoyment.

In this instance, the tenant who caused the damage to the plaintiff was an habitual drunkard, a single woman alone in the premises. On four different occasions in the course of as many months, the plaintiff was inundated by water coming from the premises above, and the cause in each instance was the drunkenness of the tenant upstairs. The defendant knew this. He knew that a claim was made against him for damages. He advised the plaintiff to collect his claim from the tenant upstairs. That course was impossible. The defendant took no means to relieve the plaintiff from this source of damage. The judgment has condemned the defendant to pay damages suffered, but altogether apart from the question of law above raised, I hold the judgment is correct. The defendant was grossly negligent in not taking means to secure the proper care of the premises above the plaintiff, and is liable under art. 1053 C. C. for damages caused by his fault.

We are to confirm.

SASK.
S. C.

INTERNATIONAL HARVESTER CO. v. SMITH.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont and Brown, JJ. July 15, 1914.

1. JURY (§ I D—30)—DENIAL OR INFRINGEMENT OF RIGHT—IMPOSING TERMS INVADING THE RIGHT—EFFECT.

It is the judge at the trial who is to decide under sec. 50 of the Judicature Act (Sask.) whether the jury is to be dispensed with; and no such power is conferred on the master in chambers or a judge in chambers; therefore a term should not be imposed on setting aside a default judgment that defendant should submit to trial at a non-jury sitings.

Statement

APPEAL from Elwood, J.

The appeal was allowed.

F. L. Bastedo, for the respondent, plaintiff.

J. A. Allan, K.C., for the appellant, defendant.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—In this action the Master in Chambers set aside a default judgment regularly entered on the following terms:—

SASK.

S. C.

INTER-NATIONAL HARVESTER CO. v. SMITH.

Newlands, J.

(1) Defendant to pay costs. (2) Execution to stand as security for plaintiff's claim. (3) The defendant is to speed the trial and file his statement of defence on or before May 26, 1914, and is to take ten days' notice of trial for a day during the non-jury sittings of the Court at Regina commencing on May 26, 1914.

The defendant appealed to a Judge in Chambers against the last provision of the order setting the case down for the non-jury sittings. My brother Elwood dismissed the appeal, but without prejudice to any application to postpone the trial or for a trial by jury. Against this decision the defendant appeals to this Court. When the action came on for trial at the May sittings before my brother Brown, he postponed the trial on account of the absence of a necessary and material witness, but held that the case was *res judicata* as to the trial by jury. The case has not yet come to trial.

As to the order appealed from I am of the opinion that it was in the discretion of the master to impose any terms he could lawfully make, but that the question as to whether the case should be tried with or without a jury was not a matter over which he had jurisdiction. Sec. 50 of the Judicature Act, ch. 52, R.S.S. provides that

> in actions for a debt or on a contract in which the amount claimed exceeds $1,000, if either party to the action demands a jury and files with the local registrar and leaves with the other party or his solicitor at least fifteen days before the day fixed for trial a notice to that effect, the issues of fact and the assessment or inquiry of damages shall be tried, heard and determined by a Judge with a jury unless otherwise ordered by the Judge.

The Judge in question is the trial Judge not a Judge in Chambers and there is no rule of Court which confers upon a Judge in Chambers the power to determine whether a case is to be tried with or without a jury. It follows that if a Judge in Chambers has not this power, neither has the Master in Chambers, he not having any greater powers than a Judge. If, therefore, he could not legally make such an order, then he could not impose it as a term of allowing the defendant in to defend.

The plaintiff's claim in this case being for a debt exceeding the sum of $1,000, the defendant under sec. 50 of the Judicature

SASK.

S. C.

INTERNATIONAL HARVESTER CO. v. SMITH.

Newlands, J.

Act, had the right to a jury on complying with the requirements of that section, and no one excepting the Judge trying the case could deprive him of that right.

The order of the master should therefore be amended by adding to paragraph (*c*) thereof the following words:—

If neither party demands a jury, but if either party complies with the provisions of the rules of Court for obtaining a jury, then for a day at the next jury sittings at Regina.

The plaintiff should pay the costs of appeal both in this Court and before the Judge in Chambers.

Appeal allowed.

SASK.

S. C.

POWELL v. CANADIAN NORTHERN R. CO.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and Elwood, JJ. November 28, 1914.

1. DEATH (§ II A—5)—LORD CAMPBELL'S ACT—AWARD TO DECEASED'S SISTER—"EXPECTATION OF PECUNIARY BENEFIT"—SUFFICIENCY OF—EVIDENCE BY COMMISSION.

An allowance to an unmarried adult sister abroad is not warranted on the assessment of damages for negligently causing death, merely from the circumstance that the sister lives with the mother, who had received financial assistance from the deceased, and the award to whom was not contested; to justify an award also to the sister evidence must be given of a reasonable expectation of pecuniary benefit from her brother.

[*Toronto General Trusts* v. *Municipal Construction Co.*, 15 D.L.R. 66, applied; and see *Brown* v. *G.T.R.*, 11 D.L.R. 97; *Scarlett* v. *C.P.R.*, 9 D.L.R. 780; *Goodwin* v. *Michigan Central*, 14 D.L.R. 411, 29 O.L.R. 422.]

Statement

APPEAL from judgment at trial before Lamont, J., in so far as award to deceased's sister was concerned.

The appeal was allowed.

Tisdale, for the appellant, defendant.

F. C. Wilson, for the respondent, plaintiff.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action under Lord Campbell's Act. The learned trial Judge allowed the mother of the deceased $1,000, and an unmarried sister $1,500. From the award to the unmarried sister the defendants appeal. The only evidence upon this branch of the case was given by the mother in England, and was taken under commission, and, that evidence being in writing, this Court is in the same position to draw conclusions from it as the learned trial Judge. In *Toronto General Trusts Corp'n* v. *Municipal Construction Co.*, 15 D.L.R. 66, at p. 67, this Court held that

In order to sustain an action under the statute in question, it is only necessary to establish a reasonable expectation of pecuniary benefit to the parties interested, if the death of the deceased had not occurred.

No evidence was given by the plaintiff to shew that the sister had any expectation of receiving assistance from her brother, and we were informed by counsel at the argument that no such claim was made by the plaintiff's counsel at the trial. The evidence from which the learned trial Judge drew the conclusion which he did was brought out on cross-examination of the mother by the defendant's counsel, and that evidence was simply: "My unmarried daughter lives with me. No one else lives with us." This is the only reference to the daughter in her evidence. In her direct examination the mother said she carried on the business of a grocer in the premises on which she resided, and that she would not get a living if it was not for her children. From this evidence the learned trial Judge drew two conclusions. He says: "It seems reasonable to presume that the daughter assisted in carrying on the business," and, "as the sister was living with her mother, the pecuniary assistance provided by the deceased would also go to the sister's support." I do not think the learned trial Judge was justified in drawing either of these conclusions from the evidence. If they are correct they are facts that were within the knowledge of the mother, and she could have said so in her evidence, and not having been asked any such questions by plaintiff's counsel it should rather be presumed that this was not the case: see Best on Evidence, 9th ed., p. 243.

In my opinion the only conclusion that can properly be drawn from the evidence I have referred to is that this daughter was one of the children who was helping to support her mother, and not that she was in any way supported by either her mother or brother, or had any expectation of any such support. I may say that the learned trial Judge assumed that this sister was the oldest of the family, and was about 42 years old, there being no evidence on that point. As the mother is 71 years old, and was married in 1870, it would be reasonable to presume that this daughter was of full age. I only mention this to shew that there could be no presumption that the daughter was a child who could not provide for herself.

I think the appeal should be allowed with costs.

Appeal allowed.

IMP.

P. C.

COATES v. SOVEREIGN BANK OF CANADA.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Moulton, Sir Charles Fitzpatrick, August 4, 1914.

1. BANKS (§ III B—27)—OFFICERS AND AGENTS—AUTHORITY OF GENERAL MANAGER—DEALING IN SHARES OF THE BANK'S OWN STOCK.

The general manager of a Canadian chartered bank can have from it no ostensible authority to do acts on behalf of the bank which would be *ultra vires* on its part, *ex. gr.* purchasing or dealing in shares of the bank's own capital stock.

Statement

APPEAL by plaintiffs from the dismissal of their action as against the defendant bank by Quebec King's Bench, affirming the decision of the Supreme Court of that Province.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Moulton

LORD MOULTON.:—The respondent, the Sovereign Bank of Canada, is a corporation (now in liquidation) incorporated under the Canadian Bank Act and having its head office in Montreal. Its general manager in the year 1906, which is the material date in the present case, was Mr. D. M. Stewart. By virtue of the provisions of the Canadian Bank Act, no banking company incorporated under it may purchase or deal in its own capital stock nor indeed the capital stock of any bank. In September, 1906, Mr. Stewart was in England and met Mr. Hanson, who was a partner in the appellant firm (which is the well-known firm of English stock-brokers who do business under the firm name of Coates, Son & Co.), and suggested to him that the appellants should take an interest in his bank by buying a block of its stock. Mr. Hanson agreed to do so on certain terms. The letters that passed between the parties relevant to these terms are as follows:—

On September 14, 1906, Mr. Hanson wrote to Mr. Stewart—

Dear Mr. Stewart.

I think it is desirable that you should write us a letter embodying the terms to which you agree in the event of our purchasing the 539 shares and I think one of the features was an undertaking on your part to take the shares back at our option within twelve months at 139.

And on September 18, 1906, he received from Mr. Stewart the following reply:

Messrs. Coates, Son & Co.

Dear Sirs,

Referring to my conversations with your Mr. Hanson, I beg to confirm the sale to you of five hundred and fifty (550) shares of stock in the

Sovereign Bank of Canada at 138 net. It is understood that I will repurchase these shares from you at your option at any time within one year from this date at 139.

These documents represent a transaction between the appellants and Mr. Stewart personally. The Bank is not mentioned therein. But it is contended that the oral testimony of Mr. Hanson shows that Mr. Stewart made the contract on behalf of the bank as its agent. In the opinion of their Lordships, the evidence to this effect is but slight, and the Courts below have found that the contract was made with Mr. Stewart personally. But though slight, the evidence shows that Mr. Hanson, in all good faith, took it that Mr. Stewart was acting on behalf of the bank as his principal in the matter, and as in their Lordships' opinion it is not necessary to decide the point, they will assume in favour of the appellants that the contract made actually by Mr. Stewart purported to be made by him on behalf of the bank.

The appellants duly obtained the shares, and paid for them by a draft for 15,595*l.* 17*s.* 11*d.* drawn by the defendant bank on the appellants, dated September 29, 1906, and duly honoured at maturity. The proceeds of this draft were placed to the account of one L. P. Snyder with the bank, and the shares were taken from shares then standing in his name in the stock ledger, and were transferred by him to the appellants or their nominees.

During the following year the bank got into difficulties and the market value of its shares fell considerably. In June, 1907, the appellants wrote to Mr. Stewart and to the bank announcing their intention to exercise their option to require the shares to be taken back at 139. By that time Mr. Stewart had ceased to be general manager and had been succeeded by Mr. Jemmett. The reply which they received from the bank was as follows:—

Messrs. Coates, Son & Co.

Dear Sirs,

We beg to acknowledge receipt of your letter of the 25th ult. enclosing a copy of a letter which on the 1st inst. you forwarded to Mr. D. M. Stewart.

Mr. Stewart forwarded the original of this letter to the writer, but it was at once returned to him with the statement that it referred to a matter with which the Bank had and could have nothing to do.

The Canadian Bank Act strictly prohibits any bank in Canada from purchasing or dealing in the shares of its capital stock, and therefore any

IMP.

P. C.

COATES v. SOVEREIGN BANK OF CANADA.

Lord Moulton

undertaking which Mr. Stewart may have given with respect to any shares in this bank's stock which he may have sold to you cannot bind the bank in any way whatever, and is simply a personal matter between Mr. D. M. Stewart and yourselves.

And to the position thus taken up the bank has consistently adhered.

Thereupon the appellants, on October 25, 1907, brought the present action against the bank and Mr. Stewart, in the Superior Court of Quebec, claiming specific performance of the undertaking to take back the shares, or in the alternative the return of the money paid by them with $550 damages, being $1 per share. Mr. Stewart did not contest the action, and judgment accordingly went against him. The Court decided in favour of the defendant bank, and dismissed the action as against it. From that decision an appeal was brought to the Court of King's Bench for the Province of Quebec (Appeal Side), and was dismissed with costs. It is from the decision of that Court dismissing the appeal that the present appeal is brought.

Their lordships are of opinion that neither of the claims set forth in the appellants' declaration can be supported, and that the judgments of the Courts below dismissing the action as against the bank were right.

With regard to the claim based on the contract, it is evident that to purchase shares of its own capital stock would have been an *ultra vires* act on the part of the bank, and consequently Mr. Stewart was not in fact its agent, to make a contract on its behalf, to purchase its shares either absolutely or conditionally. The bank could not make a man its agent to do an act which it could not itself do by virtue of the limitations imposed on it by its charter of incorporation. Nor is there here any case of ostensible agency. The only "holding out" that is suggested is that Mr. Stewart was the general manager of the bank (as in truth he was), and that fact cannot make him an ostensible agent with wider powers than belong to a general manager by virtue of his position, and those powers cannot include the power of doing acts on behalf of the bank which would be *ultra vires* on its part. The bank is, therefore, in no sense a party to the contract. If it was made by Mr. Stewart in its name, it was without authority, and it is not liable under it in any way.

IMP.
P. C.
COATES
v.
SOVEREIGN
BANK OF
CANADA.
Lord Moulton

Nor is the claim for the return of the money sustainable. The money was in fact paid by a draft, but their lordships are of opinion that this mode of payment was adopted merely for convenience, and that the rights of all parties would have been the same if it had been paid by a cheque or in notes and gold. It was received by the bank in the ordinary way of business and it did with it precisely what it was directed to do. It was received by Mr. Stewart under the contract as the price of the shares, and was credited to the account of Mr. Snyder who transferred the shares to the appellants who still hold them. The bank did not receive the money in any other manner than it receives any payments made to it in favour of a customer, and it discharges itself of such payment when it duly credits the money to the account of the customer. In the present case the payment was made in purchase of the shares and that purchase has been duly carried out. The breach that has been committed, which alone entitles the appellants to relief, is the breach of the undertaking to re-purchase the shares. Mr. Stewart alone is responsible under this undertaking, and the appellants have already obtained judgment against him for the breach of it. The bank is not responsible under it in any way, and its connection with the matter consists only in the fact that it received money in the ordinary course of business and placed it to the account of the customer as duly directed to do.

Their lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs.

Appeal dismissed.

O'CALLAGHAN v. GREAT NORTHERN R. CO.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. June 15, 1914.

1. NEGLIGENCE (§ II F—120)—CONTRIBUTORY NEGLIGENCE—INJURY AVOIDABLE NOTWITHSTANDING—ULTIMATE NEGLIGENCE.

Even if the deceased who was killed while crossing the railway was guilty of contributory negligence in not looking for approaching trains damages will be awarded against the railway if there was such ultimate negligence on the part of its employees operating the train that the collision might have been avoided after they became aware of the danger had the watchman stationed at the rear of the train moving reversely shouted a warning (on seeing the horses and load of lumber), to the driver walking on the far side and not visible to him, instead of jumping off and attempting only to warn the other train hands.

[*Jones* v. *C.P.R.*, 13 D.L.R. 900; *Wakelin* v. *London and S.W. R.*, 12 A.C. 41, referred to.]

B. C.

C. A.

O'CALLAGHAN v. GREAT NORTHERN R. CO.

Statement

APPEAL from the judgment of Macdonald, J., and the verdict of a jury of February 9, 1914. The action was for damages for causing the death of one O'Callaghan on the tracks of the defendant company. The company was carrying on shunting operations; an engine with lumber loaded box cars was moving backwards at about 4 miles an hour in a westerly direction in Vancouver on the south side of False Creek. The deceased had in hand a team of horses and waggon on which he was carrying lumber that was in front of a lumber company's offices on Main St. on the north side of the defendants' tracks, the street ascended towards the track from the company's offices on a boarded crossing. Deceased started his team towards the track, he holding the reins and walking beside his load on its right side; the train coming from the east was to the left of the team. O'Callaghan being on the opposite side, and not seeing it, when he got on the track the back of the engine struck his load and knocked it over on him, killing him. An employee of the defendant company was on the foot-board of the engine in front; he saw the waggon about 40 feet away, but instead of shouting he jumped off and then warned his fireman to stop. The trial Judge held that this was evidence upon which the jury must decide whether the company's servants were negligent. The jury entered a verdict in favour of the plaintiff for $4,500.

The appeal was dismissed, IRVING, J.A., dissenting.

R. M. Macdonald, for the appellants.

W. B. A. Ritchie, K.C., for the respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—We do not need to hear counsel for the other side. I think the appeal must be dismissed. It is not a very clear case in one way, yet in another it does not present a very difficult question for decision. I think it was a fair inference from the evidence that the deceased was guilty of contributory negligence. I think if the jury had found he was not guilty of contributory negligence they would have so found contrary to the evidence. I think it is also clear that the defendants were guilty of a breach of their statutory duty in respect of the man on the forward end of this tender

B. C.

C. A.

O'CALLAGHAN v. GREAT NORTHERN R. CO.

Macdonald, C.J.A.

who was there to give warning to all wishing to cross the track. I think the jury might infer from the evidence before us that the man did not fulfil his duty and that of course was a breach by his employers. The only question that has given me any difficulty at all is this—had it been the duty, for instance, of the man to put on a brake and had the evidence been that if he had put the brake on, the car would have stopped before reaching the waggon, there can be no doubt that failure to do so would be ultimate negligence, and that but for that neglect the occurrence could not have happened; but can it be said that his failure to shout at the time when he ought to have done so would necessarily have avoided the accident? I think that that cannot be said, but it was open to the jury to draw the inference that had that warning been given, the deceased would have stopped his team and the accident would not have occurred.

Irving, J.A.

IRVING, J.A.:—I take a different view and would allow the appeal. In my opinion this man was guilty of such contributory negligence as would have justified the Judge in withdrawing the case from the jury: *Metropolitan R. Co.* v. *Jackson*, 3 App. Cas. 193; *Dublin, Wicklow, etc. R. Co.* v. *Slattery*, 3 App. Cas. 1155, at 1166.

Martin, J.A.

MARTIN, J.A.:—It cannot reasonably be said, I think, that the defendant company discharged its statutory duty to have, in this case, on the tender "a person who shall warn persons standing on, or crossing, or about to cross the track . . ." by putting a person there who, e.g., was dumb, or who from any cause gave no warning. It was open to the jury to take the view that what said person (Davis) did here was equivalent to, or in fact was, no warning, because he did not attempt to warn the person who was crossing the track as he erroneously and unreasonably assumed no one was driving the horses, simply because he could see no driver on the side of them nearest himself owing to the load of lumber on the waggon (though it is not suggested that the horses had any appearance of being out of control). Davis says after he saw the waggon he did nothing for "just a few seconds" as he "didn't know what to think for a minute" and then jumped down from the foot-board of the tender to the ground and "gave the fireman the stop

B. C.

C. A.

O'CALLAGHAN v. GREAT NORTHERN R. CO.

Martin, J.A.

signal and hollered." He did not see the driver of the team till after he got off, and then he only saw his feet till after the collision. When he first saw the team it was approaching the crossing coming out of the lumber mill and the time was "very short" from then till he jumped, in order, he says, "to keep himself from being killed." From this it is clear that there was no attempt made to warn the driver, Davis' efforts being directed to saving himself and to warn the fireman and engineer in the engine to the rear, in doing which he would have to turn and shout in their direction. Now I am satisfied that there was evidence upon which the jury might find negligence, in taking the view that Davis was not reasonably warranted in assuming that a driver of a crossing team would walk only on the side nearest him, and therefore should have shouted to him at once without waiting to jump off and then seek to warn the train crew only: such conduct is not a discharge of the statutory duty that railway companies "shall warn" members of the public of the passing of a train. I refer to the leading and instructive case of *Jones* v. *C.P.R. Co.* (1913), 13 D.L.R. 900, on this subject generally. Furthermore, and in any event, while it is true that the deceased was guilty of contributory negligence, yet the jury were entitled to take the view that nevertheless there was such ultimate negligence on the part of the defendant company that it is responsible for the consequences which it might have avoided despite said contributory negligence. There is much here pointing to that "more probable conclusion" which it was held in *Wakelin* v. *London & S.W.R. Co.* (1886), 12 App. Cas. 41, that a Court may act upon as a sufficient degree of proof by which a plaintiff may "prove his case," which "does not mean that he must demonstrate his case."

There was contributory negligence but in the circumstances that does not excuse the defendant company.

McPhillips, J.A.

McPHILLIPS, J.A.:—We have to approach this case in the same way as we would if it were a case where the engine was moving forward in the ordinary way. If it was moving forward in the ordinary way unquestionably the engineer, or the assistant engineer, or the fireman or some one in the cab would

have to be on the alert and looking out, and if that had been the case unquestionably this team of horses would have been seen. The statutory rule, sec. 276, is one making a provision equally as careful as if the engine was proceeding forward and so the man on the foot-board, therefore, in not acting in the same way as the engineer would have been required to act in the other circumstances if the engine was moving forward committed a breach of statutory duty. He fails to immediately warn, but instead jumps down from the tender to the side of the engine and then only gives the signal. It was a clear departure from the statutory duty upon the defendant company—and was negligence independent of it. I agree with my brother, the Chief Justice, that this is eminently a case where there was contributory negligence on the part of the plaintiff because people should not approach a level crossing with the obliviousness of danger that this unfortunate man evidently did. But that does not acquit the defendant company and I consider that the jury had evidence which reasonable men could go upon and therefore I would dismiss the appeal.

Appeal dismissed.

Re MEDICINE HAT BY-LAW.

Alberta Supreme Court, Stuart, J. September 2, 1914.

1. MUNICIPAL CORPORATIONS (§ II C—112)—BY-LAWS—EARLY CLOSING—PETITION—REQUIREMENTS.

The early closing by-law passed by a municipality under the Early Closing Act, Alta., must exactly conform to the petition; so where the petition was to regulate the closing of all retail mercantile shops, its signature by the necessary two-thirds in the aggregate of those engaged in certain classes of trade will not support a by-law limited to those trades.

2. MUNICIPAL CORPORATIONS (§ II C—112)—BY-LAWS—EARLY CLOSING ACT—PETITION—AFFIDAVIT—SUFFICIENCY.

The municipal council receiving a petition under the Early Closing Act, Alta., must, under sec. 9, make careful inquiry and investigation to satisfy it that the petition is signed by the requisite two-thirds of the tradesmen affected; it is not enough that some party interested in the by-law makes affidavit that to the best of his knowledge and belief the signatures obtained covered the statutory two-thirds.

[*Halladay* v. *Ottawa*, 15 O.L.R. 65, applied.]

Statement.

MOTION to quash by-law No. 454.

Order accordingly.

Stuart, J.

STUART, J.:—In my opinion this by-law must be quashed. Section 3 of the Early Closing Act, ch. 23, 2-3 Geo. V., provides that

ALTA.

S. C.

RE MEDICINE HAT BY-LAW.

Stuart, J.

> The council of any city or town . . . having a population of not less than one thousand inhabitants may, in the manner provided by this Act, fix the hours of the several days of the week at and after which, either throughout the whole area of the city or town, or in any specified part thereof, all shops or shops of any specified class are to be closed for serving customers.

Section 9 provides in part that

> If a petition for a closing by-law is presented to the council, signed by the occupiers of at least two-thirds in number of the shops to be affected by *the proposed* by-law,

then certain things are to be done, and when they are done the council is to pass a closing by-law.

In the present case a petition was presented to the council which asked for the passing of a by-law "enabling" (probably "enacting" was intended) that *all retail mercantile shops* in the City of Medicine Hat be closed at certain times. The council thereupon gave a notice by publication in a newspaper that a petition had been presented "praying for the passing of the following by-law." A copy of the by-law then followed, by which it was to be enacted

> That all retail shops, *that is to say*, dry goods, hardware, groceries, furniture, boots and shoes, gent's furnishing and butcher shops, shall be closed and, etc.

It will be observed that whereas the petition asked for a by-law that all retail mercantile shops be closed, the notice untruthfully said that a petition had been presented for a by-law enacting that certain specified classes of shops should be closed.

It appears from the cross-examination of Baker, the City Clerk, that the only evidence presented to the council, so far as he was aware (and I think he would have known of any other evidence had there been any), as to whether the requisite number of signatures had been obtained, was the affidavit of one Hewitt, who was a grocer, and an advocate of the by-law. He swore that the annexed petition was duly signed by the respective parties opposite whose signatures his name appeared as witness, that he had carried on business for four years in Medicine Hat as a grocer and had a good knowledge of the mercantile stores and trade in the city, and finally that to the best of his knowledge and belief the fifty-four names, which appeared to the annexed petition as of parties signing the same, constituted more than two-thirds in number of the occupiers of the shops to be affected by the proposed by-law referred to in the said annexed petition, "namely, all

retail mercantile shops, including dry goods, hardware, groceries, furniture, boots and shoes, gents' furnishings, and butcher shops." In this affidavit, again, there was an inaccuracy, because the petition referred to *all* retail mercantile shops, and did not specify any particular class or classes of shops as suggested in the affidavit. The council thereupon passed the by-law specifying the class of shops set forth in the notice published, but adding after the word "hardware" the words "except the business of plumbing."

Although the objection was not taken on the argument and was not specifically referred to in the notice of motion, for which reason it may be that I cannot now give effect to the objection, I still think it well to express the opinion that it would have been a fatal objection to the by-law if it had been objected that the council did not properly discharge the function cast upon it by sec. 9 of the Act in regard to satisfying itself that the requisite two-thirds had signed the petition. I think the affidavit of Hewitt was not enough to justify the council in basing their judgment as to the fact upon it. The section quite clearly casts upon the council the serious and important duty of carefully inquiring and ascertaining to their own satisfaction that the requisite number of signatures had been obtained. The liberty of action of a large number of people was proposed to be limited in a serious way, and it was essential that the council should proceed with caution and care. They apparently did nothing but accept the vague and indefinite affidavit of an interested party, an advocate of the by-law which they knew was being opposed, as to the best of his knowledge and belief. I think that it was not sufficient. I do not say that the council must, in a body, make a personal examination of all the shops in the city, but surely they could have had some official, whom they could trust and who was disinterested, make an examination and report the result to them. Indeed, in *Halladay* v. *City of Ottawa*, 15 O.L.R. 65, at 66, it is said by a Divisional Court in Ontario that even in such a case, if it appears that the council has merely delegated the duty of inquiry to the clerk, and accepted his opinion without question, that is not sufficient and the by-law is bad. The present is a much stronger case. As I have said, I think the City Clerk would have known if the council as a body had taken any steps, other than a reading of Hewitt's affidavit, to ascertain the truth about the signatures,

ALTA.

S. C.

RE MEDICINE HAT BY-LAW.

Stuart, J.

and there would have been some evidence produced of what they had done. I am not sure that, although this objection was not mentioned on the argument, it might not properly be considered as covered by the fourth ground set forth in the notice of motion, *viz.*, that the by-law was *ultra vires* of the council.

However, I am of opinion that the by-law is bad upon another ground. I think the words "the proposed by-law," used in the third line of sec. 9 of the statute, cannot possibly be interpreted as meaning anything else than the *by-law proposed in the petition presented*. It is by the petition that the by-law is "*proposed*."

Now, the petition proposed a by-law or prayed for a by-law closing *all* retail mercantile shops. That was not the by-law of which notice was given, nor which was passed. Notice was given of a by-law, and a by-law was passed, enacting that only certain specified classes of shops should be closed. I do not think it is enough to say that two-thirds of the occupiers of shops of the specified classes in fact signed the petition. What the petitioners asked for was the closing of *all* retail mercantile shops, and it might very well be that many a one would be willing to sign if all shops were to be closed, and yet unwilling if only certain classes of shops were to be closed. The closing of all retail shops would certainly remove the obvious difficulties, suggested by the affidavits before me, arising out of questions whether a fruit and confectionery store was a grocery shop, whether a millinery shop was a dry-goods shop, and whether a flour and feed shop was a grocery shop, and so on.

It was practically admitted upon the argument that two-thirds of all the occupiers of retail shops did not sign the petition, and the by-law proposed in the petition was for the closing of all retail shops. It seems to me this is fatal to the by-law under the first ground taken in the notice of motion. Of course the most obvious way to state the objection upon which I rest my decision would be to say that there had been no petition at all for the by-law that was passed, and perhaps the first ground set forth in the notice of motion may be read in that wide sense. In any case, I think even in its narrower sense the stated objection covers the ground upon which I rest my decision.

I realize that the result of this decision will be to increase the difficulty in securing an early closing by-law, because it will follow

that the by-law passed must be such as is exactly asked for in the petition. But I do not see that I have anything to do with the consequences. It is not necessary, therefore, to refer to the other objections. There will be an order quashing the by-law, and the applicant, I think, is entitled to his costs against the city, which I fix at $75.

Order accordingly.

UNION ASSURANCE CO. v. B.C. ELECTRIC R. CO.

British Columbia Supreme Court, Gregory, J. September 3, 1914.

1. INSURANCE (§ VI F—405)—LOSS—SUBROGATION.

Where the fire insurance company is entitled to be subrogated to the rights of the assured against parties whose negligence caused the fire, it may sue the latter in its own name, under the Laws Declaratory Act, R.S.B.C. ch. 133, if it has taken a formal assignment of the assured's claim on settling with him.

[*King* v. *Victoria Ins. Co.*, [1896] A.C. 250, applied.]

Statement

ACTION by a fire insurance company for damages under its right of subrogation.

Judgment was given against the defendant.

Lindley Crease, K.C., and *Hankey*, for plaintiff.

H. B. Robertson, for defendant.

Gregory, J.

GREGORY, J.:—I have read and considered all the cases referred to by both the plaintiffs and defendant, and, speaking generally, I quite agree with the defendant's contention that this is in principle an action of tort, and that a claim for unliquidated damages for a tort is not assignable (*Defries* v. *Milne*, [1913] 1 Ch. 98), but I am unable to distinguish the case from that of *King* v. *Victoria Insurance Co. Ltd.*, [1896] A.C. 250, 65 L.J.P.C. 38. Here, as there, there has been a loss under a policy of insurance; the loss was honestly paid by the insuring company as falling within the terms of its policy, and the Judicial Committee of the Privy Council, while admitting the principle that the company's right to be subrogated to remedies of the assured did not enable it to sue in its own name, held that in the circumstances of that case it might sue in its own name by virtue of the assignment it had taken from the assured—aided by sec. 5, sub-sec. 6, of the Queensland Judicature Act (40 Vict. ch. 84), which it was stated corresponded with the English Judicature Act of 1873, sec. 25, sub-sec. 6, which is identical with sec. 2, sub-sec. 25, of the B.C. Laws Declaratory Act, being R.S.B.C. 1911, ch. 133. Here, also, we have an assignment to the plaintiff company.

B. C.
S. C.
UNION ASSURANCE CO. v. B.C. ELECTRIC R. CO.
GREGORY, J.

In these circumstances it is unnecessary to consider the questions arising from the defence of the Statute of Limitations, being sec. 60 of the defendant's Act of incorporation, ch. 55, Statutes of B.C., 1896.

Defendant made no attempt to prove the defence of contributory negligence, etc., set up, and in fact moved for a nonsuit on the ground that there was no evidence to shew how the fire originated. I cannot resist the conclusion that the fire arose through the crossing of defendant's high and low-voltage wires, as stated by the fire chief. Sister Mary Ann shews that the system had been working satisfactorily for years, and Mr. Tripp admits the crossing of the wires and the current carried by them. In the absence of technical evidence to shew that this could not cause the fire, I feel justified in inferring that it did, especially when supported as it is by the evidence of the fire chief. There will be judgment for the plaintiff, and a reference to the registrar to ascertain the amount of damages; liberty to apply for directions to govern the registrar in his inquiry.

Judgment for plaintiff.

SASK.
S. C.

ROGERS LUMBER CO. v. DUNLOP.

Saskatchewan Supreme Court, Lamont, Brown and Elwood, JJ. November 28, 1914.

1. STATUTES (§ II A—125)—CONSTRUCTION—CHATTEL MORTGAGE—RENEWAL STATEMENT FILED BY ORDER—VALIDITY—RIGHTS OF EXECUTION CREDITOR.

The effect of sec. 25 of the Bills of Sale Act, R.S.S. ch. 144, is that where an order is made to file a renewal statement subsequently to the date fixed by the Act, and that renewal statement is filed, the mortgage retains its validity, and is only void because of the delay as against those who had acquired rights during the interval between the date upon which the renewal should have been filed and the date upon which it was actually filed; a creditor of the mortgagor must have taken out execution in order to acquire such intervening right.

2. CHATTEL MORTGAGE (§II B—10)—DESCRIPTION—IDENTIFICATION—PROPER INQUIRIES.

The description of cattle in a chattel mortgage need not be such that, with the chattel mortgage in hand, without other inquiry the property could be identified, but there must be such material on the face of the mortgage as would indicate how the property may be identified if proper inquiries are instituted.

[*McCall* v. *Wolfe*, 13 Can. S.C.R. 130, applied; Barron and O'Brien on Bills of Sale, 2nd revised ed., 147, referred to.]

3. CHATTEL MORTGAGE (§ II A—6)—RENEWAL STATEMENT—MORTGAGEE'S SURNAME OMITTED—IDENTIFICATION.

A renewal statement of a chattel mortgage under R.S.S. ch. 144 is not invalidated by the omission of the surname of the mortgagee or of the additions of the mortgagor and mortgagee if the affidavit verifying the renewal statement identifies the mortgage referred to in which those details are set forth.

SASK.

S. C.

ROGERS LUMBER CO. v. DUNLOP.

Elwood, J.

APPEAL from a District Court.

Order accordingly.

G. H. Barr, for appellant, claimant.

H. J. Schull, for respondents, plaintiffs.

The judgment of the Court was delivered by

ELWOOD, J.:—This is an interpleader matter, in which the learned District Court Judge held that the chattel mortgages covering the goods seized by the sheriff were void as against the execution creditors. There were two chattel mortgages, both of which were given prior to the executions being issued. The first chattel mortgage in point of time was not renewed on the date required by the Bills of Sale Act, but subsequently was renewed under an order made by the District Court Judge under the provisions of that Act, and this renewal was filed prior to any of the executions issuing. It was contended that the execution creditors having, prior to the date of the filing of the renewal, been creditors, although not execution creditors, of the mortgagor, the mortgage was void as against them. I am of opinion that this contention is not well taken. The effect of sec. 25 of the Bills of Sale Act (ch. 144, R.S.S.) is that, where an order is made to file a renewal statement subsequently to the date fixed by the Act, and that renewal statement is filed, the mortgage retains its validity, and is only void as against those who have acquired rights during the interval between the date upon which the renewal should have been filed and the date upon which it was actually filed. The execution creditors in this instance did not acquire any rights during that period. The only way in which they could have acquired rights would have been by taking out execution. This was not done, and therefore the renewal as against them preserves the rights of the mortgagee.

The property covered by the mortgages with respect to which the contention in this matter arises consists *inter alia* of 31 red-poll cows, 6 red-poll yearling heifers, 2 red-poll yearling steers, and 20 red-poll calves. In the first mortgage there is the description, "Registered in Red-Poll Herd Book of America," and then the name given, and then the number; and "sixteen calves." In the second mortgage the cows are described as "the red-polled cow," then the name of the cow is given, and then, following that, "American Registry No.," and a number given after the cow;

SASK.

S. C.

ROGERS LUMBER CO. v. DUNLOP.

Elwood, J.

"10 red-polled heifers one year old," "10 red-polled calves, heifers, one year old." Both mortgages contain a description of the land upon which these goods are situated, which is the land upon which the goods were seized by the sheriff, and contain the following:—

> And also all and singular all the increase of any and all of the live stock above mentioned and described (etc.), and also all and singular any and all live stock of any and every description which may hereafter, during the currency of these presents and until the same are fully paid off and satisfied, be at any time purchased or got by the mortgagor, and in his possession upon or about the aforesaid lands and premises, or brought thereon, either in addition to, renewal of, or in substitution for any of the aforesaid live stock. And also any and all live stock hereafter purchased or acquired by the mortgagor during the currency of these presents or any renewal or renewals thereof.

So far as the 31 red-poll cows are concerned, I am of the opinion that the description in both mortgages is quite sufficient. They are described as of a certain breed, we can assume from the description that they are red, and the name and location in each case are given. In the argument before the District Court Judge, apparently a good deal turned upon the question of what the red-poll book of America would contain. That does not seem to me at all material. As I said above the description is given, and from that description the goods could be ascertained. As was said by Ritchie, C.J., in *McCall* v. *Wolfe*, 13 Can. S.C.R. 130, 133,

> this need not be such a description as that, with the deed in hand, without other inquiry, the property could be identified. But there must, in my opinion, be such material on the face of the mortgage as would indicate how the property may be identified if proper inquiries are instituted.

See also *Hovey* v. *Whiting*, 14 Can. S.C.R. 515; *Connell* v. *Hickock*, 15 A.R. (Ont.) 518; *Western Milling Co.* v. *Darke*, 2 Terr. L.R. 40; *Hickley* v. *Greenwood*, 25 Q.B.D. 277. The first mortgage was dated December 16, 1911, and the second one April 7, 1914. The seizure in question was on July 27, 1914, and therefore the 6 red-poll yearling heifers, the 2 red-poll yearling steers, and the 20 red-poll calves could not have been in existence, and therefore, not in the possession of the mortgagor, at the date of the first mortgage. As stated above, the first mortgage contains provisions for including after-acquired property in the mortgage, and I am of the opinion that these provisions are sufficient to include the 6 red-poll yearling heifers, the 2 red-poll yearling steers, and the 20 red-poll calves, and that the claimant is entitled to claim them under that provision: *Joseph* v. *Webb*, 1 C. & E. 271; Barron & O'Brien, 2nd rev. ed. 147 and 148.

SASK.

S. C.

ROGERS LUMBER CO. v. DUNLOP.

Elwood, J.

A number of objections were raised to the validity of the second mortgage, but in view of the conclusion I have come to with respect to the first mortgage it is not necessary that I should decide these objections, because counsel for the appellant intimated on the argument that if we should hold that the first mortgage was valid it would be unnecessary to decide the questions raised with respect to the second mortgage.

It was objected, further, that the renewal statement did not contain the surname of the mortgagee or the additions of the mortgagor and mortgagee. The statement and the affidavit verifying the statement sufficiently identify the mortgage that is referred to, and that, in my opinion, is quite sufficient.

The result, in my opinion, is that the claim of the claimant to the goods claimed under the chattel mortgage of December 16, 1911, should be allowed, and his claim barred under the mortgage of September 4, 1914. The execution creditor should pay the claimant his costs of the interpleader proceedings and of this appeal.

McDONALD v. LEADLAY.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. December 31, 1914.

1. ACCOUNTING (§ I—1)—MORTGAGOR AND MORTGAGEE—SALE BY MORTGAGEE'S AGENT—RATIFICATION.

Ratification by the mortgagor of an agreement of sale made by the mortgagee's agent with a stipulation that, failing execution of formal agreement, money should be repaid, may be shewn from the accounting by the mortgagee to the mortgagor whereby the money received by the mortgagee's agent was credited on the mortgage debt, and by the subsequent transfer of the mortgagee's right and title to the mortgagor's nominee expressly subject to the rights of the purchaser.

[*Edgar* v. *Caskey*, 7 D.L.R. 45, referred to.]

2. SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—AGENT'S RECEIPT—PURCHASER IN POSSESSION—PRINCIPAL'S INSTRUCTIONS—FORMAL AGREEMENT.

Specific performance may be ordered in respect of a sale of land evidenced by an agent's receipt for the cash payment, which in itself shewed the total price, the terms of the deferred payments and the rate of interest thereon, where the purchaser had been let into possession and the money he had paid had been retained by the vendors for an unreasonable time without repudiating the sale made by the agent, and by other acts recognizing the purchaser as such, although such sale may not have conformed with his principal's instructions, and the principal was not named therein, and although the agent's receipt had stipulated that it was a "voucher for the money paid pending the execution of the formal printed agreement of vendors," and that, in default of execution by vendors, money was "to be repaid on demand"; the reference to the formal agreement (which never was executed) may be treated as a mere expression of the vendor's wish that the agreement should be put into more formal terms than were contained in the receipt.

ALTA.

S. C.

McDONALD v. LEADLAY.

3. LAND TITLES (§ III—30)—TRANSFER—REGISTRATION—CERTIFICATE OF TITLE—UNREGISTERED CLAIM.

The registration of a transfer of lands under the Land Titles Act, Alta., will not enable the transferee, on obtaining his certificate of title, to set up the latter to defeat an unregistered claim under the transferor's contract of sale of a portion of the lands subject to which the transferee in fact took his title under his own agreement of purchase, although not disclosed in the registered transfer or in the certificate of title.

Statement

ACTION by purchasers to enforce specific performance of an agreement for the sale and purchase of land.

Judgment for plaintiffs.

J. C. Moore, for the plaintiffs.

George W. Greene and *W. E. Payne*, for the defendants.

Walsh, J.

WALSH, J.:—This is a specific performance action, in which the purchasers are the plaintiffs. The written evidence of the contract under which they claim is in the following document:—

Province of Alberta.
Red Deer Lands.
John T. Moore, Commissioner for Vendors.
Interim Receipt.

Received from Murdock J. McDonald and Roderick W. McDonald, of Red Deer, Alta., the sum of seven hundred and seventy-seven . . . 44/100 dollars, being payment on account of the total purchase-price of three thousand and eight hundred and eighty-seven . . . 20/100 dollars for the whole of section 31, township 36, range 28, west of the 4th meridian, containing 575.88 acres. Balance to be paid as follows: $777.44 on the 19th day of March, 1907; $777.44 on the 19th day of March, 1908; $777.44 on the 19th day of March, 1909; $777.44 on the 19th day of March, 1910; with interest upon the unpaid purchase-money from time to time, and arrears of interest, payable half-yearly, computed at six per cent. per annum.

This receipt is a voucher for the money paid, pending the execution of the formal printed agreement of vendors. Failing execution of agreement by vendors, money to be repaid on demand. When purchase-money is paid in full, a deed of the property, at expense of purchaser, is to be delivered by vendors.

Witness my hand this 19th day of March, 1906.

John T. Moore,
Commissioner for Vendors,
Per Wm. A. Moore.

I agree to purchase the above land on the above conditions.

Murdock J. McDonald.

In presence of

Roderick W. McDonald.

W. A. Cuthbert.

Per M. J. McDonald.

At the date of this transaction, the defendants the Leadlays were the registered owners of this land. By written agreement

dated November 3, 1900, but varied by another agreement of February 13, 1902, these defendants appointed John T. Moore their commissioner for the sale of lands comprising about 6,600 acres in what was then the North-West Territories, of which lands the parcel in question formed a part. The duties and conditions imposed upon Moore and the compensation to be paid to him are described and provided for at length in this document. This agreement was afterwards assigned by J. T. Moore to his wife, Annie A. Moore, who, in turn, assigned a half interest in it to her son W. A. Moore.

Before the date of the agreement in question litigation had arisen over all of the lands for the sale of which Moore had been so appointed commissioner. Two actions were brought in the Supreme Court of the North-West Territories, in both of which the Saskatchewan Land and Homestead Co., Ltd. (which I shall hereafter refer to as the Saskatchewan company) was the plaintiff, and in one of which the defendants the Leadlays, their commissioner John T. Moore, and his wife Annie A. Moore, and in the other of which the Moores alone, were defendants. Both of these actions had for their aim the stopping of the sale by the defendants in them of the lands covered by the agreement between the defendants the Leadlays and J. T. Moore, the Saskatchewan company claiming to be the owner of them, or that at most the defendants the Leadlays were but mortgagees of them. On June 27, 1904, an injunction was granted in the action against the Moores alone, restraining them from disposing of any of these lands until further ordered. This injunction was served on the Moores on June 29, 1904, and was still in force at the date of the agreement in question.

Mr. W. G. Greene, one of the firm of the present defendants' solicitors, swears that on January 27, 1906, he served W. A. Moore, who was then J. T. Moore's representative in Red Deer, with a notice from the Leadlays forbidding further sales of these lands. W. A. Moore says that no such notice was served on him. Although I think that Mr. Moore is quite honest in his belief that this notice was not served, I accept Mr. Greene's statement to the contrary, as the collateral evidence afforded by his correspondence with the Toronto solicitors for whom he was acting as agent in the matter satisfies me that he is right.

ALTA.

S.C.

McDONALD v. LEADLAY.

Walsh, J.

There was also litigation on foot in Ontario at this time over these lands between the Leadlays and the Moores, in which, by an order dated March 19, 1906, which is the date of the agreement here sued on, John T. Moore and his wife were restrained until the trial from selling, disposing of, or in any way dealing with the lands in question.

There is also an agreement of June 22, 1905, between the Leadlays and the Moores cancelling the two agreements between them which are hereinbefore referred to; but, I think, the fair conclusion from the commission evidence is that this never became an effective document. The position, therefore, on March 19, 1906, when the agreement in question was made, was, that the commissioner for the Leadlays, whose name is appended to the interim receipt, had been enjoined by order of a Court of competent jurisdiction from disposing of any of the lands of which the parcel here in question formed a part, and the representative of this commissioner, by whose procuration such receipt was signed, had been forbidden by the principals of that commissioner to make any more sales.

The plaintiff paid, on its date, $259.15 of the down or cash payment of $777.44 called for by their agreement, and gave their two promissory notes for $259.15 each at two and three months respectively, with interest for the balance, which notes they paid promptly at maturity, so that the whole of this sum was eventually paid by them. When the half-yearly payment of interest fell due on September 19, 1906, and again when the instalment of principal and interest fell due on March 19, 1907, the plaintiffs offered to make these payments to W. A. Moore, but he told them to keep their money, as there was litigation on foot over these lands, and, until it was concluded, he could not accept any more money from them.

The litigation to which Moore referred was that set on foot by the Saskatchewan company in Ontario, as well as that in this country, which I have already mentioned. By consent, the actions in the Supreme Court of the North-West Territories were afterwards stayed pending the final decision of the Ontario action. In September, 1907, the Ontario litigation was ended by the judgment of the Court of Appeal for Ontario, which declared that the Saskatchewan company was entitled to redeem these lands,

and a reference was directed to ascertain and fix the amount owing by it to the defendants the Leadlays, who were thereby ordered, upon the payment to them by the company of the amount so found due, within a certain specified time, to reconvey the undisposed of lands to the company.

Upon the taking of the accounts thus directed, the defendant Percy Leadlay made an affidavit on April 15, 1908, which was filed, proving the amount of the claim of himself and his co-defendant, Mary Isabel Leadlay, against the Saskatchewan company, in which he set forth, amongst other things, "a full, true, and particular account of all moneys received by me and the said Mary Isabel Leadlay, on account of the sales of lands," in which account the following item appears:—

Re all 31-36-28 W. 4th 575.88 acres	$3,887.20
Re 785—March 21, 1906—M. J. McDonald, by cash	259.15
Re 786—May 19, 1906—M. J. McDonald, by cash	262.75
Re 787—June 23, 1906—M. J. McDonald, by cash	264.30

For these amounts, which correspond exactly with the payments made by the plaintiffs to W. A. Moore, the Saskatchewan company got credit on its indebtedness to the Leadlays, so that the amount which it was compelled to pay them in the redemption of these lands was smaller by the aggregate of these payments than it would otherwise have been.

The actual redemption seems to have been delayed until January, 1911, and was then accomplished through the medium of the Trusts and Guarantee Co., Ltd., hereinafter called the trust company. It advanced to the Saskatchewan company the amount required to pay off the Leadlays, and took from them by way of security a transfer of all the lands, including the parcel in question, which was recorded on February 4, 1911, and the trust company has been ever since and now is the recorded owner of this parcel. By writing dated in January, 1911, the Leadlays assigned to the trust company the agreements for sale set out in the first and second schedules thereto, and the trust company thereby bound itself, upon payment of the purchase-moneys payable thereunder, "in so far as said sale agreements are legal and binding, to transfer the respective lands mentioned in them to the respective purchasers or holders of the agreements." The agreement contains this clause: "It is further provided and agreed that as respects the agreements or options referred to in the second schedule hereto

ALTA.

S. C.

McDONALD v. LEADLAY.

Walsh, J.

annexed neither the taking nor the making of this assignment by the parties hereto shall be deemed or treated to be in any way an admission by any of the parties hereto that such agreements or options now are or ever were binding or existing agreements or options for sale of the lands mentioned therein." And in this second schedule appears the following: "Agreement dated the 19th March, 1906, for the sale of the whole of section 31, township 36, range 28, W. of the 4th, Alberta, to Murdock J. McDonald and Roderick W. McDonald."

On January 26, 1911, an agreement was entered into between the Saskatchewan company and the trust company, evidencing the arrangement under which an advance was to be made by the latter to the former of $25,000. It recites the sale, under agreements which are set out in a schedule to it, of certain lands in Alberta and Saskatchewan to various purchasers, under which parts of the purchase-money still remain unpaid, of which agreements and of which purchase-money the trust company has become entitled to an assignment, and that the trust company's security for its advance should be "by absolute transfer of the lands included in the said agreements of sale, subject to the said agreements of sale, and by absolute transfer of the said agreements of sale and the benefits and advantages thereof." It then authorises the trust company to make collection of the deferred instalments of purchase-money under the said agreements, and provides for their application in reduction of the indebtedness to the trust company. In the schedule which is attached to the agreement, and is headed "balances due on sale agreements," the following items appear: "September 19th, 1910, 163—McDonald, W. J. and R. W., all 31-36-28 W. 4, 575.88 acres, $4,043.66, balance." There is nothing to explain the date, but I take it that it is the date to which interest was computed, the 19th September, being the date set for the half-yearly payment of interest, and the amount mentioned, $4,043.66, being, according to a rough calculation which I have made, about the amount due at that date according to the terms of the receipt.

In 1911, J. E. Cunningham, the managing director of the Saskatchewan company, came to Red Deer, and in April of that year one of the plaintiffs interviewed him about this contract. The company's final intention to repudiate this contract was

conveyed to the plaintiffs by letter dated on June 14, 1911, which was supplemented by a letter dated July 3, 1911, requesting them to remove from the land any stock or chattels which they might have on it. On June 29, 1911, the plaintiffs recorded a caveat against the land. On November 16, 1911, they tendered to the Saskatchewan company the full amount then unpaid under the agreement and a transfer for execution by the trust company, but their tender was not accepted. The statement of claim alleges a tender to the trust company, on November 18, but there is no evidence of it beyond a casual mention of it in the examination of one of the plaintiffs for discovery. I do not think that this allegation is sufficiently denied by the statement of defence, and so I take it to be admitted.

This action was commenced on January 31, 1912, against the Leadlays and the two companies. This is a summary, in as brief form as I have been able to put it, of the facts which appear to me to be essential to an understanding of the case. The equities of the case are, in my opinion, all with the plaintiffs. They entered into the agreement for the purchase of the land in the most perfect good faith. They made their cash payment at the times agreed upon, and this the defendants have, amongst them, ever since held and still hold. The difficulty which arose to prevent the carrying out by the plaintiffs of the agreement according to its terms was of the creation of some one or more of the defendants. There is nothing in the evidence to justify the insinuation that this agreement was entered into as the result of collusion between the plaintiffs and W. A. Moore. I accept the evidence of the plaintiff W. J. McDonald as to this unreservedly.

The defendants interpose many objections of a legal character to the plaintiffs' right to recover. These are for the most part of a technical character and without real merit. Unless some one of them is fatal, the plaintiffs must recover.

It is objected that W. A. Moore, by whom the interim receipt, as it is called, was signed, was not the agent of the Leadlays for the sale of this land. The written appointment of J. T. Moore as commissioner plainly contemplates the sale of these lands through the medium of agents and sub-agents. The very form of the receipt, which was the stock form in use for this purpose,

ALTA.
S. C.
McDONALD v. LEADLAY.
Walsh, J.

emphasises this idea, the printing of the word "per" opposite the line for the signature of the person signing the commissioner's name, clearly indicating that some one other than the commissioner was expected to sign. W. A. Moore had, I think, ample authority from the commissioner to make sales of these lands. See the judgment of the Court *en banc* in *Edgar* v. *Caskey*, 7 D.L.R. 45, at 53, on this point.

It is argued that the assignment by J. T. Moore to his wife of the Leadlay agreement terminated his appointment as agent. The assignment itself was produced at the trial. I think it reasonably clear that what he transferred was his beneficial interest in the agreement, which was of a substantial character, and I cannot see why he could not do that without thereby changing in any respect his other relations with the Leadlays under it.

Then it is said that the right of the commissioner to make sales is limited by his appointment, one clause of which provides that he shall not sell without his principals' assent for a less amount than that fixed in a specified price list, which is not set out in the agreement. The contention is made that the onus is on the plaintiffs to shew that the price which they agreed to pay was at least equal to the amount so fixed. As I shall presently shew, I think that the principals consented to this sale; but, even if it were otherwise, the amount of the sale price placed on this land by them was a fact peculiarly within their own knowledge; and, that being so, the onus in this regard should be on them, and not on the plaintiffs. The evidence of J. T. Moore, however, seems to cover this point in the plaintiffs' favour.

Another argument is, that Moore's authority to sell was conditional only upon payment being made of 20 per cent. of the purchase price in cash, and that he was prevented from making a valid sale by the two injunctions restraining him from doing so that were then outstanding, and that the notice served on him forbidding him to make further sales also deprived him of the right to bind the Leadlays by his agreement. There would have been a good deal of force in some, if not all, of these objections if the Leadlays had not ratified the agreement, as I think they did. I do not see how the action of these defendants, in accounting to the Saskatchewan company for the purchase-money paid by the

plaintiffs to W. A. Moore, can be regarded in any other light than as a ratification of the agreement. By this, they took the benefit of the contract. It is true that they got their information respecting it from Moore, but from whom else could they have procured it? They must have known from the manner in which the account proved by Percy Leadlay's affidavit is drawn that 20 per cent. of the purchase-money was not paid at one time, and they must or should have known that the first payment was made nearly two years after the first injunction order was made, and nearly two months after the notice forbidding further sales was served. I think it abundantly clear, not only from this affidavit, but also from the reference to this contract in the agreement between the Leadlays and the trust company and in the agreement between the two companies, that all of the defendants had full knowledge of this contract long before June, 1911, when the first attempt at repudiation of it was made; and, in view of their dealings with it and with the plaintiffs' money, they should not be allowed now to get rid of it on any of those grounds at least.

Objection is taken that the names of the vendors are not disclosed by the receipt. This is quite true. But it is equally true that written evidence that the vendors are the Leadlays is afforded by the affidavit of Percy Leadlay and by the agreement between the Leadlays and the trust company. I think that the authorities justify me in treating these documents as written evidence of the names of the vendors.

It is contended that the receipt contemplates the execution of a formal contract, and that it does not shew what the terms of this formal contract were to be. While it is true that the wording of the receipt indicates an intention that there should be a formal printed agreement, I see nothing in it to indicate that the contract was subject to or dependent upon such formal contract being prepared. All of the terms of the agreement are set out in the receipt, and I regard the reference in it to the formal agreement as nothing more than an expression of the wish of the vendors that the agreement should be put into some more formal terms than were contained in the receipt.

Finally, the defendants say that the plaintiffs have not pursued their remedy with such diligence as to entitle them to the consideration of the Court. This plea sounds very strangely coming

ALTA.

S. C.

McDONALD v. LEADLAY.

Walsh, J.

from the mouths of the defendants, who have themselves contributed almost as much in years as the plaintiffs have in months to the delays of which they complain. The only delay of which the plaintiffs have been guilty is in the bringing of the action after knowing of the position which the defendants intended to take. Seven months elapsed between these two events; and, in all the circumstances of this case, I do not think this sufficient to deprive them of their rights under this agreement.

At the conclusion of the trial, I suggested a difficulty in the plaintiffs' way in the fact of the trust company's registered title, although this was neither raised by the defendants in their pleadings nor on the argument. I made the suggestion with an imperfect appreciation of the documentary evidence, which I had not then had an opportunity to read. In view of the fact that the trust company took its title expressly subject to this contract, it should not be allowed to set up its certificate of title to defeat the plaintiffs' claim.

There will be judgment for the plaintiffs with costs.

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ. December 18, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ VIII—80)—AGREEMENT FOR SALE—MORTGAGEE—CAVEAT—ASSURANCE FUND—MISTAKE OF REGISTRAR—LIABILITY—PARTY TO FRAUDS—ACTION AGAINST—DAMAGES.

A mortgagee under a mortgage from a purchaser under an agreement of sale who, being unable to register the mortgage itself, files a caveat in respect thereof in the Land Titles Office, is entitled to compensation from the Assurance Fund for the loss sustained by reason of the Registrar's error in recording the caveat against the wrong lot; but he must first prosecute an action under sec. 105 of the Act against the party who fraudulently took advantage of the error, and who was thereby enabled to defeat the mortgage; the last-mentioned action is a special one for damages, and it is not sufficient that action had been brought and judgment and execution obtained without result against the same party on his covenant contained in the unregistered mortgage upon which the caveat was founded.

[*Setter* v. *The Registrar*, 18 D.L.R. 789, affirmed on other grounds.]

2. LAND TITLES (TORRENS SYSTEM) (§ IV—45)—AGREEMENT FOR SALE—REGISTRATION AS CAVEAT—INTEREST IN LAND—LAND TITLES ACT (ALTA.).

An "interest in land" is created in favour of the purchaser by an agreement for sale which cannot be registered except by way of caveat under the Land Titles Act, Alta., or by a mortgage, whether registered or not.

[*Wilkie* v. *Jellett*, 26 Can. S.C.R. 282; *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551; *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618; *Yockney* v. *Thompson*, 16 D.L.R. 854, 50 Can. S.C.R. 1, referred to.]

3. STATUTES (§ II A—104)—LAND TITLES ACT (ALTA.)—MEANING OF WORD "LAND."

The word "land" in sub-section (*a*) of sec. 2 of the Land Titles Act, Alta., includes any interest in land.

4. STATUTES (§ II A—104)—LAND TITLES ACT (ALTA.)—MEANING OF WORDS "AFTER A CERTIFICATE OF TITLE HAS BEEN GRANTED THEREFOR."

The words "after a certificate of title has been granted therefor," in sec. 105 of the Land Titles Act, Alta., mean "after land has been brought under the Act."

[*Setter* v. *The Registrar*, 18 D.L.R. 789, disapproved on this point.]

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Statement

APPEAL from Harvey, C.J., *Setter* v. *The Registrar*, 18 D.L.R. 789.

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

E. P. Edwards, K.C., for defendant, respondent.

SCOTT, J., concurred with BECK, J.

Scott, J.

STUART, J.:—I was at first inclined to agree with the learned Chief Justice in his opinion that under sec. 105 of the Land Titles Act a mortgagee who has been deprived of the security of his mortgage by an omission of the registrar could not maintain an action for damages. But after argument, and upon consideration, I have concluded that the opening words of that section can, and should properly, be given an interpretation wide enough to protect such a mortgagee. The question turns upon the meaning of the words, "after a certificate of title has been granted therefor any person deprived of any land, &c., &c." The view taken by the Chief Justice, as I understand it, is that the word "land" in this phrase must, as applicable to the present case, be taken to mean merely "an interest in land such as a mortgagee enjoys under his mortgage," that the preceding word "therefor" refers by anticipation to this interest only, and that, as no certificate of title was granted to the mortgagee or to anyone for such interest, therefore the section does not cover his case.

Stuart, J.

In addition to the other reasons which are given by my brother Beck, it seems to me that one very valid argument against such a view may be rested upon the proper interpretation of the whole expression, "deprived of any land." I do not think it is by any means an impossible or improper interpretation of these words to make them cover the loss of a right by way of security upon the land. If one has a chattel mortgage—or perhaps it would be more exactly parallel to say a lien—upon goods as security for a debt, and someone steals or destroys the goods, surely the person who has the lien can quite properly be said to be *deprived* of those goods. In the case of a lien he may not have the legal estate, but he would certainly feel quite certain that he had in a very

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Stuart, J.

real sense been "deprived" of the goods. It is true that in the case of a lien on chattels there must be possession, and that a mortgagee of land has under our Act only a charge on the land and not necessarily possession. But he has usually at least a contingent right of possession which for the present purpose must amount to practically the same thing. I think any mortgagee of land would consider himself "deprived of the land" if his mortgage security were destroyed. And it is this wider and more general sense that I think that expression should be taken.

With respect to the main point involved in the appeal, the right of the plaintiff to maintain an action under secs. 108 and 105 rests admittedly upon the possibility of his saying that he was given an action against Rapier by sec. 105, but that owing to Rapier's having made a *bonâ fide* transfer of the property that action is barred by the proviso at the end of the latter section.

Now, referring to the proviso first, it is obvious that the principle underlying it is this: First, if there is fraud a person guilty of it will still remain liable even if there has been a transfer, Second, if there has been an "error occasioned by any omission, misrepresentation or misdescription in the application of such person to be registered as owner of the land or on any instrument executed by him," such person must also remain liable even if he has made a *bonâ fide* transfer. If the mistake has been his, if he has caused the error through some misdescription, omission or misrepresentation (even though innocent) in his documents produced, a transfer does not relieve him. He must bear the burden of his own mistake which led to the mistake in the office. But *in every other case* the person, whoever it is, who is made liable by the main part of the section is relieved if he has made a *bonâ fide* transfer, and *then*, by the concluding words of the proviso, an action is given against the registrar instead.

This means that even though a man has been guilty of no fraud and guilty of no mistake in his documents produced, he may still be liable to an action under the main part of the section if he comes properly within its terms as long as he still holds the property. And, of course, in justice he should be so liable, because in such a case it is still in his power to correct the error, and if out of what must be clear perversity he refuses to do so he ought to be made liable. Just why the error in such a case

could not have been left to be corrected by an order of the Court in an action for that purpose only is not, to my mind, very clear, but at any rate a right of action is created, and I cannot see that that right is confined to the case of misdoing or negligence or fault in the statutory defendant. Clearly it is not so confined.

Now, it is admitted that Rapier was guilty of no fraud, and it is not suggested that the error was occasioned by any omission, misdescription or misrepresentation in any application of his or in any instrument executed by him, so that therefore, if there ever was an action against him at all he is relieved owing to his *bonâ fide* transfer for value. An action is therefore given, either under the concluding words of the proviso to sec. 105 or under sec. 108, against the registrar, in case there ever was any right of action against Rapier.

The first inquiry that I proceed to make is whether Rapier comes within the meaning of the words, "the person upon whose application the erroneous registration was made." I have, upon consideration, and with the assistance of the observations made by my brother Beck, whose judgment I have had an opportunity of reading, come to the conclusion that he does not. I think, particularly in view of the wording of the proviso, that the word "application" must be interpreted to signify a *written* application of some kind. I am unable to see how there could be a "misdescription" in any *verbal* application within the meaning of the proviso. The expression, "make application to be registered as owner," is used in several parts of the Act, and it has in every case obviously reference to a written application of some kind. I do not think, however, that the expression can be or ought to be confined to an application to bring land under the Act, because a written application to be registered as owner is referred to in secs. 74 and 75, and it seems to me quite clear that the words "upon whose application the erroneous registration was made" are quite wide enough to cover such a written application as is there referred to. Confining interpretation of the words, then, to the case of a written application of some kind, it is admittedly the case that Rapier made no such written application, and that there never was any right of action created against him upon that ground.

I have, however, much greater difficulty in dealing with the

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Stuart, J.

question whether Rapier did or did not "acquire title to the land in question through such . . . omission," as stated in the concluding words of the main part of sec. 105.

It seems to me that some confusion has arisen from the fixing of attention somewhat too strongly upon the real respective beneficial interests of Meyer and Rapier instead of upon the registered title obtained by them owing to the omission of a proper memorandum of the plaintiff's caveat. It is argued that Rapier never got any title which he would not have been entitled to get even if the caveat had been filed. And this consideration impressed itself strongly upon my mind for some time. There is also a not unnatural hesitation in giving any interpretation to the section which would have left Rapier open to action for damages which is a pure statutory creation when it is admitted that he was entirely innocent in the matter. But it must be remembered that the action *is* a statutory one, created not by the justice or equity of the ordinary law, but by the Legislature in a certain specified case. If Rapier comes fairly within the meaning of the words and an action is given against him I hardly think the Court should hesitate to declare him so to be within its meaning, merely because in our opinion it was an unjust thing for the Legislature to do. Moreover, in this particular case the action created by the statute would only exist against Rapier while the title remained in the joint names of him and Meyer. At that stage nothing would have prevented the plaintiff filing another caveat or getting the registrar to put the old one right, and any damages suffered by the plaintiff would only have amounted to the expense or trouble to which the plaintiff might have been put in getting that arranged. There is nothing much to shrink from in such a contingency. Practically speaking, no such action, even if technically existing, would ever be brought. Persons in Rapier's position are protected, if they have acted *bonâ fide*, as soon as they have transferred the land *bonâ fide* for value. In view of the wording of sec. 106, it seems to me the Court might not improperly take a broad view of the expression "*bonâ fide* transfer for value" so as to cover the case even of a mortgage for value. Section 2, sub-sec. (*c*), indeed, itself interprets "transfer" to mean "the passing of any estate or *interest* in land under this Act." So that the case of a mortgage is actually covered in this way.

Practically, therefore, the existence during one period of a hypothetical right of action against a person in Rapier's position is merely made a peg upon which to hang a right of action against the registrar. When the whole purpose of the Act is to protect persons who rely upon the registry system, to which they are really compelled to resort, from mistakes of the officials, and to create a feeling of absolute confidence in registered titles, I think no fear of any injustice in the creation or maintenance of a right of action against a person in Rapier's position during a period when *ex hypothesi* the damages could in any case be only very minute, and, also *ex hypothesi*, would scarcely ever be claimed, should not deter us from asserting that there was at one time such a right of action when the only present result will be to establish one against the registrar and practically the Insurance Fund, which was created just for the purpose of such cases as this.

Now, can Rapier be fairly said to have acquired a title through the omission? It seems to me that if we keep our eyes steadily upon the question of "title," that is, of the title as disclosed *on the face of the registry* and quite apart from Rapier's real beneficial interest as between himself and Meyer, he can quite properly be said to have done so.

The Hudson's Bay Co. executed a transfer to Meyer and Rapier jointly, and the transfer did not specify their respective interests. The certificate of title, issued to them upon that transfer, did not specify their respective interests. It does not seem to have been filed as an exhibit, only an epitome of its contents being given. But I have taken the liberty of making sure upon the point by having the registrar produce the certificate to me, and it only confirms what would otherwise be the necessary inference, *viz.*, that Meyer and Rapier were stated to be "the owners of an estate in fee simple" in the south half of the section. It seems to me that the effect of this is that Rapier and Meyer together acquired a title—*i.e.*, a registered title to the whole. That, of course, is quite distinct from beneficial interest. So far as the face of the title goes Rapier might have had an eighth and Meyer seven-eighths, or any other proportion. The situation is not different from what it would have been if at the request of Meyer and Rapier the Hudson's Bay Co. had issued a transfer to John Smith and Thomas Jones jointly and there had been a

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Stuart, J.

separate agreement between Smith and Jones and Meyer and Rapier that the two former would hold as bare trustees for Meyer and Rapier in certain proportions. Smith and Jones would have acquired a title certainly enough. So here I think Meyer and Rapier must be treated, so far as the registered title is concerned, as trustees for themselves according to their real interests. But, all the same, they jointly have a registered title to the whole half section and the whole estate. That Rapier had a title covering the interest of Meyer must be clear when we consider that Meyer could not possibly have conveyed a half interest by a transfer signed merely by himself. Rapier was a necessary party to any such transfer, and did in fact join in both transfers that were subsequently made. With respect to Meyer's interest, he was a bare trustee for Meyer, it is true. But he had a certificate of title in his name, and it covered Meyer's interest. And by the omission to make the proper memorandum of the caveat he acquired a more complete title, so far as Meyer's interest was concerned, than he otherwise could have obtained. He obtained a title free of the caveat, and he was thereby enabled to join in and execute a transfer to cover and convey free of encumbrance Meyer's interest to the purchasers, which he could otherwise not have done.

Although this reasoning may appear somewhat technical, it does seem to me that that consideration should not be an obstacle, especially when the only purpose of holding that there was once a right of action against Rapier is to secure a foundation for an action against the registrar. The final objection to this view which has been pointed out to me lies in the provisions of sec. 111, which give the registrar a right of action over against a person when any money has been paid on his account. It would be unjust to allow the registrar to recover over against Rapier, who is entirely innocent. But even this difficulty can, I think, be avoided by a very fair construction of the words "on account of any person." Even though the original action was against Rapier, it was only because he was trustee for Meyer, and the payment by the registrar could, I think, quite properly in such a case be held to have been made on account of Meyer after all.

If we suppose the case of a caveat being attempted to be filed against lands of which A is the registered owner and a failure

owing to an omission of the registrar, and then a transfer by A to B, the latter being merely a bare trustee either for A or for some other party D, and innocent of any wrongdoing or fraud; and then an innocent transfer for value by B, say at A's or D's request, to C; which would bar the action against E; in this case B is a bare trustee, and yet he is the person who has acquired title owing to the omission, and it is against him that the action would be given by the statute. Surely in such a case the remedy under sec. 111 given to the registrar would be against the A or D as the person on whose real account the money would have been paid, although in the first instance the technical statutory action was against B.

I admit that this sec. 111 presents some difficulty, but I think it could be overcome in the way I suggest. Aside from that difficulty, it seems to me fairly clear that Rapier did acquire an unencumbered registered title covering Meyer's interest owing to the omission, and that there was a right of action against him.

For these reasons I think the appeal ought to be allowed with costs, but that the conditions as to proving damages suggested by the prevailing judgment ought even in such a case to obtain.

BECK, J.:—This is an appeal from the judgment at the trial of the learned Chief Justice. I quote from his reasons for judgment his summary of the material facts:— Beck, J.

In October, 1909, one Meyer gave a mortgage to the plaintiff on an undivided one-half interest in the S.E. ¼ 26-31-2, west of the 5th meridian, to secure $2,016, the purchase price of certain machinery.

At the time the mortgage was given, the title to the said land stood in the name of the Hudson's Bay Co., Meyer and another being the purchasers under an agreement of sale assigned to them, upon which there was a small balance still unpaid. The plaintiff, being unable to register the mortgage, caused a caveat to be filed, under which he claimed to be interested as mortgagee under his unregistered mortgage. As required by sec. 86 of the Land Titles Act, the registrar caused a memorandum of the caveat to be entered on the certificate of title standing in the name of the Hudson's Bay Co., but by error the land was described as sec. 23, instead of sec. 26, and, in consequence, when the transfer from the Hudson's Bay Co. to Meyer and his co-owner came in to be registered, the caveat was disregarded, and no memorandum of it was noted on their certificate. The land was subsequently sold as unencumbered, but the mortgage was not paid, though there was a small amount paid on it at one time. The plaintiff recovered a judgment against the mortgagor for the amount unpaid, but the sheriff has been unable to realize anything on the execution, to which he has made a return of *nulla bona*. The notice provided by sec. 108 of the Land Titles Act was given, and this action was then begun against the registrar as nominal defendant.

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Beck, J.

For a decision of the case it is necessary to consider several sections of the Land Titles Act (ch. 24 of 1906), especially secs. 105 to 108.

Though long, I think it best to quote sec. 105 in full. It is as follows:—

105. *After a certificate of title has been granted* therefor *any person deprived of any land* (1) in consequence of fraud or (2) by the registration of any other person as owner of such land, or (3) in consequence of any fraud, error, omission, or misdescription in any certificate of title or in any memorandum thereon or upon the duplicate thereof, may, in any case in which the land has been included in two or more grants from the Crown, bring and prosecute an action at law for the recovery of damages against such person as a Judge appoints, and in any other case against the person upon whose application the erroneous registration was made, or who acquired title to the land in question through such fraud, error, omission, or misdescription:

Provided always that except in the case of fraud or error occasioned by any omission, misrepresentation, or misdescription in the application of such person to be registered as owner of such land, or in any instrument executed by him, such person shall, upon a transfer of such land *bona fide* for value, cease to be liable for the payment of any damages which but for the transfer might have been recovered from him under the provisions hereinbefore contained, and such damages, with costs, may in such last-mentioned case be recovered out of the assurance fund hereinafter provided for, by action against the registrar as nominal defendant.

By the interpretation section (2 (*a*)), "land" includes "every estate or interest therein, and whether such estate or interest is legal or equitable." That an interest in land is created by an agreement for sale (which cannot be registered except by way of caveat), or by a mortgage whether registered or not, is settled by such cases as *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282; *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551; *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618, and *Yockney* v. *Thompson*, 16 D.L.R. 854, 50 Can. S.C.R. 1.

The words which in the first instance require most careful consideration are, "After a certificate of title has been granted therefor, any person deprived of any land, &c." "Therefor" obviously refers to "land." The sentence can therefore be reconstructed so as to read: "After a certificate of title has been issued for a particular parcel of land, any person deprived of the land comprised in the certificate of title, &c." and the word "land" in the second instance must, as the whole includes all its parts, include "or any part thereof or interest therein," for it would be absurd that where the condition had arisen, *i.e.*, "after

a certificate of title has been issued for a particular parcel of land," only a person who had been deprived of his entire interest in the land should have a remedy. Of course no such proposition is put forward; and I have met it because I think its statement makes the alleged difficulty appear to be less serious than it is to my mind. The section (105) gives a remedy in certain cases against the Assurance Fund established under the Act for, speaking generally, the indemnification of persons damnified by mistakes of the registrar.

The present Land Titles Act, though the first passed by the Legislature of Alberta, is, in fact, a revision of one passed in 1886 by the Parliament of Canada for the North-West Territories out of which the Province of Alberta was carved and constituted, which was amended from time to time. Prior to 1886 there had been a system of registration established under an ordinance of the North-West Territories. The Dominion Act of 1886, while introducing the "Torrens System," did not abolish the older system of merely recording instruments, so that for some time both systems continued concurrently. Subsequently it came to be enacted that no instrument of title could be received for registration unless the existing title were first registered under the Act, that is, until a certificate of title had been issued to the applicant; and inasmuch as in 1906 there might remain cases in which land had not yet been registered under the Act, provision appears in the present Act for this being done in such cases (secs. 27 *et seq.*); and furthermore, it was not unreasonable to suppose when the present Act was passed that titles to properties appeared in the Land Titles Offices for which no certificate of title had yet been issued.

In respect of any such titles, it is obvious that the Assurance Fund was not intended to be available, but available only and in respect of registrations made "after a certificate of title had been issued therefor"—that is, for the land in respect of which the claim against the Assurance Fund is made. With deference to the learned Chief Justice, it seems to me that this is the clear purpose and intention of the opening words of sec. 105 and at the same time their proper grammatical construction. No doubt some plainer expression might have been used.

Section 27 says that the owner, &c., "may apply to have his title registered under the provisions of this Act."

ALTA

S. C.

SETTER v. THE REGISTRAR.

Beck, J.

Section 36 uses the expression, "after the registration of a title"—*i.e.*, in pursuance of an application under sec. 27.

The application for the registration of a title, if successful, results in the issue of a certificate of title for the land. In order, therefore, to express the idea that the remedy against the Assurance Fund is confined to cases where title has been registered under the Act, the words "after a certificate of title has been issued for the land" are undoubtedly fit and apt; and perhaps more apt than an attempted adaptation of either of the other expressions I have quoted; for in both instances the words are used to signify the registration of the particular title of the applicant and not the wider idea as often expressed popularly of the *land* being brought under the Act; an idea quite correct, but nowhere so or similarly expressed in the Act, and therefore used only to express the result consequent upon the particular title of a particular person becoming registered either as original patentee or as an applicant for registration of a title depending upon a patent issued prior to a certain date stated in the Act, being the date when it became compulsory that titles should be brought under the Act before being dealt with by instruments of title. In my opinion, therefore, the condition for the application of sec. 105 existed, namely, a certificate of title had issued for the land.

The plaintiff is a person deprived of an interest in the land, namely, his interest as a mortgagee, in consequence of an error or omission in a certificate of title, namely, the omission of the entry of a memorandum of the plaintiff's caveat, and was therefore entitled to bring and prosecute an action at law for the recovery of damages against the person who acquired title to the land in question through such error or omission.

In my opinion the words "the person upon whose application the erroneous registration was made" (sec. 105) refer not to a person, *e.g.*, asking for the cancellation of a certificate of title and the issue of a new certificate of title upon a transfer, but solely to the case of the formal application, so designated, of a person for the registration of his title where the land has not yet been registered under the Act (secs. 32 *et seq.*). And I think, too, the whole of the exception contained in the proviso to the section is confined to such an application or to like formal applications; *e.g.*, under sec. 74 (transmissions). But Meyer & Rapier, to whom

the certificate of title upon transfer from the Hudsons Bay Co. was issued, acquired a clear title to the land through the error or omission of the registrar to indorse a memorandum of the plaintiff's caveat protecting his interest as mortgagee. Rapier, however, was entitled to an undivided half interest in the land free from the caveat; for the mortgage affected only Meyer's half interest, and there is no allegation nor anything to shew that Rapier had knowledge of the mortgage or of the caveat so as to make him a party to fraud on Meyer's part. I think, therefore, that Rapier did not occupy such a position as to come within the sense of the words of the Act, and that the plaintiff's right of action under sec. 105 was against Meyer only. This, too, seems to have been the view of counsel for the plaintiff, for an action was brought by the plaintiff against Meyer alone.

If, therefore, the plaintiff had brought "an action at law for the recovery of damages" against Meyer under sec. 105, I think that upon shewing a judgment and execution and a return of *nulla bona* and producing a certificate of the Judge who tried the case he would have been entitled to payment of his claim by the Provincial Treasurer in pursuance of sec. 107, which I quote, for it calls for some further consideration:—

> 107. If the person against whom the action for damages is directed to be brought as aforesaid is dead or cannot be found within the province, an action for damages may be brought against the registrar as nominal defendant for the purpose of recovering the amount of the said damages and costs against the said assurance fund; and in any such case, if final judgment is recovered *and also in any case in which damages are awarded in any action as aforesaid* and the sheriff makes a return of *nulla bona* or certifies that any portion thereof, with costs awarded, cannot be recovered from such person, the provincial treasurer, upon receipt of a certificate of the Judge before whom the said action was tried, shall pay the amount of such damages and costs as are awarded or the unrecovered balance thereof, as the case may be, and shall charge the same to the account of the said assurance fund.

The plaintiff did in fact bring an action against Meyer, but it was not one for the recovery of damages, but one upon the covenant in the mortgage. Judgment by default was obtained, execution issued and returned *nulla bona*.

I was inclined, as a first impression, to the view that that action might be treated as an action for damages under secs. 105-7, inasmuch as all actions are now "formless," and the amount recovered would in this case perhaps be the same, but on further consideration I have come to the conclusion that this is not so.

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Beck, J.

It does, indeed, at first sight seem strange that the plaintiff should be compelled in order to reach the Assurance Fund—not necessarily to forego their obvious simple remedy against Meyer upon his covenant, but ultimately at least proceed against him in an action setting up all the special circumstances called for by the Act; but the combination of several reasons, it seems to me, makes the requirement of this course clearly reasonable. In the first place, the words of sec. 105 are, as might be expected, general so as to apply to all classes of cases, in most of which probably no such simple and direct remedy against the person responsible for the fraud, error or omission existed, and the case of the double remedy may well have been overlooked or considered as likely of not so frequent occurrence as to make special provision necessary. Again, I think the intention is that the Assurance Fund should be liable only for the real ultimate net loss to the person damnified. In the present case the plaintiffs had in fact additional security from Meyer. In the action on the covenant the plaintiff was entitled, of course, to a judgment for the whole amount owing on the covenant irrespective of the value of his other securities, and in the result it might have turned out that by reason of the further securities no loss would be ultimately sustained. That the judgment the amount of which is to be paid from the Assurance Fund is intended to be only for the ultimate net loss is, I think, made clear by sec. 111, which provides for the recovery by the registrar of the amount paid out of the Assurance Fund. The provision is long and detailed, and yet there is nothing providing for or suggesting the registrar's right to the benefit of any collateral securities, to which the original plaintiff had a right to look. I think, therefore, that in order to reach the Assurance Fund the plaintiff was bound to bring his action against Meyer as one expressly for damages given them by sec. 107, and in that action to shew his ultimate net loss, and that only upon a return of execution *nulla bona* in such an action and the certificate of the Judge who tried the action is the plaintiff entitled to payment by the Provincial Treasurer under sec. 107.

I think that the plaintiff had not a concurrent or alternative remedy under sec. 108 by a direct action, as the present action is, against the registrar, as nominal defendant for damages by reason of the words "in any case in which remedy by action for

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Beck, J.

recovery of damages hereinbefore provided as barred." These words clearly refer to the action for damages referred to in secs. 105, 106 and 107.

Earlier words in the section provide that the plaintiff must be a person "who by the provisions of this Act is barred from bringing an action of ejectment or other action for the recovery of land." These words obviously refer to the provisions of sec. 104. The plaintiff is barred from the actions mentioned in sec. 104, but not from the action for damages mentioned in secs. 105, 106 and 107. As this is an action under sec. 108, I think it is clear that the plaintiff cannot succeed in the action and that it must be dismissed, but on the argument we were given to understand that the Government as well as the plaintiff wished an opinion upon the meaning and effect of secs. 105, 106 and 107, and it is for this reason that I have discussed those sections at such length.

A question may be raised whether or not the plaintiff, having elected to sue Meyer upon his covenant, is not now barred—not by virtue of statutory provision but by his own conduct—from now suing him under the statute. I am of opinion that he is not barred. I see no reason why a person in the position of the plaintiff should not, before proceeding with his statutory remedy against his debtor, which in effect is a remedy against the Assurance Fund, proceed personally against the debtor upon all grounds of claim and upon all securities, and delay his statutory action until he has by means of such personal actions ascertained his ultimate net loss, for which only he then looks to the Assurance Fund. As the registrar—or rather the Government whom he represents—have in this action been anxious for a judicial opinion upon the questions incidentally arising on the action and which I have discussed, I think the action should be dismissed without costs.

Simmons, J.

SIMMONS, J.:—The plaintiff resides at Portage la Prairie, in the Province of Manitoba, and has brought this action nominally against the registrar to obtain compensation out of the Assurance Fund for loss arising out of the mistake of the registrar at Calgary, who registered the plaintiff's caveat against another parcel of land instead of against the lands described in the caveat.

The plaintiff sold a threshing outfit, consisting of an engine, separator, tank and other equipment, to one Frederick Meyer.

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Simmons, J.

The purchaser executed a mortgage upon his undivided one-half interest in the south-east quarter of section 26, township 31, range 2, west of the 5th meridian, in the Province of Alberta, for to secure the purchase price of $2,116, and also executed a chattel mortgage collateral to the real estate mortgage upon the goods sold to secure said sum.

The purchaser of the machinery was not registered owner of the lands in question, but he and one Rapier had purchased together the south half of said section under an assignment of an agreement for sale from one Pearson, who had purchased from the Hudson's Bay Co.

At the time the sale of the threshing outfit was made Meyer told the plaintiff that he was the owner of a half interest in the half section, and he had the choice of which quarter he would take, and he had selected the south-east quarter, and the mortgage was therefore taken by the plaintiff upon this quarter section. If such right of division of interest existed, Meyer apparently did not exercise it, as his partner Rapier says there never was any division of interest between them (p. 60, line 19). The half section was sold for $25 per acre, and Napier and Meyer divided the proceeds equally. The transfer for the half section issued to the two men, Rapier and Meyer, from the Hudson's Bay Co., and they jointly transferred to the purchasers from them. The mortgage given by Meyer is upon his undivided half interest in the south-east quarter of said section, and it is obvious that Rapier, who was innocent in the matter and who did not know of Meyer's mortgage, was not liable to any action by the mortgagee Setter, and obtained no advantage through the absence of indorsement of the plaintiff's caveat upon the certificate. The plaintiff's action is therefore, in my opinion, improperly brought under sec. 108 of the Act. The plaintiff is upon the facts entitled to his remedy and to compensation from the Assurance Fund, if he brings an *action for damages* against the person chargeable with fraud, upon the ground that he is "a person deprived of any land in consequence of fraud."

Section 105 provides that

> After a certificate of title has been granted therefore any person deprived of any land in consequence of fraud or by the registration of any other person as owner of such land, or in consequence of fraud, error, omission or misdescription in any certificate of title or in any memorandum thereon or upon the duplicate thereof, may . . . prosecute an action at law

for the recovery of damages against (*a*) such person as a Judge appoints where land has been included in two or more grants from the Crown; and (*b*) against the person upon whose application the erroneous application was made; and (*c*) against the person who acquired title to the land in question through such fraud, error, omission or misdescription.

The proviso to this section is applicable to class (*b*) only, namely, "fraud, or error occasioned by the omission, misrepresentation or misdescription in the application of such to be registered as owner."

Those who must make an application to be registered as owner are, (1) those who apply pursuant to secs. 27-36 (Form E) to bring land under the Act, and (2) those who apply to become registered owners pursuant to secs. 74, 75, 76, 77, 78, 79, 80, 82 and 83 and 83A, relating to transmission of title upon death, sale under execution or for taxes, registration in consequence of marriage of female owner, and transmission under assignment for benefit of creditors.

Those who acquire title without an application to be registered as owner obviously are those who obtain a transfer or lease, as the case may be, from the registered owner, and to give the instrument to the registrar for registration, and if the instrument is in the form required by the Act and the duplicate certificate of title is produced the registrar registers the instrument without any application to be registered as owner.

It is quite clear that an action against class (*b*) would be barred upon a transfer of such land *bonâ fide* for value except in the case of fraud or error occasioned by any omission, misrepresentation or misdescription in the *application* of such person to be registered as owner of such land, and the proviso in sec. 105 makes the assurance directly accessible under sec. 108 where there is no fraud or error chargeable to the person who makes the application, as an action against such person is barred at the moment he transfers the land *bonâ fide* for value.

In the case under consideration Meyer obtained title by transfer from the Hudson's Bay Co., who were registered owners. No *application to be registered as owner* was required. The right of action against him falls under (*c*), namely, "who acquired title to the land in question through such fraud, error, omission, or misdescription," and the proviso in sec. 105 has no application. The registrar omitted to register the plaintiff's caveat, and Meyer

ALTA.

S. C.

SETTER v. THE REGISTRAR.

Simmons, J.

fraudulently took advantage of the omission, which enabled him to dispose of the land and obtain the purchase price and defeat the mortgage which he had executed against the land. Section 105 therefore gives the plaintiff a statutory right of action against Meyer for damages.

Section 107 provides, "in any case in which damages are awarded in any action as aforesaid and the sheriff makes a return of *nulla bona* . . . the Provincial Treasurer shall pay the amount of such damages and costs . . ."

The plaintiff, as a condition precedent to the right of having his damages paid in this way, must prosecute an action against Meyer pursuant to sec. 105. This he has not yet done. He has sued upon the covenant in the mortgage, and obtained judgment and execution and a return of *nulla bona* thereunder by the sheriff, but this cannot be construed as an action pursuant to sec. 105, as the remedy given therein is a statutory one and the statute must be strictly followed. In the result, then, I cannot agree with the interpretation of the secs. 105, 106 and 108 of the Act assigned to them by the Chief Justice in the judgment appealed from.

The interpretation of the word "land" in sub-sec. (*a*) of sec. 2 is quite wide enough to include any interest in land, and the opening words of sec. 105, "after a certificate of title has been granted therefor," means after land has been brought under the Act. The same term is used in sec. 41, where obviously it means "after land has been brought under the Act." I concur, therefore, in the result of the judgment of Beck, J.

SASK.

S. C.

TOMLINSON v. KIDDO.

Saskatchewan Supreme Court, Newlands, Lamont and Elwood, JJ. July 15, 1914.

1. JUDGMENT (§ VII E—295)—RELIEF AGAINST; REHEARING—PROCEDURE—DELAY.

Mere delay where not intentional or wilful is not an answer to an application to set aside a judgment on the merits unless irreparable wrong will be done.

[*Hanson* v. *Pearson*, 3 Terr. L.R. 199; *Regina Trading Co.* v. *Godwin*, 7 W.L.R. 651, and *Vinall* v. *DePass*, [1892] A.C. 90, applied.]

Statement

APPEAL from the order of a District Court Judge dismissing a motion to open up a default judgment.

The appeal was allowed.

W. M. Rose, for appellant.

A. Frame, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—In this matter the plaintiffs sued the defendants for a balance of $179.12 claimed to be due with respect to a car of lumber sold by the plaintiffs to the defendants. No appearance to the action was entered, but on May 15, 1913, the plaintiffs signed judgment in default of appearance for the amount of their claim and costs. The defendants or their solicitors on May 26, first learned that judgment was signed. The solicitors for the defendants had some interviews or correspondence with the solicitors for the plaintiffs with a view to opening up the judgment and allowing the defendants in to defend, and on June 12, 1913, the plaintiffs' solicitors wrote the defendants' solicitors stating that they could not allow the judgment to be opened up. No further steps were taken until September 19, last, when a notice of motion was served on behalf of the defendants to set aside the judgment and to allow the defendants to defend on the following grounds, namely (1) that at the time of signing the judgment there was no proof of service of the writ of summons on the defendants; (2) in the alternative, that the defendants had intended to defend the action, but appearance was omitted to be entered by their solicitors through a *bonâ fide* mistake; (3) that the defendants have a good defence to the action on the merits. The defendants filed an affidavit alleging that the car in question which they ordered was to be No. 1, whereas it was No. 2, and that the difference in price between No. 1 and No. 2 is the amount which the plaintiffs are seeking to recover in the action. There does not appear to have been any satisfactory explanation of the delay in moving to open up the judgment, but counsel for the appellant on the argument stated that the delay was caused through the Judge at Saskatoon being busy and unable to attend to the matter before vacation, and that the application was made immediately after the vacation. At any rate, when the application was made the District Court Judge dismissed the application, and no reasons therefor appear in the appeal book. It was decided in *Sandhoff* v. *Metzer*, 4 W.L.R. 18, and *Hanson*

SASK.

S. C.

TOMLINSON v. KIDDO.

Elwood, J.

v. *Pearson*, 3 Terr. L.R. 197, that mere delay is not an answer to an application to set aside a judgment on the merits unless irreparable wrong will be done. In *Regina Trading Co.* v. *Godwin*, 7 W.L.R., 651, Wetmore, C.J., quoted with approval the dicta of Cotton, L.J., in *Atwood* v. *Chichester*, 3 Q.B.D. 722 at 725, as follows:—

> I should have thought that if a defendant had lain by intentionally, she could not be allowed to appear.

And in the case of *Regina Trading Co.* v. *Godwin, supra*, the Chief Justice refused to set aside the judgment on the ground that the delay in the case had been practically wilful. In *Vinall* v. *DePass*, [1892] A.C. 90, at 96, which was a garnishee matter, the Court apparently up to the time of the hearing of the appeal were disposed to allow the garnishee to file an affidavit shewing what, if any, debts were due from him to the defendant, and apparently if that had been done the judgment against the garnishee would have been opened up.

While the delay in this case is not altogether satisfactorily explained, yet it does not appear to be wilful, and I am of the opinion that as the defendants disclose a probable defence to the action, they should be allowed in to defend; but in view of the delay it should only be upon terms. It was conceded on the argument that the judgment was regularly entered. In my opinion the order appealed from and the judgment and subsequent proceedings thereon should be set aside, and the defendants given leave to enter an appearance and file a defence; such appearance to be entered on or before August 1 of this present year; the defence to be delivered on or before September 16, next; the defendants within one week after taxation to pay the plaintiffs' costs of entering the default judgment and of issuing executions, if any, thereunder, and of any seizure thereunder, and of the application before the District Court Judge to set aside the judgment, and to pay into Court to the credit of this cause the amount of the plaintiffs' claim, less the defendants' costs of this appeal, which the defendants should have. In default of the defendants so paying said costs or paying said money into Court, the plaintiffs' judgment to stand.

Appeal allowed.

RITCHIE v. SNIDER.

ALTA.

S. C.

Alberta Supreme Court, Stuart, J. September 2, 1914.

1. SOLICITORS (§ II C—35)—SOLICITOR'S LIEN—ON JUDGMENT BY HIS EXERTIONS—PRIORITY.

A solicitor's lien upon a judgment in his client's favour recovered by his exertions will take priority over a garnishee order attaching the judgment debt.

[*Dallow* v. *Garrold*, 14 Q.B.D. 543, applied.]

MOTION to declare a solicitor's lien.

Statement

Order granted sustaining the lien.

Bates, for the solicitor.

C. F. Adams, for the defendant.

STUART, J.:—Ritchie sued Snider, who was Ritchie's landlord, and also the defendants, Stahle & Graham, for damages for wrongful seizure. Her action was dismissed as against Snider who on the contrary obtained judgment against Ritchie for rent unpaid. Ritchie, however, got judgment for damages against Stahle & Graham for $75 and costs. Snider then issued a garnishee summons attaching the judgment debt of $75 to which Ritchie was entitled under her judgment and Stahle and Graham paid the debt into Court.

Stuart, J.

Mr. McDonald, Ritchie's solicitor, now applies to have a declaration made that he is entitled to a lien on the sum of $75 for the solicitor and client costs due him by Ritchie and which of course were not recovered from Stahle and Graham. Snider contends that inasmuch as no charging order has been made prior to the service of the garnishee summons therefore the attachment has priority over the solicitor's lien.

The case of *Dallow* v. *Garrold*, 54 L.J.Q.B. 76, 14 Q.B.D. 543, seems to be a clear decision in favour of the solicitor. In that case the application for the charging order was not made until after the service of the garnishee summons yet the solicitor's claim was given priority. It is true that our Legal Profession Act does not contain the provisions of the Solicitor's Act in England regarding charging orders, but I think this is immaterial because apart from statute the solicitor clearly has a lien upon a judgment recovered by his exertions. See 26 Hals. p. 821. And I think it clear from the words of Lindley, J., in *Dallow* v. *Garrold*, *supra*, at 547, that the priority in no way,

ALTA.

S. C.

RITCHIE v. SNIDER.

Stuart, J.

depends upon the statute. There are also cases cited in Halsbury at page 825 of the volume referred to viz.: *Shippey* v. *Grey*, 49 L.J.C.P. 524; *Birchall* v. *Pugin*, 44 L.J.C.P. 278, and some others, which although not being so exactly in point as *Dallow* v. *Garrold*, lead to the same general conclusion.

I think, however, that inasmuch as Ritchie would have a right to have the solicitor and client's bill taxed and as the defendant Snider is certainly entitled under the garnishee summons to any balance that may remain of the fund after satisfaction of the solicitor's lien the solicitor should submit his bill for taxation upon notice to Snider's solicitors who should be at liberty to attend thereon and to object to the amounts set forth therein. With this proviso, I think the solicitor is entitled to his order.

The costs of the application should not, I think, in the circumstances be considered, because I think Snider was justified in appearing and at least partially opposing the application, that is, so far as the uncertain amount of the bill was concerned, and he was entitled in the circumstances, as I have held, to ask that it be taxed.

Order accordingly.

N. S.

S. C.

PHILLIPS v. HATT.

Nova Scotia Supreme Court, Graham, E.J. November 18, 1914.

CONTRACTS (§ II A—125)—CONSTRUCTION—TELEGRAM FOLLOWING QUOTATION INCOMPLETE—RIGHT TO REJECT.

A contract is not made out by a telegran from the buyer following a quotation for a cargo of all chestnut coal, that he "must have 75 tons grate coal for foundry, balance nut, cargo not over 200 tons, price for nut satisfactory"; the buyer must be taken to have desired a quotation for the foundry coal then first mentioned, and was justified in refusing the entire shipment consigned to him without further order.

Statement

TRIAL of action to recover the price of a cargo of coal.

Action dismissed.

Hall, K.C., for plaintiff.

Paton, K.C., for defendant.

Graham, E.J.

GRAHAM, E.J.:—This is an action upon an alleged contract consisting of correspondence to recover the price of a cargo of coal shipped at Elizabethtown, New Jersey, for Liverpool, N.S., by the schooner "Georgie Pearl." These are the letters and telegrams:—

Letter.

Liverpool, N.S., Oct. 2, 1913.

Messrs. Parrish, Phillips & Company.
No. 1 Broadway, New York.

Gentlemen:

I want a small cargo of coal under two hundred tons. If you can get a vessel please let me know, and oblige.

Yours faithfully,
(Signed) F. W HATT.

Day Telegram.

October 6, 1913.

F. W. Hatt,
Liverpool, Nova Scotia.

Will ship cargo all chestnut six seventy coal and freight.

(Signed) PARRISH, PHILLIPS & CO.

Telegram.

Liverpool, N.S., 10-6-13.

Parrish, Phillips & Co.,
New York.

Must have seventy-five tons grate coal for foundry balance nut cargo not over two hundred tons price for nut satisfactory.

(Signed) F. W. HATT.

Letter.

October 7th, 1913.

Mr. F. W. Hatt,
Liverpool, Nova Scotia.

Dear Sir:

In accordance with your telegram, we have closed schr. "Georgie Pearl" to bring you a cargo of coal as follows:

75 tons broken,
Balance chestnut.

This vessel is ready and will proceed to coal at once. Kindly advise if we shall insure cargo for your account.

Yours truly,
PARRISH PHILLIPS & CO.
(Signed) Per J. W. LIVINGSTON.

The letter of October 7, 1913, although duly posted at New York, never in fact reached the defendant. That fact, however, is not, I think, material in the consideration of the point on which I propose to dispose of the action. On October 10 an invoice was sent to the defendant at Liverpool, and was received by him there on October 15 about 1.30 p.m. There was no covering letter. But the invoice disclosed that no insurance had been effected by the plaintiffs. The prices were as follows: "84 tons Lehigh broken, at $4.95, f.o.b., $415.80; 128 tons Lehigh chestnut, at $5.55, f.o.b., $710.40." This was the first communication actually received by the defendant informing him of the charter, loading, or vessel's name.

N. S.
S. C.
PHILLIPS
v.
HATT.
Graham, E.J.

Meanwhile the vessel had been chartered October 7 or 8, and commenced loading the 8th. She finished at 8 o'clock of the 9th, and sailed at 11 o'clock. On the 13th she got into a storm which carried away her sails, and the crew were taken off on the 14th. A salvage crew took the schooner into Edgartown, Mass. This resulted in a libel for salvage in the Court, and eventually $1,400 was paid for that service, besides $182.70 for costs. When the claim was afterwards adjusted, the claim against the cargo was adjusted for general average at $466 and special charges $300.43.

However, the schooner arrived with the cargo at Liverpool some time after November 20, her owner having been obliged in respect to the coal to put up security in Boston, in view of the salvage claim, before she could sail. The coal was offered to the defendant at Liverpool on the condition that he would sign an average bond, but he refused to take it, and it was sold at auction in respect to the charges against it.

Meanwhile, when the defendant found out from the arrival of the invoice the circumstances of the shipment, he proceeded to effect insurance—I suppose for whom it might concern (I mean that I think he did not prejudice himself by that step)—but news of the disaster having been published in the newspapers and he having learned of its occurrence, no insurance could be procured. On October 18 the defendant telephoned repudiating any responsibility.

There are three separate matters urged in defence to this action: 1st, that the correspondence did not constitute a completed contract; 2nd, that the defendant was not obliged to take the cargo, the amount mentioned being "under 200 tons," and the cargo amounting to 212 tons; 3rd, then there is a counterclaim for damages alleging that the plaintiffs did not inform him of the transaction, and particularly of the name of the vessel, in due time, and he was not able to effect insurance. It will only be necessary for me to consider the first point in the view I take of the case.

I think that the correspondence does not constitute a contract. The defendant clearly asked for a price, and in respect to the price of the 84 tons of broken coal for the foundry no price had been given or agreed upon, and this left the contract for all the coal not completed. Neither had they informed him of the rate for

N. S.
S. C.
PHILLIPS
v.
HATT.
Graham, E.J.

freight until the bill of lading arrived with the invoice. So that, in respect to this matter, there was not, as alleged in the statement of claim, "an agreed price of $4.95 per ton" for the broken coal.

Apparently the plaintiffs sought to remedy this matter by putting another claim in the statement of claim and giving evidence as to the market price in New York of coal at that time. He offered in evidence some circulars of the Deleware, Lakawanna and Western Coal Co. for Scranton coal delivered at Hoboken, N.J., and the Philadelphia and Reading Coal and Iron Co.

Mr. McIlroy says in his evidence:—

Q. What have you to say as to the prices charged Captain Hatt, as set forth in the invoice R./22? They were the regular prices of coal at that time of year? A. They were the net circular prices.—Q. (Handing papers) I shew you a series of prices from different railroads at or about that time, and ask you if your price to Captain Hatt for this cargo was based upon the prices current at that time as shewn by those lists? A. Yes, sir.

In the first place, although I may be mistaken, some kind of chestnut coal appears on those circulars at $5.50, and in this invoice the charge is $5.55. And for some kind of broken coal there are two prices, but the lowest is $5, and in this invoice it is $4.95. But I think, in any event, this correspondence cannot be supplemented in that way and a price charged by reference to any market price. The plaintiffs could not ship coal to the defendant and rely upon the act to complete the contract in the circumstances of this case. They shipped the coal without having a price fixed.

In my opinion the action should be dismissed with costs.

CARTWRIGHT v. CITY OF TORONTO.

CAN.
S. C.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. June 19, 1914.

1. TAXES (§ III F—149)—SALE—DEED—CURATIVE ACT.

Failure of a municipal council to give notice before an adjourned tax sale under the Ontario Assessment Act, R.S.O. 1897, ch. 224, sec. 184, that the municipality intended to purchase the land for the arrears if no better bid were received, is cured by the statutes 3 Edw. VII. (Ont.) ch. 86, sec. 8, and 6 Edw. VII. (Ont.) ch. 99, sec. 8, and on the expiration of the time fixed for redemption after sale to the municipality as the highest bidder at the adjourned sale, all rights of the former owner are barred in its favour.

[*City of Toronto* v. *Russell*, [1908] A.C. 493, applied; *Cartwright* v. *Toronto*, 13 D.L.R. 604, 29 O.L.R. 73, affirmed.]

2. DISCOVERY AND INSPECTION (§ IV—20)—BY DEPOSITION—ADMISSIBILITY—BY WHOM INTRODUCED—AFTER DEPONENT'S DEATH.

Where the original plaintiff to an action was examined before trial by the defendant for discovery, the plaintiff's executors continuing the

CAN.

S. C.

CARTWRIGHT v. CITY OF TORONTO.

action on his death cannot give such depositions in evidence on their behalf unless the defendant has first used them.

[*Cartwright* v. *Toronto*, 13 D.L.R. 604, 29 O.L.R. 73, affirmed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, *Cartwright* v. *Toronto*, 13 D.L.R. 604, 29 O.L.R. 73, affirming the judgment at the trial in favour of the defendant.

The original plaintiff, Sir Richard Cartwright, brought action to have a sale of his land for unpaid taxes set aside as irregular for want of notice by the defendant's council of the city's intention to purchase and for other irregularities, or, if the sale was held valid, for a declaration that the defendant only held the land in trust for the plaintiff as security for the unpaid taxes. The defendant examined the plaintiff on discovery and at the trial, the plaintiff being dead and the action having been revived by his executors, the latter sought to use the deposition on the examination on discovery, but the trial Judge refused to receive it.

Judgment was given for the defendant at the trial and affirmed by an appeal to the Appellate Division, which also held that the deposition was properly rejected.

The appeal was dismissed.

George Bell, K.C., for the appellants.

Geary, K.C., and *Colquhoun*, for the respondent.

Davies, J.

DAVIES, J.:—I concur in the proposed judgment to dismiss this appeal. I think we are bound by the decision of the Judicial Committee of the Privy Council in the case of *City of Toronto* v. *Russell*, [1908] A.C. 493, and that, in the face of that decision, it is not open to us to limit the curative effect of the remedial statute of 3 Edw. VII. ch. 86, sec. 8, amended by 6 Edw. VII. ch. 99, sec. 8. On the question raised as to the admissibility in evidence of Sir Richard Cartwright's depositions on discovery, we were all of the opinion on the argument that those depositions were properly excluded by the trial Judge.

Idington, J.

IDINGTON, J.:—It may have been fairly arguable before the decision in the case of *City of Toronto* v. *Russell*, [1908] A.C. 493, that the omission to give the notice required by the Assessment Act, R.S.O. 1897, ch. 224, sec. 184 (3), to be given by the municipality of its intention to purchase the land in question for the taxes in arrear did not fall within any of the many curative

provisions of the validating Act, 3 Edw. VII. ch. 86, in question herein.

It might well have been argued with much force that the words "a failure or omission on the part of an official of the said city" was meant only to cover failure to give some routine notice or omission of such like duty prescribed by the statute to be observed by any of the city's officials and could not be extended so far as to cover an unusual step such as required in consequence of a determination which the council was enabled to take in the way of buying land offered for sale for taxes, but subject to the condition precedent to the power becoming operative of giving the special notice which the Act imposes.

The Judicial Committee of the Privy Council has, however, in said decision, put a construction upon that Act which, notwithstanding other facts and circumstances also relied upon in the decision, seems to me to preclude our giving effect to any such argument as suggested.

Their Lordships seem to have rested the judgment not only upon the peculiar facts and circumstances absent in this case, but also upon their construction of the statute. And a later amendment to same curative provision seems to render any attempt to distinguish this case still more difficult. The judgments in the Courts below render it quite needless to say any more. The point I have referred to is the only one which was not disposed of on the argument before us.

The appeal must be dismissed with costs.

Duff, J.

DUFF, J.:—The appellant seeks to shew that the late Sir Richard Cartwright entered into an agreement with Mr. Biggar, then City Solicitor of Toronto, and for the purpose of proving this he offers in evidence certain statements in the examination of Sir Richard Cartwright for discovery. The principle upon which he relies is this: Where a witness has given evidence in the course of litigation, such evidence may be used in other litigation relating to the same subject matter between same parties if the witness have, in the meantime, died, provided the party against whom it is offered has had an opportunity of cross-examining the witness.

I think the rule has no application. The examination for discovery is in the nature of a cross-examination; but the rule relating to the admission of evidence given on such examination

CAN.

S. C.

CARTWRIGHT v. CITY OF TORONTO.

Duff, J.

entitles the cross-examiner to proceed with the absolute assurance that no part of the examination can be used against him, unless he on his part seeks to make use of it for his own purposes. It is not a cross-examination with a view of testing and setting in a proper light the whole of the evidence of the party examined. It is an examination *alio intuitu*. I think it is not a cross-examination such as contemplated by the rule sought to be invoked.

On the merits of the case I think all the contentions advanced on behalf of the appellant are disposed of by the decision of the Privy Council in *City of Toronto* v. *Russell*, [1908] A.C. 493. I see no reason to doubt that the passages of the judgment at p. 501 form a part of the *ratio decidendi*. The effect of these passages, in my judgment, is to explode the notion which appears to have been founded on some decisions of this Court, that statutes of this character are subject to some special canon of construction based, apparently, upon the presumption that all such statutes are *primâ facie* monstrous. The effect of the judgment of the Judicial Committee is that particular provisions in such statutes must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole.

Anglin, J.

ANGLIN, J.:—On the questions raised as to the admissibility in evidence on behalf of the executors (now plaintiffs) of the depositions on discovery of the original plaintiff, the late Sir Richard Cartwright, and as to the obligation of the municipality to account to their former owners for any surplus proceeds realized on the resale of lands bought by it at tax sales, it was made sufficiently clear during the argument that the Court is of opinion that the position taken on behalf of the appellants is not tenable.

The purposes for, and the conditions under which, evidence is taken on discovery make it impossible that such evidence should be admissible on behalf of the party giving it except as provided by Consol. rule 461. Such evidence is not within the proposition enunciated in Taylor on Evidence (9th ed.), para. 464, relied on by counsel for the appellants. It is also clearly distinguishable from evidence taken *de bene esse*.

The statute under which the municipality is authorized to buy in at tax sales (R.S.O. [1897] ch. 224, sec. 184 (3)), empowers it to become a purchaser without any restriction upon its rights of

ownership, except the obligation to sell within three (now seven) years. The effect of the purchase is to extinguish the personal obligation of the former owner for the arrears of taxes. If the municipality sells for less than the amount of taxes, it has no right to recover the deficiency; if it sells for more, the surplus belongs to it and it is under no obligation to account for it.

The only objection taken to the proceedings by which the municipality became purchaser that calls for consideration is the failure of the municipality or its officers to give to the owner the personal notice of the intention of the municipal council to purchase at the tax sale, which the Judicial Committee, concurring in the views expressed in the Ontario Courts, held, in the *Russell* case, [1908] A.C. 493, at 501, is required by sub-sec. 3 of sec. 184 of the Assessment Act, ch. 224, R.S.O. 1897. In that case the same sale for taxes which is here attacked was dealt with, but in respect of another property. It is true that upon the special facts of that case their Lordships were of the opinion that the plaintiff had waived the notice of intention to buy, but they rest their judgment disposing adversely of his objection that such notice had not been given to him equally on the provisions of the curative Act, 3 Edw. VII. ch. 86, on which the respondent relies. Their Lordships' view of the effect of the statute, which they assign as a ground of their decision, cannot be treated as *obiter dictum*: *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179, at 184; *Membery* v. *Great Western Railway Co.*, 14 App. Cas. 179, at 187. I agree with the learned Judges of the Appellate Division of the Supreme Court of Ontario that the decision in the *Russell* case, [1908] A.C. 493, is conclusive on this point against the appellants. The statute, 3 Edw. VII. ch. 86, sec. 8, was so amended by 6 Edw. VII. ch. 99, sec. 8, that it extends to failure or omission by the city itself or the council to comply with the requirements of the assessment Acts, as well as failure or omission to do so by any official of the city. As amended, this legislation, given the effect required by the decision in the *Russell* case, [1908] A.C. 493, clearly covers the failure to give notice of which the appellants seek to take advantage, whether the default is ascribable to the municipality, its council or its officials.

BRODEUR, J.:—This is an action to impeach a tax sale made by the City of Toronto on April 10, 1901, and for a declaration that

Brodeur, J.

CAN.
S. C.
CARTWRIGHT
v.
CITY OF
TORONTO.
Brodeur, J.

the respondent, the City of Toronto, was holding the lands sold in trust for the owner. The action was instituted in 1909 and was dismissed by the Supreme Court of Ontario in 1913. That judgment was confirmed by the Appellate Division of the Supreme Court.

Three questions have been submitted to us. The first question is this: Can the evidence on discovery given by one of the parties be used in this case when the party dies? As a general rule a witness giving oral testimony under oath in a judicial proceeding in which the adverse litigant could cross-examine his evidence may be used in any subsequent suit between the same parties if the witness himself is incapable of being called: Taylor on Evidence (9th ed.), para. 464.

By the Rules of Court in the Province of Ontario a party to an action may be examined on discovery, but his evidence can be used only at the request of the opposite party: Rules 431-460 and 461.

Those rules are statutory and must be restricted to the provisions of the statute. The opposite party, according to those rules, is the only one who can use that evidence on discovery and at the request of the representative of the party put in evidence the examination on discovery given by that party cannot be received.

The second question is as to the effect of the remedial statute, passed by 3 Edw. VII. ch. 86, sec. 8, which validated the tax sales made during certain periods of time mentioned in the said Act and which periods of time included the tax sale in question in this sale.

The bearing of that statute was considered in the case of *City of Toronto* v. *Russell*, [1908] A.C. 493, and it was decided by the Privy Council that those tax sales were validated and could not be impeached for the reason which is now contended by the appellant. Besides, by a statute passed in 1906, 6 Edw. VII. ch. 99, sec. 8, the above legislation of 3 Edw. VII. ch. 86 was extended in order to make still more certain the validity of those tax sales.

As to the claim of the appellants that those tax sales are subject to redemption or that the city becomes purchaser in trust for the former owner, I do not see that the statute may be construed to cover such a contention. The City of Toronto had been author-

ized to purchase the lands at those tax sales. A right of redemption exists for a certain period of time, but after that period of time the city becomes the absolute owner of the property and does not hold it subject to any trust.

The appeal should be dismissed with costs.

Appeal dismissed.

George Bell, for the appellants.

William Johnston, for the respondent.

IRONSIDES v. VANCOUVER MACHINERY DEPOT.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher and McPhillips, JJ.A. November 3, 1914.

1. SALE (§ I D—20)—ACCEPTANCE; RETENTION—DILATORY COMPLAINT OF SHORTAGE AND UNFITNESS.

Lapse of time before making complaint of alleged shortage of or unfitness of goods sold and delivered and the mixing of the goods with other similar goods by the buyer are elements to be considered as adversely affecting the credit to be given the evidence adduced for the buyer to sustain a defence based on such complaint.

Statement

APPEAL by the defendant from the judgment of Gregory, J., in an action for the price of railway construction dump cars and equipment, the defence being shortage and unfitness.

The appeal was dismissed.

Burns, for appellant, defendant.

D. G. Macdonell, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiffs contracted to sell to the defendants a number of dump cars, scrapers and other contractor's plant, and the only question involved in this appeal is as to how many of such articles were delivered and accepted. They were second-hand goods, some in fair condition, and others in very bad state of repair, but the defendants had looked them over before entering into the contract. A verbal agreement was confirmed by letters, the result being a contract for the sale of all the dump cars, scrapers, car frames and wheels at specified prices. For "cars complete" defendants were to pay $28, for wheel scrapers $28, and for car frames and wheels $15. There was some dispute as to the place where defendants were to inspect them for the purpose of determining whether they fulfilled the conditions of the contract or not—plaintiffs say at Cloverdale, the place of shipment, defendants say at Vancouver. They were loaded at Cloverdale by the men employed by the defendants.

B. C.

C. A.

IRONSIDES v. VANCOUVER MACHINERY DEPOT.

Macdonald, C.J.A.

Two of these men kept tally for the plaintiffs, and theirs is the only available direct evidence of quantities.

The goods were brought to defendants' shops, and without being checked over for acceptance by the defendants as they admit, were repaired and many of them sold and others dealt with in such a manner as to have made it impossible at the time of the trial to ascertain whether or not they would conform to the description contained in the contract.

The learned Judge found that 46 wheel scrapers, 123 complete cars, and 25 frames and wheels had been delivered. The defendants endeavoured to prove that a large number of cars were not complete, or were in such a dilapidated condition that they were worthless. They did not deny that the number of cars, scrapers, frames and wheels sworn to by plaintiffs' witnesses, who kept the tally, were delivered, but denied that all the cars fell within the description above set forth of "cars complete," but they give no satisfactory evidence of the number so incomplete, and hence the difficulty mentioned by the learned Judge and experienced as well by myself of arriving at an entirely satisfactory conclusion. If defendants did not make an inspection of the articles when they received them it was their own fault, and this is so, whether the inspection was to be made at Cloverdale, as the plaintiffs say, or at Vancouver, as the defendants say.

There is nothing to be done, then, but to accept with such modifications as appear to be just, having regard to the other evidence in the case, the testimony of the only persons who have made a list of the goods, and classified them in such a way as to enable the Court to reach a conclusion with respect to the number answering the descriptions in the contract.

The learned Judge has done this and I cannot say that he has not come to the right conclusion.

The appeal, therefore, should be dismissed.

Irving, J.A.

IRVING, J. A., dissented.

Galliher, J.A.

GALLIHER, J.A., concurred.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal is that of the defendants from the judgment of the Honourable Mr. Justice Gregory. The action is one for goods sold and delivered, the goods being cars and equipment used by railway contractors in railway construction. The cars and equipment generally had been in use some

time, and no doubt to a considerable extent the value thereof had been exhausted yet still serviceable. The defendants examined the goods before purchase at Cloverdale, B.C., and delivery was taken at Cloverdale, servants of the company loading the goods upon railway cars at the point of delivery, and taking note of the number of cars, scrapers, etc., loaded.

The learned trial Judge held that the goods under the terms of the contract—which was a verbal contract, later referred to in letters which passed between the parties—called for delivery at Cloverdale. The total claim of the plaintiffs was in amount $4,201.72, after giving credit to the defendants for $1,425 paid on account. The items of the account disputed had relation to the number of cars and scrapers delivered or which had to be paid for under the contract, the plaintiffs alleging that 148 cars and 47 scrapers were duly delivered complying with the terms of the contract, whilst the defendants claimed that but 51 cars and 38 scrapers were received which were in true compliance with the contract. In effect, the defendants' contention was that they did not check over the cars and scrapers at the point of delivery, although they paid men to load same and took delivery at Cloverdale, and further, paid the men employed upon the basis of there being the number of cars and scrapers claimed by the plaintiffs put aboard the cars.

Without entering into details with regard to the evidence, it is clear, in my opinion, that the contract was made for delivery at Cloverdale, B.C., and there the defendants took delivery, and also at that point advised themselves of the number of cars and scrapers delivered, and it was only after a long lapse of time—a year or more—that the defendants would appear to have advanced the contention put forward at the trial, that was that they were not called upon to pay for the number of cars and scrapers claimed to be delivered by the plaintiffs, but the number should be reduced to the number above stated. The learned trial Judge would appear to have carefully gone into the facts, and in the result reduced the plaintiff's claim somewhat, and gave judgment for the sum of $3,763.72. In my opinion, upon the evidence as adduced at the trial it would have been quite justifiable to have given judgment for the total amount claimed, but, as there has been no cross-appeal or fault found with the amount allowed upon the part of the plaintiffs, it is not a matter calling for attention at the hands of this Court.

B. C.

C. A.

IRONSIDES v. VANCOUVER MACHINERY DEPOT.

McPhillips, J.A.

It is evident, when all the surrounding facts are looked at, that the plaintiffs were in possession of and the owners of railway construction plant which the defendants were anxious to acquire, and inspection was made of the plant which was for sale, and the defendants bought it, and it would be arriving at a conclusion that both the plaintiffs and the defendants proceeded in a most unbusinesslike way, if it was to be held that the transaction was really not complete at Cloverdale.

Without alluding to all the facts which might be alluded to, one fact alone stands out prominently, and that is this: all the plant of which the defendants took delivery was shipped by them to Vancouver and freight paid by them. If so much of the plant so accepted was worthless, this course would appear to be a most unbusinesslike proceeding.

There can be no question, upon the facts of the present case, that the property in the goods was at Cloverdale transferred from the plaintiffs to the defendants: see *Tarling* v. *Baxter* (1827), 6 B. & C. 360, 365, 30 R.R. 355, and Sale of Goods Act, sec. 26, r. 1. The Sale of Goods Act (ch. 203, R.S.B.C. 1911) being looked at, especially sec. 50, and the evidence in this case considered, it is, in my opinion, impossible for the defendants to contend that the sale was not complete at Cloverdale. Further, the lapse of time and the mixing of the goods with other goods, and the contention at such a late date that instead of 148 cars being received but 51 were received, and that instead of 47 scrapers being received but 38 were received, and this in the face of a complete statement (upon the basis of which the defendants paid the men who loaded the cars) proving the plaintiffs' case, renders it impossible, in my opinion, for the defendants to successfully contend that there was not complete acceptance of the cars and scrapers, the contract price for which is sued for, and which, in my opinion, is properly payable by the defendants to the plaintiffs.

Unquestionably this is a case where the maxim *caveat emptor* applies (see sec. 22, Sale of Goods Act). The defendants were thoroughly conversant with the goods purchased, and it is not open to the defendants, in my opinion, to now set up the unfitness of the cars and scrapers for which payment is refused, and that was really the defence which was advanced and pressed at the trial.

It follows that in my opinion the appeal should be dismissed.

Appeal dismissed.

MAN.

K. B.

SAMWELL v. KINDT.

Manitoba King's Bench, Curran, J. May 5, 1914.

1. ARCHITECTS (§ I—5)—RIGHTS AND LIABILITIES—BUILDING CONTRACT—SUBSTITUTING CONCRETE FOR RUBBLE WALL—ABSENCE OF RESULTING DAMAGE.

The substitution by the architect's direction of a concrete for a rubble wall called for in the specifications of a building contract will not be allowed as a ground of diminution to or set-off against the architect's remuneration where no resulting damage to the building owner is shewn, and the evidence proves that the building was not of less value on that account nor was the owner put to any increased cost by the change.

Statement

TRIAL of action for services as an architect in connection with the erection of an apartment block for the defendants in the summer of 1913, and for additional services over and above those to be rendered in his capacity of architect and in the nature of a contractor's services on a percentage basis, also in connection with the same block, and in the alternative for damages for breach of contract.

Judgment was given for the plaintiff.

J. H. Leech, for the plaintiff.

F. M. Burbidge, for the defendants.

Curran, J.

CURRAN, J. (after reviewing the facts):—Upon the whole, I am forced to the conclusion that, whatever the plaintiff's intentions were as to extra charges, he did not clearly communicate them to the defendants and secure their concurrence, and while I am quite satisfied that, in the absence of agreement to the contrary, he did in fact do work and render services to the defendants for which he could properly charge and for which the defendants ought to be held liable, yet he did not so arrange matters in this particular transaction as to entitle him, as a matter of law, to make any extra charge. I am of opinion upon the evidence that he cannot recover for such extra services.

It is, perhaps, a hardship on the plaintiff, but he has no one but himself to blame. If I could, notwithstanding my view of the evidence, award him some further compensation, I would do so, because I think he has earned it, and a charge of 5%, amounting to $900, would, in my opinion, have been a fair and proper allowance in this respect. As it is, I must govern myself by my findings of fact, and these are against the plaintiff on the question of extra remuneration.

I further hold that the defendants have failed to establish any

MAN.

K. B.

SAMWELL v. KINDT.

Curran, J.

liability in damages against the plaintiff under their counterclaim. I think the plaintiff has fairly and substantially performed his agreement, and that the work done can be said to be a substantial compliance with this agreement. Any deviations made were, I think, justified, not only on the ground of the saving of expense to the defendants, but by the circumstances and necessities of the case. In the matter of the brick, it resulted in the defendants getting a better quality of brick than the specifications called for, without any additional cost to them. The substitution of the concrete for the rubble wall, if not an actual benefit, yet was not a detriment, and in the face of the evidence of the witness Fingland, who says it was as good a wall, that of Matthews, who says it was a stronger wall, as well as a cheaper wall, giving additional space in the basement, that of Frederick Hines, who says it was a stronger wall, and that of Rodgers, the city building inspector, who says the wall is a better wall than that called for in the specifications, it would be unjust to punish the plaintiff for exercising his judgment as an architect in making the change in this respect, especially as no resulting damage or injury has been proved by reason of the change.

The bridging of the joists cannot now be altered, as the work is covered up. I cannot say that the building is of less value on this account or that the defendants have been injured. The defects in pointing of the brick work are trifling, and can be remedied by looking to the men who did the work. If the defendants had not dismissed the plaintiff when they did, I have no doubt that the plaintiff could and would, before finally passing the work, have seen to it that these matters were put right before making final payments to those who did the work.

As to the heating plant, it would seem that if the pipes were covered as suggested by the expert Roberts this part of the work would be substantially satisfactory. At any rate, the heating was not fully installed when the plaintiff was dismissed. There is a contract in writing for the doing of this work, and the contractor is bound under his contract to adhere to the plans and specifications. He admits that it is part of his contract to cover these pipes, and that he is bound to do so, and remedy any other defects in the work to make it conform to the plans and specifications. This matter has now been placed beyond the control of

MAN.

K. B.

SAMWELL v. KINDT.

Curran, J.

the plaintiff because of his dismissal, and the defendants must, I think, accept the responsibility.

I dismiss the counterclaim, and give judgment in the plaintiff's favour for $1,000 and costs.

I understood during the trial that a sum of $360 had been paid the plaintiff on account, although not credited in the statement of claim. If this is the fact, the judgment will be reduced by that amount.

The plaintiff will be entitled to his costs of any examinations for discovery of the defendants.

Judgment for plaintiff.

REX v. WATCHMAN.

SASK.

S. C.

Saskatchewan Supreme Court, Elwood, J. December 28, 1914.

1. THEFT (§ I—5)—RECEIVING STOLEN GOODS—ALLEGING THE THEFT.
A magistrate's conviction under Cr. Code sec. 399 should show not only that the accused received the goods knowing them to have been stolen but should contain an allegation as to the goods having theretofore been stolen, it being possible that prior to the goods reaching the accused they may have lost the character of stolen goods and yet be known to him to have been stolen.
[*R.* v. *Schmidt*, 35 L.J.M.C. 94, referred to.]

2. CERTIORARI (§ II—28)—RETURN OF AMENDED CONVICTION—DEPOSITIONS.
If the magistrate returns to a *certiorari* an amended conviction by which the substance of that first drawn is changed, the Court may decline to accept the amended conviction in the absence of the depositions.
[*R.* v. *Barker*, 1 East 188, referred to.]

Statement

MOTION for a writ of *habeas corpus*.

W. H. McEwen, for prisoner.

H. E. Sampson, for the Crown and the Department of the Attorney-General.

J. F. Bryant, for Canadian Pacific Railway Company.

Elwood, J.

ELWOOD, J.:—This is an application for a writ of *habeas corpus* and for a writ of *certiorari* in aid thereof. The prisoner was, on the 3rd day of December, 1914, tried before William Trant, police magistrate, under an information charging the prisoner that he did, on the 27th day of November, 1914, at Regina, in the province of Saskatchewan, unlawfully have in his possession thirty-three grain doors of the value of over ten dollars, the property of the Canadian Pacific Railway Company, he, the said Watchman, then knowing the same to have been stolen, and on the same day was convicted by the said magistrate. The minute of conviction is as follows:—

SASK.

S. C.

REX
v.
WATCHMAN.

Elwood, J.

"I do convict the within-named accused of the offence charged and do order that he be imprisoned with hard labour for the term of three months. I do further order that he pay to the Canadian Pacific Railway Company the sum of $33 for damages, to be paid forthwith; in default of payment forthwith to be imprisoned for a further term of one month."

The formal conviction was on the same day made out in the terms of the above minute of conviction, and a warrant issued, which warrant omitted from it any reference to payment of the $33 or imprisonment in default thereof, and commanded the imprisonment for the three months above-mentioned. The objections which were urged before me were the following:—

1. The conviction and complaint herein, the police magistrate's minute of adjudication, the conviction and the warrant of commitment herein state no offence known to the law.

2. The police magistrate had no jurisdiction to order the accused to pay the sum of $33 or any sum to the Canadian Pacific Railway Company as damages or at all.

4. The police magistrate had no jurisdiction to order that, in default of payment by the accused of the sum of $33 to the Canadian Pacific Railway Company as damages, the accused should be imprisoned for a further term of one month.

On the return of the motion before me, two amended convictions were filed, one convicting the accused for that he, on the 27th day of November, 1914, at Regina, in the said province, did receive and have thirty-three grain doors of the value of over $10, the property of the Canadian Pacific Railway Company, and theretofore stolen, he, the said Thomas Watchman, then well knowing the said grain doors to have been stolen, and adjudging the said Thomas Watchman to be imprisoned with hard labour for three months, and ordering the repayment of the sum of $33 as compensation, without adjudging any penalty for failure to pay the $33.

The other conviction convicted the accused in the terms of the second conviction, but merely adjudged him to be imprisoned with hard labour for three months, and made no reference to the payment of the $33. At the hearing, counsel for the Attorney-General stated that he elected to rely on the third conviction instead of the second. It was stated to me by counsel that the

evidence before the magistrate was taken in shorthand, and that the reporter who took this evidence had gone to England, and he would not likely return till March; and, as the evidence had not been extended, there was, therefore, nothing before me to shew what evidence was before the magistrate when he made the conviction. Counsel for the informant and for the Attorney-General contended that the magistrate had the right to return an amended conviction, and that in any event I had the right to amend the conviction under sec. 1124 of the Criminal Code. So far as my powers are concerned, I am satisfied that, before I can amend the conviction, I must have before me the depositions, and I must be satisfied from a perusal of the depositions that the depositions justify the amendment. The objection to the conviction, apart from that which adjudges compensation and imprisonment in default thereof, is that neither the information nor the minute of conviction nor the original conviction states that the goods in question had been stolen. The conviction is apparently under sec. 399 of the Code—at least, that is the only section to which I was referred. While it is probable that in most cases, in order to prove the guilty knowledge, it would be necessary to prove the actual theft of the goods, yet it is quite conceivable that it could be possible for one to have in his possession goods which he knew to have been stolen, and yet those goods, prior to their having reached him, may have lost the character of stolen goods. See *Regina* v. *Schmidt*, 35 L.J., Mag. Cas., 94.

I notice, in looking at the forms of indictment for various offences contained in the Code, that the form of indictment for receiving stolen goods does contain an allegation that the goods had theretofore been stolen. I am of the opinion, therefore, that the information, minute of conviction and conviction as originally drawn were bad in that they did not contain an allegation that the goods had theretofore been stolen.

So far as the amendment by the magistrate is concerned, the magistrate, assuming that he had the right to amend, would have to have before him evidence which would justify an amendment. See Paley on Convictions, 7th ed., p. 234. In *Rex* v. *Barker*, 1 East, p. 188, Lord Kenyon, C.J., says:—

"If the magistrate has done no more than return the con-

SASK.

S. C.

REX v. WATCHMAN.

Elwood, J.

viction in a mere formal shape, instead of sending it up in the informal manner in which it was first drawn, and supposing that the facts as they really happened would warrant him in the return he has now made, the contrary of which is not imputed, I am of the opinion that it was not only legal but laudable in him to do as he has done, and he would have done wrong if he had acted otherwise."

In the case at bar, objection was made that the evidence was not before me, and it was, as I understood, suggested that the evidence would not warrant the conviction. I think, therefore, that a question having arisen as to the evidence, I would not be justified in accepting the amended conviction under the circumstances of this case in the absence of the depositions, nor have I power myself, in the absence of the depositions, to amend.

The result will be that the conviction and the warrant of commitment will be quashed, but there will be no action against the magistrate.

Under all of the circumstances of this case I will not award any costs to either party.

Prisoner discharged.

SASK.

S. C.

HUTCHINS v. GAS TRACTION CO.

Saskatchewan Supreme Court, Newlands, Lamont and Brown, JJ. July 15, 1914.

1. SALE (§ II A—27)—WARRANTY—STATED CONDITIONS AND WARRANTIES EXCLUDE IMPLIED WARRANTY, WHEN.

A stipulation in the agreement to sell a tractor engine that it is sold subject to the stated conditions and warranties and no other, excludes any claim upon the basis of an implied warranty.

[*Sawyer-Massey* v. *Ritchie*, 43 Can. S.C.R. 614, followed.]

2. APPEAL (§ VIII B—670)—JUDGMENT—RESERVING JUDGMENT INSTEAD OF GRANTING NEW TRIAL — PERVERSE VERDICT — NECESSARY MATERIAL BEFORE APPELLATE COURT.

On setting aside a verdict for the plaintiff as perverse, the Supreme Court of Saskatchewan may without sending the case back for a new trial, give judgment for the defendant if it has before it the material necessary for finally determining the questions in dispute and finds upon these in the defendant's favour.

Statement

APPEAL by defendant in action for breach of warranty.

The appeal was allowed.

G. H. Barr, for appellant.

G. E. Taylor, for respondent.

Newlands, J.

NEWLANDS, J.:—This is an action for damages for breach of warranty, and was tried before the Chief Justice with a jury at

SASK.

S. C.

HUTCHINS v. GAS TRACTION CO.

Newlands, J.

Moose Jaw, and the jury brought in a verdict for the plaintiff for $1,600.

The agreement signed by the plaintiff for the purchase of the engine in question contained the warranties as set out in the plaintiff's statement of claim, as follows:—

In the said agreement dated the 14th September, 1910, the defendants warranted the said engine to be of good material and workmanship, capable of developing continuously twenty-five horse power capacity delivered to the draw bar; that the automatic steering device would guide the engine through the fields while breaking or plowing more perfectly than could be done by any man; that the engine was capable of plowing an acre of land with from one and a half to two gallons of gasoline; that the engine would furnish ample and continuous power to drive any 36 inch separator made in Canada complete with self feeder, weigher and blower, and would pull in the locality in which the plaintiff resided six 14-inch breaking plows and eight 14-inch stubble plows; and the defendants would send a competent man to start the said engine and instruct the purchaser in its proper operation.

The plaintiff alleges the following breaches of warranties: In the spring of the year 1911, and so soon as the plaintiff was able to test the said engine the same was tested for plowing and the plaintiff discovered that the same was and is not properly built for plowing, is not made of good material and workmanship, is not capable of developing the rated capacity, and will not fulfil the said warranties or any of them, and will not plow at all. The said defendants never sent an expert to repair the said engine as in the said letter of the 10th November, they had agreed to do or took any proceedings whatsoever further in regard thereto.

In addition to the express warranties the plaintiff alleges the following implied warranties: "That the defendants, knowing the purposes for which the said machinery was required by the plaintiff, that is to say for threshing and plowing, warranted the same to be capable of plowing and threshing," and alleged as a breach that "the said machinery is not capable of plowing at all or threshing properly."

The plaintiff kept and used the engine three seasons. He did all his threshing with it in 1910, he did all his threshing and broke 240 acres in 1911, and did two-thirds of his threshing and broke 75 acres in 1912.

The warranties may be divided into three classes:

SASK.

S. C.

HUTCHINS v. GAS TRACTION CO.

Newlands, J.

1. The warranty that it was of good material and workmanship. 2. The warranties as to its capacity and what it would do; and 3. The implied warranty.

As to the first, the warranty that the engine was of good material and workmanship; this warranty was practically a warranty for a year only, as the defendants agreed, "Should any part (except electrical parts, which are not warranted) prove defective within one year from the the date of delivery through inferior material or workmanship, new parts should be furnished by the defendants." This warranty was complied with, as the plaintiff swore at the trial that the defendants had furnished him free with all the parts required to repair the engine during the first year.

As to the second class of express warranties, the agreement contained the following provisions:—

V. It is further agreed that the Gas Traction Co. Limited shall send a competent man to start said engine and instruct the purchaser in its proper operation. If within three days from date of first use of said engine it has fulfilled the above warranties, the purchasers agree to settle for the same in accordance with clause II of this contract and such settlement is acknowledgment of acceptance of engine and fulfilment of above warranties. If, however, the operator fails to make said engine fulfil said warranties, the purchasers agree to notify the Gas Traction Co., Limited, at his head office in Winnipeg, Manitoba, by registered letter or telegram stating in particular wherein the engine fails to fulfil the above warranties, and a reasonable time shall then be given the Gas Traction Co., Limited, to remedy the defects, if any there be, the purchasers agreeing on their part to render necessary and friendly assistance to the person sent by the company; and if the Gas Traction Co., Limited, is unable to make the engine fulfil the warranties, said engine shall be returned to the Company by the purchaser to the railway station where he received it, free of charge for such delivery. If, however, the person sent by the company shall make the engine fulfil the said warranties, then the purchaser shall keep said engine and pay the purchase price therefor, in the manner hereinbefore stated and the said warranties shall be deemed fulfilled in all respects;

VI. The failure on the part of the purchaser to pay for the engine in the manner above provided, or failure to give notice as herein provided, or the keeping of the engine for more than three days after the delivery thereof, without giving notice as above provided of the failure of said engine to fulfil said warranties, shall be and become an absolute waiver of said warranties and of any breach thereof, and shall forever release and discharge the Gas Traction Co., Limited, from any and all liability to the purchasers on said warranties, nor shall the fact of any local or travelling agent or expert of the company rendering assistance of any nature in con-

nection with said engine after the foregoing warranties have been terminated as above provided, operate as an extension of the said conditions and warranties or as a waiver thereof.

After the engine was started the plaintiff made no complaints which were not attended to by the company, and he kept the engine and continued to work it, and on November 21, 1910, nearly two months after he had received the engine and started to work with it, he forwarded to the company his promissory notes as required by the agreement and a cheque for $838.20, the cash payment, and in the letter forwarding the same he made no complaint as to the engine. Under the agreement the plaintiff, therefore, waived these warranties and released the company from all claims thereunder.

As to the third class, the implied warranties, the agreement contains the following provision, "The above-described engine is sold subject to the following conditions and warranties and no other." Under *Sawyer-Massey* v. *Ritchie*, 43 Can. S.C.R. 614, this provision would cut out all implied warranties.

The plaintiff further claimed that it was too late to plow when he got the engine, and that the defendants agreed through their sales manager that the warranty as to its fitness for plowing, which would include both the express and implied warranties, was not to take effect until the spring, when he could commence plowing. Apart from the question as to whether any such agreement was proved, it would be subject to the agreement that the plaintiff would notify the defendant company of its defects and would return the engine in case it could be made to comply with the warranty. He, however, did neither, but broke 240 acres that year, and kept it without complaint until after the next season, when he broke 75 acres more. These warranties would, therefore be waived, and the company released from any liability under them.

After the jury had retired they returned and asked the Chief Justice the following questions:—

Q. If we find the contract calls for a 25 horse-power, could we call it not worth anything if we find it is not a twenty-five horse power? Would we be justified in saying it was not worth anything?

THE CHIEF JUSTICE:—I don't understand the question, because there is no evidence to say it is not a twenty-five horse power engine—to begin with.

Q. Could we find that if it was sold under a warranty as a twenty

SASK.

S. C.

HUTCHINS v. GAS TRACTION CO.

Newlands, J.

five horse-power engine and we decide it cannot come up to that power, but only to say ten or fifteen—may we bring in a verdict that it is no good?

THE CHIEF JUSTICE:—You have to have evidence to support your finding: you cannot go into the jury room to speculate as to the strength of this engine. You have to decide this case on the evidence.

When the jury returned they brought in a general verdict for $1,600 damages.

Now if the jury based this verdict upon the finding they wanted to make that the engine was not a 25 h.p. engine after being told by the Chief Justice, as was the fact, that there was no evidence upon which they could so find, their verdict would be perverse.

A new trial may be ordered if the jury gave a verdict which was against the weight of evidence, and such that a jury reviewing the whole of the evidence reasonably could not properly find, or if the jury gave a perverse verdict: 23 Hals. Laws of Eng. art. 375; *Metropolitan R. Co. v. Wright*, 11 App. Cas. 152.

But no matter what ground the jury based their verdict on, I think there was no evidence upon which it can be sustained, and I think the case should have been withdrawn from the jury by the trial Judge. As I have said, it is an action for breach of warranties, and the plaintiff by his action has under the terms of the agreement waived all the warranties and released the company from their liability thereon, and under these circumstances he cannot have an action against them for damages for breach of warranty.

There is no necessity to send this case back for a new trial, as we have before us all the facts necessary upon which to base a judgment.

On the hearing of an application for a new trial, after trial with a jury, the Court of Appeal may give judgment for the appellant, without sending the case back for a new trial, where it has before it the materials necessary for finally determining the question in dispute between the parties: 23 Hals. art. 370.

The appeal should be allowed, and judgment entered for the defendant with costs both of the trial and appeal.

Lamont, J.

LAMONT, J., concurred.

Brown, J.

BROWN, J., for reasons given in writing was also of the opinion that the appeal should be allowed with costs, the verdict set aside and judgment entered in favour of the defendant with costs.

SNELL v. BRICKLES.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Duff, Anglin, and Brodeur, JJ. February 23, 1914.

1. VENDOR AND PURCHASER (§ I E—28)—RESCISSION OF CONTRACT—PENALTY—EQUITABLE RELIEF—"DEPOSIT" CONSTRUED.

Where an offer to purchase land stipulated payment of the price as follows: "$500 as deposit accompanying this offer" and the balance in stated instalments, and further provided that should the purchaser fail to complete the purchase on time the vendor could retain any moneys paid on account as liquidated damages, rescind the contract and re-sell the property, the deposit is a part of the purchase money within such forfeiture clause, but the provision for forfeiture is only a penalty and default does not of itself disentitle the purchaser to a decree for specific performance.

[*Kilmer* v. *B.C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319, applied; *Snell* v. *Brickles*, 12 D.L.R. 753, reversed.]

2. VENDOR AND PURCHASER (§ I E—28)—AGREEMENT OF SALE—PENAL CLAUSE—FAILURE TO PAY PURCHASE MONEY—FORFEITURE RELIEVED AGAINST, WHEN.

Where the effect of a stipulation that time is of the essence of an agreement for sale of land is expounded in express terms by the agreement itself and a further stipulation inserted giving the vendor a right to rescind on failure to pay an instalment, whether the last or not, at the exact time named for payment, and to forfeit the moneys already paid, such stipulations are to be treated as constituting a penal clause for securing punctual payment of the purchase money and may be relieved against.

[*In re Dagenham*, 8 Ch. App. 1022, and *Kilmer* v. *B.C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319, followed; *Whitla* v. *Riverview Realty Co.*, 19 Man. L.R. 746; *Chadwick* v. *Stuckey*, 8 D.L.R. 357, 5 A.L.R. 145, referred to; *Snell* v. *Brickles*, 12 D.L.R. 753, reversed.]

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 12 D.L.R. 753, 28 O.L.R. 358, reversing the judgment at the trial in favour of the plaintiff.

There was but one question of law raised for decision in this appeal, namely, whether or not, where a contract for sale of land to be paid for by instalments at fixed dates, with a forfeiture of instalments paid in case of default in any, time being of the essence of the contract, the stipulation that the initial payment is a deposit takes it out of the rule in *Kilmer* v. *British Columbia Orchard Lands*, [1913] A.C. 319, 10 D.L.R. 172, that the forfeiture of the money is only a penalty and default does not of itself disentitle the purchaser to decree for specific performance. The trial Judge granted the decree, but his judgment was overruled by the Appellate Division.

Statement

The appeal was allowed; FITZPATRICK, C.J., and ANGLIN, J., dissenting.

Proudfoot, K.C., for the appellant.

J. E. Jones, for the respondent.

CAN.

S. C.

SNELL v. BRICKLES.

Davies, J.

Duff, J.

FITZPATRICK, C.J. (dissenting):—I agree with Mr. Justice Anglin.

DAVIES, J.:—I am not able to distinguish this case from that of *Kilmer* v. *British Columbia Orchard Lands*, [1913] A.C. 319, 10 D.L.R. 172, and, therefore, think that the appeal must be allowed with costs, and the plaintiff's claim for specific performance granted.

DUFF, J.:—I think this case is governed by the decision of the Judicial Committee in *Kilmer* v. *British Columbia Orchard Lands*, [1913] A.C. 319, 10 D.L.R. 172.

The application of that decision becomes as I think very clear when the real nature of the agreement now before us is once understood. It was constituted by a proposal from the purchaser accompanied by the sum of $500 on account of the purchase-money and an acceptance by the vendee. . . .

Whatever disputes might have arisen in the absence of express provision on the subject, the terms of this agreement are perfectly unambiguous upon the point that in the event of the vendee making default in respect of any of the things necessary for completion on the day named the vendor may terminate the agreement and retain the moneys theretofore paid. If any part of the sum of $2,000 should remain unpaid on March 15, 1912, the consequences mentioned were to ensue by the express language of the contract.

Now, the decision in *Kilmer's case*, [1913] A.C. 319, 10 D.L.R. 172, as I understand it is that such a clause must be read as providing for a penalty against which the Court will relieve.

Reference also to *In re Dagenham*, 8 Ch. App. 1022. . . . .

The other point is perhaps the same argument in another form. The respondent, it is said, is not exercising the power of rescission given by the agreement. But he has professed to put an end to the agreement and he has retained the moneys paid; and he does not, of course, pretend that he has kept the moneys inadvertently, but asserts his right to them. He does not really argue that in the circumstances he could have kept these moneys except under some stipulation express or implied to that effect; and he finds such a stipulation implied in the

use of the word "deposit." As I have said above, the presence of the express stipulation excludes any implication which might otherwise have arisen in respect of the precise matter upon which that stipulation makes provision; and it is pursuant to this stipulation that the vendor must be taken to have acted. . . .

Now it has been many times laid down and it is undoubtedly law that where an instalment of purchase-money is declared by the contract to be paid as a "deposit," and there is no modifying context, it is thereby implied that this sum besides being a part payment of the purchase money stands as security for the completion of the purchase.

But, what is the consequence of this where the contract contains a provision that time is the essence of it and the vendee fails, let us say, through the carelessness of his solicitor, to make the final payment? Does it follow that the vendor becomes *instanter* indefeasibly entitled to refuse to transfer the property and at the same time retain the moneys in his hands? . . .

Sprague v. *Booth*, [1909] A.C. 576. I have not found any decision and I do not think there is one in which the vendee's default being merely the technical default of failing to pay at the hour named, there being in fact admittedly the intention as well as the ability on his part to carry out his contract, and an offer to perform it made almost immediately after the default has occurred, there being no equity against the vendee or in favour of the vendor, except such as may be created by the existence of the formal stipulation making time the essence of the contract and technical default in exact performance—I say I have found no decision and I do not think one can be found —that a vendor in such circumstances is on equitable principles entitled to terminate the agreement and retain the moneys paid on the sole ground that such moneys are declared by the agreement to be paid as a "deposit."

As to whether such a decision could be justified on principle there are two observations which appear to me to be of weight. It ought to be noted that in the traditional view of Courts of equity the vendor's interest in the contract of sale has been considered to lie in the right it gives him to demand and en-

CAN.
S. C.
SNELL
v.
BRICKLES.
Duff, J.

force the payment of the purchase-money. This has been compendiously put by saying that the estate in equity was considered to have passed to the vendee or that the vendor was considered to be a trustee of the land for the purchaser subject to the interest he had in it as security for the purchase-money. Expressions of this kind, of course, may easily be misunderstood by people who leave out of sight the manner in which the doctrine they are intended to epitomize is applied by Courts of equity; but one may say, I think, with entire accuracy that the Court of Chancery looked at such contracts from a point of view which brought into relief the interest of the vendor in the payment of the purchase-money as his substantial interest in the contract. See the judgment of Jessel, M.R., in *Cave* v. *Mackenzie*, 37 L.T. 218, at 219, and of Mowat, V.-C., in *Parke* v. *Riley*, 3 E. & A. 215, at 230. The second observation is this:—The English doctrine of the equity of redemption is only a particular application of the principle governing the law as to penalties and forfeitures. The Lord Chancellor in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*, [1914] A.C. 25, at 35, says that the equitable jurisdiction *in personam* over mortgagees

> was merely a special application of a more general power to relieve against penalties and to mould them into mere securities.

In the light of these observations some of the results of the contention I am now considering appear rather singular. First, this sum that is to stand as security for the performance of the vendee's obligations which in their substance consist in making the payments mentioned on the stipulated days, is, according to the contention, to become the absolute property of the vendor on the vendee's failure to pay on the exact hour named and against this forfeiture the Courts have no power to relieve; and this consequence is not only not prevented by the fact that the intention of the parties was that the sum mentioned was to stand as security only, it is expressly on the ground that it was intended to be and is a security for the payment of the purchase-money that (according to the argument) the Court is powerless to afford relief. The process referred to by the Lord Chancellor is reversed. Instead of a penalty being

moulded into a security and relieved against a security is turned into a penalty and forfeited as a penalty. Secondly, the effect of declaring the initial payment to be a "deposit" coupled with a stipulation that time is of the essence of the contract being to raise an implied agreement that the vendor shall upon default of punctual payment be entitled to terminate the agreement and retain the moneys deposited and these stipulations giving rise to this implied agreement being (according to the respondent's argument) sanctioned and enforceable according to the doctrine of the Court; nevertheless, it is indisputably the law as laid down in *Re Dagenham*, 8 Ch. App. 1022 and in *Kilmer's case*, [1913] A.C. 319, 10 D.L.R. 172, that if such an agreement be stated in express terms on the face of the contract, that is to say, if it be declared in so many words that in the event of non-completion on the day named the contract of sale may be rescinded and the initial payment forfeited, that is a stipulation which the Courts will relieve against as a penalty. A stipulation stated in plain terms is a penal stipulation; a stipulation precisely the same in effect is not penal when stated in terms which can only be understood by lawyers. This, presumably, is regarding substance rather than form.

The difficulties arising from conflict among views from time to time expressed by distinguished lawyers and Judges in relation to this subject are, no doubt, considerable. I am inclined to think it will be found, if the decisions themselves be looked at as distinguished from the expressions of individual Judges, that most of the apparent difficulties disappear. In the meantime the case before us seems to me, as I have already said, to be governed by the decision in *Kilmer's case*, [1913] A.C. 319, 10 D.L.R. 172, according to which I think the appellant is entitled to be relieved from the exigency of the penalty and to have judgment for specific performance.

On the other points in the case I express no opinion.

ANGLIN, J., dissenting, for reasons given in writing was of opinion that the appeal should be dismissed. The respondent to have costs on returning the sum of $125 to the plaintiff and the contract to be rescinded. If the appellant should decline to so treat it, the appeal to be dismissed with costs.

Anglin, J.

CAN.

S. C.

SNELL v. PRICKLES.

BRODEUR, J.:—I am of opinion that this appeal should be allowed for the reasons given by my brother Duff.

Appeal allowed with costs.

Proudfoot, Duncan & Grant, for the appellant.

Rowan, Jones, Somerville & Newman, for the respondent.

B. C.

C. A.

SMITH v. CREMATION SOCIETY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. July 14, 1914.

1. ESTOPPEL (§ III M—150)—WHO AFFECTED — WHO MAY SET UP — VOLUNTARY CONVEYANCE — INSOLVENT DEBTOR — CREDITORS' RIGHTS, HOW PROTECTED.

Even if a company were estopped by its conduct from denying the validity of a chattel mortgage made on its effects in the name of an individual mortgagor as against the mortgagee and those claiming under him, no such result follows even on the admission of authority by the company's pleadings, as regards execution creditors of the company; and the goods may be declared liable to their claims without regard to the chattel mortgage not regularly made by the company in whom the property in the goods was vested. (Per GALLIHER, J.A.)

[*Richards* v. *Johnson*, 4 H. & N. 660; *Richards* v. *Jenkins*, 18 Q.B.D. 451, referred to.]

Statement

APPEAL from judgment of HUNTER, C.J.B.C.

The appeal was allowed.

J. P. Hogg, for appellant, plaintiff.

Charles Macdonald, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal, and concur in the reasons therefor of my brother Irving.

Irving, J.A.

IRVING, J.A.:—The judgment is founded on a misapprehension of the resolution passed on December 18, 1911. That resolution did not authorize Price to mortgage the company's property. It simply said that if Price mortgaged *his* property the company would accept it subject to the mortgage, as performance of his contract.

The difference between a resolution authorizing him to deal with the company's property and a resolution agreeing to a modification in his contract with the company is to my mind quite plain, but it was not appreciated by the learned Chief Justice, [Hunter, C.J.B.C.] who, on his view of it, held that the resolution as passed worked an estoppel against the company. That I think is the first error.

In the next place the company had nothing to do with the loan to Price from Brown. Douglas and Price carried that

through by themselves in January, 1912. Douglas of his own volition agreed to become guarantor, and without authority from the company promised and agreed that certain furniture which Price then contemplated buying should be included as a collateral security. He was acting in his personal capacity, but even if he was not so acting, his promise would not create an estoppel against the company. Promises do not constitute an estoppel.

Then Price failed to buy the furniture. The company bought it in May, 1912. This, all parties, including Brown, admit in their statement of defence. But Price falsely pretending he had bought it, mortgaged it to Brown in October, 1912. Price could not transfer the company's property. Douglas did not join in this chattel mortgage, but I cannot help feeling that he was aware that it was being given.

Douglas then, to save himself as guarantor, took over the chattel mortgage, and claims it is valid against the company. I think he is within the exception to the general rule that a purchaser for value with notice can shelter himself behind the want of notice of his assignor.

The company could in my opinion have the mortgage to Brown set aside, and therefore the plaintiff is entitled to the relief he seeks.

Gallihee, J.A.

GALLIHER, J.A.:—The Cremation Co. by their amended defence claim that the goods purchased by Price from the plaintiff and included in the chattel mortgage from Price to David E. Brown were the goods of the company and purchased for them, and that Price was acting as agent for the company, and with their authority in so mortgaging the goods. This is also the position taken by the defendants Douglas and McKinney (to whom the chattel mortgage in question was assigned) in their amended pleadings.

In the first place I find no authority permitting Price to mortgage the company's property.

The authority relied on is at p. 70 of the Appeal Book, and is as follows:—

> Moved by Mr. Hanna and seconded by Mr. Hutchings: That since Mr. E. S. Price has reported with reference to a certain contract dated June 12, 1911, between this society and Mr. Charles G. Wright for the completion of a crematorium at Mountain View Cemetery, that unforeseen

B.C.

C. A.

SMITH v. CREMATION SOCIETY.

Gallihier, J.A

conditions have rendered impossible the carrying out of this contract according to its terms with special reference to delivery of the completed building together with the land on which same is situated, free and clear of all encumbrances on January 1, 1912, that he be authorized to mortgage the property for ten thousand ($10,000) dollars to complete and furnish the building and pay for the land on condition that he deposit 25,000 dollars ($25,000) worth of the capital stock of the society with the president, said stock to be returned to Mr. Price upon payment of the mortgage.

The effect of this resolution, when read in connection with the agreement between Price and the company, is simply this: that the company instead of insisting that Price turn over the property on completion free from encumbrance, they agree to accept it subject to a mortgage of $12,000—on the condition that Price deposit certain stock with the company, in other words, permission to turn over an encumbered instead of an unencumbered property.

If, however, it should be held that this was an authority, I doubt if such authority would not be *ultra vires* of the company: see *A. R. Williams Machinery Co.* v. *Crawford*, 16 O.L.R. 245, but if my view as to that is erroneous, it seems to me that while the company might be estopped as against Brown or his assignees Douglas and McKinney from denying that the goods were theirs, or Price's authority; that estoppel could not operate as against the plaintiffs who do not claim through but adversely to the company: See *Richards* v. *Johnson*, 28 L.J. Ex. 322; 4 H. & N. 660; and *Richards* v. *Jenkins*, 56 L.J.Q.B. 293; 18 Q.B.D. 451.

I would allow the appeal and declare the goods and chattels in question liable to execution at the instance of creditors of the company freed from encumbrance.

McPhillips, J.A

McPHILLIPS, J.A., concurs with MACDONALD, C.J.A.

Appeal allowed.

SASK.

S. C.

O'CONNOR v. STURGEON LAKE LUMBER CO.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. July 15, 1914.

1. APPEAL (§ VII C—302)—AMENDMENTS — SETTING UP NEW CAUSE OF ACTION—PROPER REMEDY, IF ANY.

The unsuccessful plaintiff at the trial appealing from the dismissal of his action will be refused leave to amend where the proposed amendment sets up an entirely new cause of action and would necessitate a new trial; but leave may be reserved to him to bring another action. [*Morrison* v. *Earls*, 5 O.R. 477, referred to.]

Statement

APPEAL by plaintiff from judgment at trial.

The appeal was dismissed.

J. A. Allan, K.C., for appellants.

J. F. Frame, K.C., and F. W. Turnbull, for respondents.

The judgment of the Court was delivered by

Elwood, J.:—By a memorandum of assignment dated December 10, 1911, the defendant, the Sturgeon Lake Lumber Co., Ltd., assigned to the plaintiffs, O'Connor, Hudson, Glenn and Russell and the defendant Baker a license to cut timber theretofore granted by the Hon. Frank Oliver, the Minister of the Interior of Canada. The learned trial Judge found that the contract entered into between these parties was induced by the representations of said Baker, one Sibbald and the report of one Ballantine, all that the timber berths comprised in the license to cut contained substantially between 40 and 50 million feet of merchantable timber, whereas as a fact these berths contained only 9,185,695 ft. These representations were found not to have been made fraudulently. At the trial it appeared that the defendant Baker refused to join as a plaintiff in the action, and was, on the application of the plaintiff, added as a party defendant, and was represented at the trial. It appears that the defendant Baker is not seeking rescission. It appears further from the evidence that the said Sibbald and one Dempster at one time purchased from the plaintiff O'Connor a certain share of O'Connor's interest in the undertaking, which Sibbald and Dempster subsequently sold to one Levey. Levey at the conclusion of the case was added as a party defendant. It also appears from the evidence that Sibbald and Dempster subsequently purchased a portion of the share of Baker in the undertaking, and that one Mahon was interested in part of the share of O'Connor. There was no evidence of any assignment or agreement in writing with respect to the shares which are held by Mahon, Sibbald, Dempster or Levey. The learned trial Judge held that as Dempster, Sibbald and Mahon had each an interest in the berths, and that as the government of the Dominion of Canada were interested in any transfer and were not before the Court, the plaintiffs' action must be dismissed. Apparently, so far as the records in the Department of the Interior show, the only persons interested in the land are the plaintiffs and the defendant Baker, and the interest of the other parties is not—if I may use the expression—

SASK.

S. C.

O'CONNOR v. STURGEON LAKE LUMBER CO.

Elwood, J.

a matter of record. They claim either through O'Connor or the defendant Baker. The plaintiff O'Connor is a trustee for the interest of the said Mahon and the defendant Levey. The defendant Baker is a trustee of the interest of the said Sibbald and Dempster. The facts shew that shortly after the assignment to the plaintiffs Dempster and Sibbald became shareholders and officers of the defendant company; in fact, the actual assignment was signed by Dempster as president. The evidence shews that at the present time the shareholders of the defendant company consist of the said Sibbald, Dempster and Baker and Mrs. Dempster, who are the sole shareholders of the company. So far as the defendants Dempster and Sibbald are concerned, they gave evidence at the trial, and I am of the opinion that in order to grant the plaintiffs the relief asked for it is unnecessary to join them as parties, or, if it is necessary, that they should now be joined. So far as the government of the Dominion of Canada is concerned, I am of the opinion that it is unnecessary to join it as a party, because the only interest which the government has is as grantors of the license, and reconveyance to the defendant company could be made without in any way joining the government of Canada. The position of the defendant Baker, however, is entirely different. While he was made a party defendant, there is no allegation in the statement of claim that any of the representations which induced the contract were made by him; in fact, his name is not in any way mentioned in the statement of claim except that he is added as a defendant and referred to as one of the purchasers. At the trial the plaintiffs' counsel distinctly stated that the sole ground on which he was added as a defendant was that he was interested as one of the purchasers, and that, as he would not join as a plaintiff, he was added as a defendant. At the trial Baker's counsel stated that he was not asking for rescission. Baker was not called to give any evidence, and no evidence was called on his behalf. So far, therefore, as any decree for rescission against him is concerned, he should have an opportunity of being heard. I am of the opinion that the Court has no right to say that rescission must be granted against Baker in his absence and without his being afforded an opportunity of making what defence he desires. Before rescis-

sion can be granted, the plaintiffs have to be in a position to restore the property to the defendant company. They cannot make a complete restoration without the concurrence of Baker. If there had been an allegation in the statement of claim that Baker had made the false representations which induced the contract, then I am of the opinion that under the evidence the Court could and should have declared rescission, and if he had refused to convey his interest an order could have been made directing an officer of the Court to convey. But, as I said above, there is no allegation in the pleadings that he was in any way a party to the misrepresentations. The case of *Morrison* v. *Earls*, 5 O.R. 434 at 477, seems to be very much in point, where the following appears:—

> The fraud is not that of this syndicate, but of Morrison, to whom the defendant gave the note, and Morrison's fraud will not avoid the syndicate agreement, so long as all of the parties to it do not assent to put an end to it.

The appellants' counsel in his factum asks that if necessary the plaintiff be allowed to amend. This, however, would mean setting up an entirely new cause of action: the defendant Baker would be at liberty to plead to that amendment; and it would necessitate a new trial. I am of the opinion that this amendment should not be allowed. I would therefore dismiss the appeal, with costs, giving the plaintiffs leave to bring such other action as they may be advised.

At the conclusion of the argument, counsel for the respondent stated that no matter what the result of the appeal might be his clients were willing to join with the appellants to have a re-cruise of the timber limits covered by the license, and that, if it transpired that the limits were not as represented, compensation would be made. I think that effect should be given to this offer, and that if the appellants desire to accept it they might notify the respondents and arrange to have arbitrators appointed and have a joint re-cruise of the limits, and have the arbitrators fix what, if any, compensation should be made; or, if the parties desire it, the Court might appoint arbitrators and persons to re-cruise the limits and have an order made confirming whatever award the arbitrators may make.

Appeal dismissed.

B. C.
C. A.

McKINNON v. LEWTHWAITE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. June 2, 1914.

1. INTEREST (§ II B—72)—INTEREST ACT—BILLS OF EXCHANGE ACT—RATE AFTER MATURITY—"LIABILITIES" CONSTRUED.

The interest after maturity by way of liquidated damages upon a promissory note maturing prior to July 7, 1900, not made with interest, which is to be allowed under the Bills of Exchange Act and the Interest Act, 1900, R.S.C. 1906, ch. 120, sec. 2, is six per cent. from the date of maturity to the entry of judgment, although the latter took place subsequent to the passing of the Interest Act, 1900, on July 7, 1900, whereby the legal rate was reduced from six to five per cent.; the exception by that Act, as to "liabilities" existing at the time of its passing has reference to the debt and not to the accrued interest to that date, and the interest rate on then existing debts on which six per cent. would be allowed theretofore, was not reduced to five per cent. even as to interest to be computed from and after July 7, 1900.

[*Plenderleith* v. *Parsons*, 9 O.W.R. 271, and *Kerr* v. *Colquhoun*, 2 O.W.N. 521, considered; *British Canadian* v. *Farmer*, 15 Man. L.R. 593, and *Plenderleith* v. *Parsons*, 14 O.L.R. 619, disapproved.]

Statement

APPEAL by the plaintiff from the order of Murphy, J., setting aside a default judgment in plaintiff's favour and allowing defendant in to defend, involving also the rate of interest allowable after maturity by way of liquidated damages on a promissory note maturing prior to July 7, 1900, and the meaning of "liabilities" under the Interest Act.

The appeal was allowed; the order below being set aside and the judgment in plaintiff's favour being re-instated with a modification reducing the interest on mathematical grounds by $6.07; MARTIN, and MCPHILLIPS, JJ.A., dissenting.

J. G. Gibson, for appellants.

A. R. Creagh, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The defendant has not made out his claim that the judgment was entered in contravention of an undertaking between the solicitors. The onus of proof is upon him to shew this, which onus he has failed to satisfy; on the contrary, the evidence on this point is substantially against the appellant. This being so, there being no reasons for judgment in the Court below, I think I can fairly assume that the judgment was not set aside on the ground above alluded to.

The next ground relied upon by the respondent is that the judgment was irregularly entered because assuming the rate of interest to be 6 per cent. for the whole period the interest included in the judgment is $6.07 in excess of the true amount.

B. C.
C. A.
McKINNON v. LEWTHWAITE.
Macdonald, C.J.A.

This is admitted. As, however, it was a clerical error I think the Court ought to exercise the discretion given to it by R. 319 and reduce the interest to the proper amount.

The other and substantial objection to the judgment as entered, is that the rate of interest is not the legal rate, and hence judgment could not be entered in virtue of R. 295.

Interest at 6 per cent. was charged from April 12, 1899 to February 5, 1907, the date when judgment was entered. The promissory note which evidences the debt did not by agreement provide for interest. The interest is therefore claimed by way of liquidated damages by virtue of the Bills of Exchange Act and the Interest Act. The legal rate in 1899 was 6 per cent., but this rate was changed by an amendemnt to the Interest Act made in 1900, reducing the rate to 5 per cent.

The contention of the respondent is that the legal rate was 6 per cent. up to July 7, 1900, the date of the reduction of the rate of interest, and 5 per cent. thereafter, while the appellant contends that the reduction in the rate did not apply to a case like the present one, and that 6 per cent. continued to be the legal rate up to the entry of judgment.

We were referred to *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619; *British Canadian Loan & Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 593; and *Kerr* v. *Colquhoun* (1911), 18 O.W.R. 174, 2 O.W.N. 521.

There are some American cases mentioned in the judgment of Mr. Justice Richards in the Manitoba case, but the wording of the statute upon which they are based is so different from ours as to render them of little assistance here.

The decision of this point depends upon the construction to be placed upon the proviso in the amending statute of 1900, which reads as follows:—

> Provided that the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act.

The only liability to which it can apply is the debt. If the accrued interest up to 1900 using the words "accrued" interest as a convenient designation of the creditor's right to damages for the detention of the principal, be termed a liability, the section could have no reference to it because it is not interest bearing. To put it in another way: there are two liabilities,

B. C.

C. A.

McKINNON v. LEWTHWAITE.

Macdonald, C.J.A.

first, the debt for the detention of which damages may be awarded to the amount of the statutory rate of interest: second, the accumulated damages on the debt. Now, it is clear that the creditor had no right to interest on the accumulated damages by way of further damages for their detention. The change in the rate of interest therefore has no reference to that liability. It therefore must have reference only to the debt, and the effect of it is to leave the old rate untouched in its application to the debt which is still to bear interest unaffected by the reduction. I have come to this conclusion with a good deal of hesitancy, because it is at variance with the construction placed upon the section by the learned Chancellor of Ontario and Mr. Justice Richards. Mr. Justice Middleton, however, though feeling himself bound by the learned Chancellor's opinion, appears to have entertained the contrary one.

Respondent also claimed a good defence on the merits. He wished to plead the Statute of Limitations and that the note was an accommodation. The material before us disposes effectually against him of both, and the delay of seven years in moving against the judgment is not satisfactorily explained. The order below should be set aside and the judgment re-instated with a reduction of the interest charged by $6.07.

Defendants should have costs as of a motion to amend the judgment. The plaintiffs should have all other costs here and below.

Irving, J.A.

IRVING, J.A.:—I prefer the opinion expressed by the Master in *Plenderleith* v. *Parsons* (1907), 9 O.W.R. 271, 14 O.L.R. 619, and of Middleton, J., in *Kerr* v. *Colquhoun* (1911), 18 O.W.R. 174, 2 O.W.N. 521, to the decisions relied upon by the learned Judge appealed from. In my opinion the endorsement was right, and the judgment should not have been set aside.

Mr. Creagh says that the Judge, having exercised discretion, this Court should not interfere. Undoubtedly a Judge has discretion, but it is not shewn that he proceeded on that ground. On the contrary, I am satisfied that he must have proceeded on the ground that the plaintiff was entitled *ex debito justitiæ* to have the judgment set aside on account of the supposed error in the rate of interest.

Another argument relied on by Mr. Creagh was that there had been a breach of the plaintiff's solicitors' undertaking to give him time. The giving of any undertaking is denied, so that we have no sure guide to enable us to determine the question of fact, if it were desirable that such should be done.

When a solicitor alleges that an extension of time has been granted to him, the onus is on him to prove it. If the agreement is a verbal one, the proper and only safe course for the solicitor relying on such extension, is to write a letter as soon after the interview as possible, stating the terms of the agreement.

Another point relied on was that there was no presentation at the place named in the note alleged in the endorsement: *Croft* v. *Hamlin* (1893), 2 B.C.R. 333. It was however alleged it had been "duly" presented. That seems sufficient: see Form No. 6, appendix C. I think that the decision in *Croft* v. *Hamlin*, is questionable. It is not in conformity with the form given in appendix C., sec. IV, which is as follows:—

The plaintiff's claim is against the defendant as maker of a promissory note for $250, dated 1st January, 1899, payable 4 months after date.

Particulars	$250.00
Interest	10.00
Amount due	$260.00

Place of trial—

The name of the payee is not even mentioned. Nothing is said about presentation, nor that payment was refused: both these things go to the establishment of the cause of action.

As to the error in the computation of interest when this was discovered—during the argument of the summons now under consideration—the plaintiff's counsel at once offered to reduce the judgment. That seems to me to be practically an application to amend and sufficient to bring it within *Armitage* v. *Parsons*, [1908] 2 K.B. 410, at 418; 77 L.J.K.B. 850, 853.

Galliher, J.A.

GALLIHER, J.A.:—This appeal is from an order of Mr. Justice Murphy in Chambers setting aside a judgment signed in default of defence and allowing the defendant in to defend.

The judgment was signed on March 5, 1907, for the sum of $2,240.80, being for principal—$1,510, interest at 6% —$710, and $33.80 costs.

B. C.
C. A.
McKINNON v. LEWTHWAITE.
Galliher, J. A.

The defendant in his affidavit swears that he was not aware that judgment had been signed against him until June, 1913, but this is contradicted by the plaintiff who swears that on April 11, 1909, he, while going to Victoria, on the boat, met the defendant and asked him to pay something on account of the judgment, and the defendant admitted that there was a judgment against him and that he was liable thereunder, and there is no denial by Lewthwaite of this.

Although the defendant admits he knew of the judgment in June, 1913, no steps were taken to set it aside until January 6, 1914, and excuses the delay on the ground that he was absent from Vancouver most of this time.

Failure to file a defence within the proper time is accounted for by the defendant's solicitor who in his affidavit states that there was an understanding between himself and Mr. Wallbridge, a partner of the plaintiff's solicitor, after appearance entered that nothing further would be done without the defendant's solicitor being first notified. This is flatly denied by Mr. Wallbridge.

So far there is nothing in my opinion which would entitle the defendant to have judgment opened up, the onus cast upon him not being satisfied. Then it is alleged that the judgment is signed for too much. If the legal interest is to be calculated at 6% there is a slight error in calculation, and the judgment is for $6.07 too much, but this is for so trivial an amount that I think the proper course is to rectify the judgment to that extent, under the discretion given the Court by R. 319.

But there are other matters for consideration. First, as to the defences set up. These are that the note was an accommodation note and that it is barred by the Statute of Limitations. Both of these must, I think, fail in view of the letter of March 26, 1901, written by the defendant to the plaintiff acknowledging the indebtedness and agreeing to pay it off at the rate of $40 per month, supported as it is by the affidavit of the plaintiff.

There still remains perhaps the most serious point of all, viz.: whether the rate of interest chargeable is 6 or only 5 per cent. If the latter, then admittedly the judgment is for

B. C.

C. A.

McKINNON v. LEWTHWAITE.

Galliher, J.A.

too great an amount, and it is not a mere clerical error in computing interest but the charging of too great a rate of interest.

At the time the note was given the statutory rate of interest was 6%: R.S.C. 1886, ch. 127, sec. 2. This was amended in 1900, 63 & 64 Vict. ch. 29, 1, reducing the statutory rate to 5%, with the proviso that the change should not apply to liabilities existing at the time of the passing of the Act.

And in R.S.C. 1906, ch. 120, (the Interest Act) sec. 2 reads as follows:—

> Except as to liabilities existing immediately before the 7th day of July, 1900, whenever any interest is payable by the agreement of parties or by law and no rate is fixed by such agreement or by law, the rate of interest shall be 5 per cent. per annum.

The difficulty arises over the interpretation to be put upon the word "liabilities." The matter has been before the Courts in Manitoba and Ontario.

In the case of *British Canadian Loan & Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 593, 606, Richards, J., held the view that "liabilities" meant liabilities respecting interest. This view was not followed by the Master in *Plenderleith* v. *Parsons* (1906), 9 O.W.R. 265, but on appeal (1907), 14 O.L.R. 619, Boyd, C., disagreed with the Master and expressed approval of the view taken by Richards, J., while in a later case, *Kerr* v. *Colquhoun* (1911), 18 O.W.R. 174, 2 O.W.N. 521, Middleton, J., while expressing himself as bound by the decision of Boyd, C., in *Plenderleith* v. *Parsons*, *supra*, stated, that but for that decision he should have understood "liability" as referring to the debt and not to the liability as to interest.

I have, with great respect, for contrary opinions, and after full consultation with the Chief Justice, arrived at the same conclusion as he has and for the reasons given by him.

It follows that the appeal must be allowed.

MARTIN and MCPHILLIPS, JJ.A., dissented from the majority judgment.

Martin, J.A.
McPhillips, J.A.

Appeal allowed.

MAN.

C. A.

REAMAN v. CITY OF WINNIPEG.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. June 29, 1914.

1. MUNICIPAL CORPORATIONS (§ II C 2—55) — BY-LAWS; RESOLUTIONS; "QUESTIONS"—VALIDITY—THREE READINGS—ENACTMENT.

A proviso in a city charter that no "question" once decided by the city council shall be reversed without notice from at least one meeting to another, will apply to invalidate a by-law which was given its third reading at the session of its introduction which could only be done on a suspension of the rules of order, when the motion to suspend had carried only after a like motion had been lost, the vote on the lost motion to suspend being upon a "question" within the meaning of the restriction in the charter. (*Per* Richards and Perdue, JJ.A.).

[*Reaman* v. *Winnipeg*, 17 D.L.R. 582, affirmed on an equal division.]

Statement

APPEAL from decision of Macdonald, J., *Reaman* v. *Winnipeg*, 17 D.L.R. 582.

The appeal was dismissed; the Court being equally divided, HOWELL, C.J.M., and CAMERON, J.A., dissenting.

E. Anderson, K.C., for the applicant.

T. A. Hunt, K.C., and *J. Preudhomme*, for the city of Winnipeg.

Howell, C.J.M.

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

Richards, J.A.

RICHARDS, J.A.:—Section 473 of the city charter says the council may make regulations for governing its proceedings. Under that power the council passed by-law 4238, sec. 56 of which says:—

Every by-law shall receive three several readings, and on different days, previous to its being passed, except on urgent and extraordinary occasions, and upon a vote of two-thirds of the members present, when it may be read twice or thrice, or advanced two or more stages in one day.

Sec. 26 of that by-law provides that

No standing rule or order of the council shall be suspended except by a vote of two-thirds of the members present.

Sec. 251 of the city charter says:—

Every disputed question shall be decided by a majority of the votes of the members of the council present, except that in case where, in conformity with the provisions of this Act, another number of votes is required to carry the matter. Provided that no question once decided shall be reversed without notice from at least one meeting to another, and without a majority of the whole council voting in favour of such reversal.

At the council meeting of July 28, 1913, at which the by-law in question passed its first and second readings, a motion to

suspend the rules, to enable it to be read a third time, was put and lost, not receiving the support of two-thirds of the members of the council present. Later on, at the same meeting, on the representation of one of the aldermen that a permit had been applied for to erect an apartment building within the district covered by the by-law, the members were induced to again allow the motion to suspend the rules for the above purpose. The motion carried and the council purported to give the by-law its third reading. The minutes of the meeting do not say how many members of the council voted in favour of this second motion to suspend. As they state that the motion was carried, it must be presumed that at least two-thirds so voted, but it can not be presumed, that the vote was unanimous in favour of the suspension. There was nothing either "urgent" or "extraordinary" about the matter sought to be dealt with. The council could have directed the building inspector to withhold the permit till after their next meeting.

The council did vote and did refuse to suspend the rules. Then, had they power to again, at that meeting, allow such suspension? It seems to me that they had not. The second part of sec. 251 of the charter applies, unless this point can be held to be not a "question" within its meaning. It is argued that it is not because, in any case, the third reading would automatically have come up for decision at the then next meeting of the council without a notice, and that the word "question" as used in sec. 251, is confined to matters that would need such a notice. But the question was not the broad one, whether the by-law should be read a third time. It was, should it be read a third time at that meeting of July 28. So that, when that meeting had ended, a motion at a subsequent meeting to read it at that meeting of July 28 would be an absurdity. It could not be subsequently reversed because of its temporary application, so that the provision as to notice could not apply.

I should read the latter part of sec. 251 to mean that no question once decided could be reversed, provided, however, that, in the case of a decision that from its nature was capable of being reversed at a later meeting, it should not be so dealt with without such notice, etc. I think the by-law has never legally

MAN.

C. A.

REAMAN v. CITY OF WINNIPEG.

Perdue, J.A.

been read a third time, or passed, and that the learned Judge properly quashed it.

I would dismiss the appeal with costs.

PERDUE, J.A.:—This is an application to quash by-law number 8078 of the city of Winnipeg, being a by-law prohibiting the erection of apartment blocks, tenement houses or garages within a certain defined area. The applicant, Mrs. Reaman, is the owner of lots 11 and 12 fronting on Grosvenor Ave., between Wellington Cres. and Lilac St. in the city of Winnipeg. According to her affidavit she purchased these lots for the purpose of erecting an apartment block upon them, and she had plans of the proposed block prepared and submitted to the building inspector of the city on July 25, 1913. On July 28, 1913, the by-law in question was passed, the rules of procedure being suspended and all three readings of the by-law taking place at the one meeting. The area of land affected by the by-law includes the applicant's lots and the effect of the by-law is to prohibit her from erecting an apartment block on her land. She can therefore only use the land as sites for residences and, if the by-law remains in force, she estimates her loss to be $10,000 in the value of the land. This estimate is uncontradicted. It was also shewn that there was an apartment block already erected on the same street within a very short distance of the applicant's land and there were a number of apartment blocks already in existence in the immediate vicinity of the land in question. The by-law after reciting the powers of the city under the Winnipeg Charter and the receipt of a petition signed by three-fifths of the owners of property in the area affected, enacts as follows:—

1. No apartment or tenement houses, and no garages to be used for hire or gain shall be erected on any lot fronting or abutting on both sides of Grosvenor Avenue between Wellington Cres. and Lilac St. in the city of Winnipeg, and that said portion of said Grosvenor Ave., be and the same is hereby declared to be a residential street. Done and passed in council assembled, this 28th day of July, A.D., 1913.

The legislative authority for passing the above by-law is found in 3 Geo. V. ch. 88, sec. 7, amending sec. 703 of the city charter, 1 & 2 Edw. VII. ch. 77. The amendment adds to sec. 703, a sub-section (29*a*) which enables the city to pass by-laws

for prohibiting, regulating and controlling the erection on certain streets or in certain areas of apartment or tenement houses and of garages to be used for hire or gain, the council, before the passing of the by-law, to receive a petition therefor signed by at least three-fifths of the owners of property on such street or in such area. The motion to quash the by-law was allowed by Macdonald, J., upon two grounds: First, That the by-law reads as applying to lots "fronting or abutting on both sides of Grosvenor Avenue between Wellington Cres. and Lilac St.," and that there was no lot within that area answering to that description. Secondly, That the by-law was illegally passed because it received its final readings at the same meeting at which it was introduced, under a suspension of the rules after a motion to suspend the rules had been put and lost at the same meeting.

In regard to the first ground it is clear that the very strictest interpretation should be applied to a by-law of the character of the one under consideration. It derogates from private rights, its intention is to prevent the applicant from using her land for the purpose for which it was acquired, it causes her great loss and it provides no compensation. It is statutory in its effect, and at least as strict principles of construction should be applied as in the case of a statute which interferes with private rights. The authorities as to the strictness of interpretation to be applied to statutes interfering with private rights and private interests are numerous. I need only refer to the collection of cases in Beal's Cardinal Rules, 2nd. ed., pp. 392-396, and particularly to the statement of the rule by Turner, L.J., in *Hughes* v. *Chester & Holyhead R. Co.*, 31 L.J. Ch. 97, at 109. There is the further consideration that,

> it is a proper rule of construction not to construe an Act of parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it: *per* Brett, M.R., in *Atty.-Gen.* v. *Horner*, 14 Q.B.D. 257.

Now, in the area described in the by-law there is no lot, as plainly appears from the plan put in, "fronting or abutting on both sides of Grosvenor Avenue." The by-law only prohibits the erection of an apartment block, etc., upon a lot of that description. This is not a case, in my view, in which the Court

MAN.

C. A.

REAMAN v. CITY OF WINNIPEG.

Perdue, J.A.

should, for the purpose of upholding the by-law, strain the meaning of words deliberately used by the framer of it and say that "fronting on both sides" means "fronting on one side," or simply "fronting on." It may be argued that if the by-law is nugatory or inoperative, then why set it aside? The answer to this argument is that the city authorities will not, so long as the by-law stands, give a building permit for the erection of an apartment block on the applicant's land, and she will be prevented from puting the land to the use she intended. The by-law as it stands is uncertain in its application and is not, as it appears to me, a reasonable exercise of the powers conferred by the statute. While it remains, it interferes with the applicant's rights, causes her great loss and gives no compensation. It cannot be properly said that the by-law in question was passed for the general benefit of the public, or to serve the public health or convenience. It is clear that the by-law was hurriedly passed by the council for the very purpose of preventing the applicant from going on with the construction upon her land of the proposed building. It was in fact passed at the instance of the owners of neighbouring property in deference to a prejudice against apartment blocks.

Dealing with the second ground, it is shewn that the by-law received its three readings at one session of the council. To do so required that a motion should be carried to suspend the rules governing the proceedings of the council. Sec. 56 of by-law 4238 provides as follows:—

> Every by-law shall receive three several readings, and on different days, previous to its being passed, except on urgent and extraordinary occasions, and upon a vote of two-thirds of the members present, when it may be read twice or thrice, or advanced two or more stages in one day.

At the meeting of July 28, at which the by-law was passed, a motion for the suspension of the above rules in order that the by-law might be read a third time was put and lost, five out of fourteen members voting against the suspension. Subsequently at the same meeting a motion to suspend the rule was put and carried. The by-law was then read a third time and passed.

Sec. 251 of the city charter, 1 & 2 Ed. VII. ch. 77, enacts that every disputed question shall be decided by a majority of the

votes of the aldermen present except where otherwise required by the Act, and contains the following proviso:—

Provided that no question once decided shall be reversed without notice from at least one meeting to another, and without a majority of the whole council voting in favour of such reversal.

Counsel for the city argued that the objection was cured by sec. 590 of the charter which declares that,

No proceeding, act, matter or thing, done or purporting to be done under this Act, shall be held invalid for any formal defect or omission.

The objection in question, however, does not appear to me to be a mere matter of formal defect or omission. The question of suspending the rules in order to read the by-law a third time was put and lost and then the positive prohibition contained in sec. 251 applied and prevented that question from being taken up and voted on again at that meeting. It is no mere matter of form; it is a positive statutory enactment that must be obeyed. It is argued that the word "question" in sec. 251 does not include a motion to suspend the rules. I cannot agree with that argument. The word is no doubt used in its parliamentary sense and means "the point under discussion" "the matter to be put to the vote," as in the formula, "are you ready for the question?"

It is also argued that the section could not apply to a motion to suspend the rules at a meeting, because that suspension could only apply during that meeting, and it would be useless to give notice of a motion to reverse it at the next meeting. The answer to that argument appears to me to be this, the question involved not only the suspension of the rule, but also the third reading and passing of the by-law at that meeting. The third reading could not take place without the suspension of the rule and the motion to suspend was for the purpose of, and formed a necessary preliminary of the motion to read the by-law a third time at that meeting. The procedure in question was not mere internal regulation within the council. It seriously affected the applicant, and delay until the next meeting of the council and more mature consideration might have brought about a different result. In any event, the applicant is justified in insisting upon a strict compliance with the law in the passing and putting in force of a by-law which so seriously affects her private rights.

MAN.

C. A.

REAMAN v. CITY OF WINNIPEG.

Perdue, J.A.

MAN.

C. A.

REAMAN v. CITY OF WINNIPEG.

Perdue, J.A.

I think the order made by Macdonald, J., to quash the by-law should be affirmed and that the appeal should be dismissed.

CAMERON, J.A. (dissenting):—Where the language of a statute, in its ordinary meaning and construction, leads to inconvenience, absurdity, hardship or injustice, a construction may be put upon it which modifies its meaning. This may be done, amongst other ways, by giving an unusual meaning to words, by altering their collocation, by rejecting them altogether, by interpolating other words:—

> under the influence of an irresistible conviction, that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections. Maxwell on Statutes, p. 372.

The intention being clear, it must not be reduced to a nullity by a draftsman's ignorance or want of skill. The rule is also stated very clearly in Halsbury, Laws of England, XXVII. 146. I think there can be no doubt whatever as to the intention of the council in this case. The use of the expression "both sides" instead of "either side" was a manifest slip and I can see no great difficulty in reading the by-law with the meaning which it was obviously intended to convey. The authorities cited in Maxwell and Halsbury are numerous and some of them go far. The rule applicable to a statute can readily be applied to a by-law. The point raised by sec. 251 of the city charter is not, to my mind, one of merit. I think the "question" therein referred to means a matter of substance, a by-law or resolution dealing with some matter within the authority of the council. A motion to suspend the rules is not a "question" within the meaning of this section. That is a mere matter of procedure, a matter of domestic economy, and there is nothing to prevent it coming up a dozen times at one meeting. I consider that the by-law was regularly passed. The procedure in this matter by notice of motion was in my view properly taken.

With respect, I think the judgment appealed from must be reversed and the application to set aside the by-law dismissed with costs here and before the Judge who heard the application.

Howell, C.J.M.

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

The Court being equally divided the appeal was dismissed without costs.

Appeal dismissed.

MIGUEZ v. HARRISON.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November, 30, 1914.

1. COSTS (§ II—28)—SCALE—CLASS OF ACTION—DAMAGES—SPECIFIC PERFORMANCE.

A County Court in Manitoba would have no jurisdiction to entertain in the form of a simple action for a money demand an action by a purchaser of lands for damages in lieu of specific performance where the latter relief is beyond the competence of a County Court under the County Courts Act (Man.), and this although the relief of specific performance could not be had in the particular case because the vendor had re-sold the lands to another; therefore a judgment with costs in an action brought in the King's Bench for specific performance of a contract to sell for a price exceeding $500 carries costs on the King's Bench scale, although by reason of the re-sale the plaintiff took only a judgment for $141 damages.

[*Richards* v. *Trottier*, 18 D.L.R. 508, 24 Man. L.R. 473, and *Cornwall* v. *Henson*, [1900] 2 Ch. 298, referred to.]

APPEAL from the order of Galt, J. Statement

The appeal was allowed.

J. L. M. Thomson, for plaintiff, appellant.

A. B. Hudson, for defendant, respondent.

The judgment of the Court was delivered by

CAMERON, J.A.:—This action was brought to enforce specific performance of an agreement whereby the defendants agreed to sell to the plaintiff certain land for the sum of $810 payable as therein mentioned. The action was tried before Mr. Justice Metcalfe, who gave judgment for the plaintiff for $141 damages, but made no order as to costs. The costs were taxed by the taxing officer on the King's Bench scale. From this taxation an appeal was had to Mr. Justice Galt, in whose judgment the facts and pleadings are referred to at length, and the rule (936) of the King's Bench Act, and the section (57*b*) of the County Courts Act which govern the matter in question are set out in full. Cameron, J.A.

The judgment being for $141 damages for breach of the contract sued upon, the learned Judge held that it was a matter within the competence of the County Court and that, therefore, the plaintiff was, under rule 936 of the King's Bench Act, entitled to County Court costs only, with the right to the defendants to set off.

It appears from the pleadings and the judgment of Metcalfe,

MAN.

C. A.

MIGUEZ v. HARRISON.

Cameron, J.A.

J., that the real issue tendered by the defendants was that the agreement sued upon could not be enforced because it had been abandoned by the plaintiff and that that abandonment had been accepted by the defendants. I take it that the judgment of Metcalfe, J., is to the effect that the defendants failed to establish this defence of abandonment and that the plaintiff was entitled to specific performance but that specific performance being impossible, by reason of the defendant's action in disposing of the property, he awarded damages in lieu thereof, and fixed these at the sum of $141, the amount paid by the plaintiff on the agreement which he adopted as the measure of damages.

In the first place, there is no jurisdiction in the County Court to entertain the action for specific performance as brought by the plaintiff. This jurisdiction is expressly excluded by sec. 57(*b*) of the County Courts Act.

Nor can there be jurisdiction to entertain in the County Court an action to declare the cancellation of an agreement on the ground of abandonment, which is in reality the relief claimed by the defendants. There is here no allegation of fraud or misrepresentation and therefore the matter could not in any event come within the jurisdiction of the County Court. Had there been such, the jurisdiction would be restricted to contracts involving a sum not exceeding $500: *Richards* v. *Trottier*, 24 Man. L.R. 473.

In the well known case of *Cornwall* v. *Henson*, [1900] 2 ch. 298, a similar action was brought, the plaintiff asking for specific performance, and damages instead of or in addition to specific performance, or alternatively for damages for breach of contract, or for repayment of the money paid. The defendant having rendered specific performance impossible, he was held liable in damages.

In this present case it seems to me the trial Judge, in effect, found that the defence of an abandonment of the contract had not been established, and that the plaintiff was, therefore, entitled to specific performance. That particular remedy being rendered impossible by the action of the defendants in disposing of the property, he awarded damages against them in lieu thereof, and in ascertaining those damages he took as the

MAN.

C. A.

MIGUEZ v. HARRISON.

Cameron, J. A.

measure of them the amounts paid by the plaintiff on this contract so found to be unenforceable. If the defendants had sought to establish by action the abandonment by the plaintiff of the contract and their acceptance thereof, they would not, and could not, have taken proceedings elsewhere than in the King's Bench.

The fixing of damages in lieu of specific performance is a proceeding authorized by the King's Bench Act, and incidental to a form of action not within the competence of the County Court. The governing fact is that the action which had to be tried to determine the rights of the parties could be entertained in the Court of King's Bench and nowhere else. If the land had not been transferred that point would be clear beyond question. That the appropriate relief could not ultimately be granted does not to my mind affect the status of the case as a case properly triable by the King's Bench. If it had been considered in the County Court, objection to the jurisdiction would have been inevitable. It is impossible to see how a County Court Judge could have proceeded to try the facts here involved without at once being confronted with questions plainly outside his competence. A simple action to recover $141 would not have been triable without examining the question of the plaintiff's right to have the contract performed and the defendant's default in refusing to carry it out. Nor could the defendant's defence be touched upon without raising the question of cancellation of a contract on the ground of abandonment.

With all due deference, therefore, I reach the conclusion that this action is not of the proper competence of the County Court. I would allow the appeal with costs. The order made by Mr. Justice Galt will be set aside with costs.

Appeal allowed.

ROBERT BELL ENGINE v. GAGNE.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown, and Elwood, JJ. July 15, 1914.

1. WITNESSES (§ I A—10)—COMPETENCY OF COUNSEL AS WITNESS.

Counsel may in strictness testify for the party whose case he is conducting, although the practice is highly undesirable.

[*Cobbett* v. *Hudson*, 1 El. & Bl. 11, followed.]

APPEAL from judgment at trial.

Statement

The appeal was allowed.

SASK.

S. C.

ROBERT BELL ENGINE v. GAGNE.

Brown, J.

J. F. Frame, K.C., for appellant.

J. A. Allan, K.C., for respondent.

The judgment of the Court was delivered by

BROWN, J.:—The only question that arises in this appeal is, as to the right of counsel to give evidence on his client's behalf in a case in which he is acting as counsel. Mr. Earle, who was acting as counsel for the plaintiffs at the trial, wished to give evidence on behalf of his clients; and the learned trial Judge refused him that privilege, stating as his reason for doing so:

> Although there may be occasions (as where other counsel cannot be obtained or where counsel has been taken by surprise at the trial) in which the court might allow counsel to give evidence, yet in cases where counsel from the delivery of the statement of defence knew that his evidence was the only evidence on behalf of his client, to allow such counsel to fight for his client to the best of his ability as counsel to the close of the defendant's case and then go into the witness box to swear facts to help his client was not only inimical to the administration of justice but was so calculated to shake the confidence of the public in that administration that it should not merely be discouraged but should not be allowed.

I am in full accord with the remarks of the learned trial Judge to the effect that such a practice should be discouraged, and that counsel should not put themselves in a position where it would be necessary to act in the capacity of counsel and witness in the same case. It is not in the interests of the legal profession that counsel should be required to comment on the evidence given by brother counsel engaged as such in the same action, and moreover, the Bench should not be called upon to discuss with counsel the weight to be attached to evidence offered by the counsel himself. The giving of such evidence must have the effect of preventing a full and free discussion on the part of both counsel and Bench, and to that extent, at least, serves to hamper the proper administration of justice. There is the further feature, which is emphasized by the trial Judge, as it affects the public mind. In this connection, Wigmore, in his work on Evidence (Can. ed., 1905), at p. 2535, § 1911(2), referring to this feature as a ground of objection, says:

> It is concerned with the dangerous effects of the practice upon the public mind. In short, it does not fear that lawyers may as witnesses distort the truth in favour of the client, but it fears that the public will *think* that they may, and that the public's respect for the profession and confidence in it will be effectively diminished. This is at once the most potent and most common reason judicially advanced.

SASK.

S. C.

ROBERT BELL ENGINE v. GAGNE.

Brown, J.

The remarks of Lord Campbell, C.J., in the case of *Cobbett* v. *Hudson*, 1 El. & Bl. 11, 14, might well be here quoted:

> We may hope that, without any positive rule against a party addressing the jury and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up; for it is not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it.

I am of opinion, however, after examining the various and somewhat conflicting authorities on the point, that there is no rule of law or practice which prevents counsel so giving evidence if so disposed. In the case above referred to, the plaintiff, who sued *in forma pauperis*, conducted his cause in person. Lord Campbell, who presided at the trial, instructed the plaintiff that if he addressed the jury as an advocate he could not be permitted to give evidence as a witness. On the appeal Lord Campbell himself, who sat as one of the Judges on appeal, in giving the judgment of the Court said:

> We are of opinion that in this case the rule for a new trial should be made absolute, on the ground that the plaintiff was improperly told that he could not be permitted to address the jury as his own advocate without agreeing to waive his right to be examined as a witness in his own behalf. We are fully aware of the inconvenient consequences which must follow from a party to a suit being alternately during the trial advocate and witness; and we express our strong disapprobation of such a practice. But we cannot say that the Judge at *nisi prius* has at present sufficient authority to prevent it.

Phipson on Evidence, (4th ed., 1907), at p. 420, says:

> Advocates may in strictness, although the practice is highly undesirable, testify either for or against the party whose case they are conducting.

Taylor on Evidence (10th ed.), at p. 997, says:

> All persons who, at *nisi prius*, being engaged in a cause as counsel, solicitor, or parties, had in that capacity actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence, were at one time supposed to be incompetent to give testimony as witnesses in such cause. But it has since been, on further investigation, judicially acknowledged that no such right to reject such a person as a witness exists, although the obvious inconvenience of permitting one and the same person, first, to state the case as an advocate, and next, to prove that statement as a witness, appears to furnish ample justification for its immediate adoption; and it is not only in all cases a most objectionable and reprehensible practice for the solicitor who is conducting a matter to himself also give evidence as a witness in it, but may even, under special circumstances, afford ground for a new trial.

Best, in his work on Evidence (8th ed.), beginning at p. 168,

SASK.

S. C.

ROBERT BELL ENGINE v. GAGNE.

Brown, J.

[11th ed., p. 174] goes into the question very fully, and at p. 171 sets out what in his opinion is the result of judicial decision.

There can be no doubt that to call an advocate in the cause as a witness is most objectionable, and should be avoided whenever possible. But we apprehend that a Judge has no right in point of law to reject him; although, if the Court above were of opinion that, under all the circumstances, any practical mischief had resulted from the reception of such a witness, they might, in their discretion, grant a new trial, if not as a matter of right, at least as matter of judgment.

If this objectionable practice should become at all general, it would be advisable to remedy it by legislation, or perhaps by rule of Court. In the case at bar, it may be that the plaintiffs were prejudiced by the rejection of the proffered evidence, and there should therefore be a new trial.

In the result the appeal should be allowed with costs, a new trial ordered, and the costs of the previous trial should abide the event of the new trial.

Appeal allowed.

ALTA.

S. C.

LANCASTER v. HINDS.

Alberta Supreme Court, Walsh, J. November 28, 1914.

1. EVIDENCE (§ XII—920)—WEIGHT, EFFECT AND SUFFICIENCY—CONFLICTING TESTIMONY—PROBABILITIES—SCALE TURNED BY.

On conflicting tesimony as to the application of a payment by cheque, the court will incline to give credence to the version which appears the more reasonable and probable.

Statement

ACTION on accounts, involving the application of a certain payment by cheque.

Judgment was given for the plaintiff.

Short, Ross, Selwood & Shaw, for the plaintiff.

J. J. Petrie, for the defendants.

Walsh, J.

WALSH, J.:—I have no doubt but that the judgment that I am about to give in this case will not be satisfactory to either of the parties to it. But I do not think that is my fault. These people dealt together for over a year having almost daily transactions which in the aggregate ran up into thousands of dollars. This was all done without the scratch of a pen between them to indicate the terms upon which they were dealing with each other or the conditions of any of their contracts. Most of their contracting was done by themselves so that in a great many instances I have been met simply with the contradictory stories

of the parties. I have not had the benefit, speaking generally, of the assistance of independent evidence in the matter. Neither side has kept anything in the nature of an accurate account of the transactions that have been had between them and under these circumstances I have picked out the truth as best I could from the mass of contradictory and confusing and unsatisfactory oral evidence that is before me. The parties themselves I think will agree that they are to blame for the unsatisfactory condition of their accounts and perhaps will not be so disappointed as they otherwise might be at the result at which I have been obliged to arrive. The defendants admit that the plaintiff sold and delivered to them after November 19, 1913, meat to the value of $2,411.88 and the plaintiff accepts that as being the correct amount of the purchases made by the defendants from him. The only dispute there is with respect to that item is as to whether or not the cheque for $2,500 which defendants issued to plaintiff on November 19, was issued in respect of those purchases. The plaintiff says that the cheque had nothing to do with the purchases made after its date. That is the cheque given by defendants to him he says in settlement of all the transactions which had been had between them up to its date with the exception that plaintiff's pasturage of $400 (four hundred dollars) was not included. Defendants say that they gave this cheque to the plaintiff to enable him to carry through his purchase of the Ellis cattle on the agreement that he would deliver to them meat at 11 cents a pound at their shop in Calgary. I have not the slightest hesitation in accepting the defendants' version as being the correct one. I think not only is the great preponderance of evidence in their favour with regard to this contention, but that the reason and common sense and probability of the situation is all in favour of it. We have the two defendants themselves. We have their salesman Slocum. We have the bank manager all giving evidence corroborative of the story which they put forward. As against that we have the evidence practically of the plaintiff alone with the exception of the attempted corroboration of it by his wife who says that she saw the receipt for $2,500 which her husband brought out from the defendants' store on this 19th day of November, after the

ALTA.
S. C.
LANCASTER
v.
HINDS.
Walsh, J.

settlement was made. I felt a great deal of doubt about the truthfulness of plaintiff's story even when he was telling it, and before the defendants put their version of the transactions before me and it seemed to me a most unreasonable, a most unlikely thing that this man who has no education at all, who cannot read or write even his own name, would have gone in there and in the short time while his wife was waiting outside for him have been able by himself to effect the settlement with Hinds of transactions running into hundreds and perhaps thousands of dollars spreading over a period of fully a year. I do not think it would be possible that that could have been the case and his story standing by itself did not impress me as being a reasonable or probable story. The contention of the defendants is on the other hand a most likely one. Lancaster at the time that this cheque was issued was negotiating for the Ellis cattle. As a matter of fact he had put a deposit on them. He was depending upon the defendants to enable him to complete the purchase and all the dates and all the circumstances combine to lend strength to the story which the defendants tell. I find therefore that the defendants' version of that is correct and instead therefore of the defendants owing the plaintiff $2,411.88 for that meat, the plaintiff owes the defendant $88.12 being the difference between the amount of meat supplied and this sum of $2,500. I think the plaintiff is entitled to recover for the pasture which he sues for. The preponderance of evidence with respect to this claim and the probabilities combine to lead me to the conclusion that his claim in this respect is well founded. His story is corroborated in this respect by his wife and daughter and I cannot see even any good reason why he should have pastured for nothing these cattle which belonged to the defendants. He was not under any obligation to do so. It is unquestioned that he did so and I think the reasonable assumption is that he would be paid for it and the evidence satisfies me that he was to be paid and that the amount was fixed by agreement between the parties at $400. I do not think that the defendants are entitled to $210 which they claim is the value of three head of cattle which they claim plaintiff did not deliver to them. It is the case of oath against oath as far

as this item is concerned. Lancaster says he delivered all the defendants' cattle that were at his place when he was under that contract to slaughter them and Hinds say the number lacked three. The onus is on the defendants to establish this claim and they have not succeeded in doing it, and I dismiss that claim. The item which is giving me the most serious concern of all is the claim of $1,064 the defendants make as being the value of the hides of their cattle which admittedly were not delivered by plaintiff to them. These hides were the property of the defendants and unless some different arrangement was made they were entitled to get them from the plaintiff or failing that to get their value. The plaintiff's story is that the cattle of the defendants which were pastured on his place were suffering, at least they required to be fed, required something more than the pasture that they were grazing on and that under agreement between him and the defendants he fed these cattle hay and green feed under the arrangement that he was to be entitled to retain as compensation or remuneration for that, these hides. I think there is no question on the evidence but that the plaintiff did feed the defendants' cattle. The evidence of himself and his daughter, the entries which were made by her, satisfy me that considerable quantities of hay and green feed were fed by plaintiff to the cattle of the defendants. The plaintiff was under no obligation to do this. I cannot conceive why he should have done it unless under some such arrangement as that which he put forward. He sold the hides and he did so with the knowledge of the defendants. They knew that he was bringing the hides into Calgary, getting the money, and keeping the money. They do not appear to have asked him to account for it. They had the means in their own hands to keep the payment of the value of these hides out of his money if they thought they were entitled to it and they did not do it. The fact that these cattle were fed by plaintiff and the course of conduct adopted by the defendants in their dealing with plaintiff with respect to these hides suggests to my mind that the agreement which plaintiff alleges was the agreement was as a matter of fact made between them, that he was to be entitled to the hides in return for the feeding of the cattle and I so find. That

ALTA.
S. C.
LANCASTER
v.
HINDS.
Walsh, J.

being the case, defendants are not entitled to recover this sum or any sum in respect of that. Defendants are, in my judgment, entitled to the sum of $122.19 being the balance unexpended of the sum of $200 which they gave the plaintiff to purchase these chickens and turkeys. He admitted that he only delivered them $77.81 worth of poultry and I think he is liable to them for the balance of $122.19. He says that he put that amount to his credit in the bank at Cochrane and used it for subsequent purchases of cattle for the defendants which he bought for them, but he fails to satisfy me this is the case and defendants are entitled to credit for that item. I think plaintiff is liable for $12.70, the value of the scales. I do not think defendants are entitled to recover $19.05, one of the items in paragraph 4 in the counterclaim; this is a case of oath against oath. Hinds says these things were delivered and plaintiff says they were not. The item of $15 is admitted and defendants are entitled to credit for that. I do not think they are entitled to credit for the sum of $65 being the amount claimed for two veals. Plaintiff says these carcasses were in good condition when he left them there and defendants' witness Slocum tells a story which sounds most unlikely. He says that when Lancaster was unloading these carcasses at the shop he told him that they were not good and says that he, Slocum, noticed that they were not good and he says, notwithstanding the statement of the plaintiff and his own knowledge of the fact that the veal was not good, they were taken in and bought and paid for. I cannot conceive it possible that men engaged in the butcher business would buy animals which the statement of the vendor told them were rotten and that they paid out their good money for them. There does not seem to have been any attempt at all on the part of the defendants to get back the sum of $65 which they paid for these carcasses. They could easily have kept that amount out of the subsequent sums, out of the sums which subsequently they became indebted to plaintiff in respect of, and they do not seem to have made the slightest attempt to do it and I say that they are not entitled to credit for that amount. The outcome of this protracted litigation is that the plaintiff is entitled to recover $400 for the pasture. The defendants are entitled to re-

ALTA.
S. C.
LANCASTER v. HINDS.
Walsh, J.

cover $238.01 being the aggregate of the items which I have allowed. These amounts which defendants are entitled to credit on are more matters of a setoff than counterclaim and they should be deducted from $400 found owing to the plaintiff, and therefore judgment will be entered for the plaintiff for $161.99 with costs. That will be such costs as that amount of judgment will entitle plaintiff to: whatever rules cover such costs on taxation will be applied at the taxation of these costs. I do not think plaintiff is entitled to costs of the witness fees for his witnesses Copethorn, Nichols, and Patterson. They were all called on a branch of the case on which plaintiff has failed.

Judgment for plaintiff.

TESSIER v. LESSARD.

ALTA.
S. C.

Alberta Supreme Court, Scott, Stuart, Simmons and Walsh, JJ. October 21, 1914.

1. ELECTIONS (§ IV—91*a*) — CONTESTS—JURISDICTION — PRELIMINARY OBJECTION—STATUS OF PETITIONER.

The mere change of name of the electoral district in which a petitioner resides on the creation of a new electoral district, including his place of residence, does not deprive the petitioner of his status as such in the new district although by reason of the election being held within 3 months after the creation of the new district the three months' prior residence necessary under sec. 104 of the Elections Act (Alta.), 1909, ch. 3, to qualify as an elector is made up partly of time in which the territory was part of the former district.

2. ELECTIONS (§ IV—91*a*)—CONTESTS — JURISDICTION — DEPOSIT FOR COSTS — ADVANCED BY ANOTHER THAN THE PETITIONER.

That the deposit for costs on an election petition under the Controverted Elections Act, Alta., 1907, sec. 5, was not the petitioner's own money, but was supplied by another person for the purposes of the petition does not constitute a valid preliminary objection.

3. ELECTIONS (§ IV—91*a*) — CONTESTS — JURISDICTION — SERVICE — "COPY OF PETITION" MINUS ONE PAGE—EFFECT—REMEDY.

It is a good preliminary objection to an election petition under the Controverted Elections Act, Alta., 1907, ch. 2, to shew that the "copy of petition" served was defective because of an entire page having been omitted from the alleged copy; the defect is not curable under sec. 18 of the Act which makes the Judicature Ordinance applicable in certain contingencies and an amendment is not permissible; but, *semble*, the petitioner might have applied under sec. 7 of the Act for an extension of time within which to make a fresh service.

Statement

APPEAL from the decision of Beck, J., setting aside an election petition.

The appeal was dismissed.

Frank Ford, K.C., and *C. H. Grant*, for the petitioner, appellant.

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

ALTA.

S. C.

TESSIER v. LESSARD.

Simmons, J.

The judgment of the Court was delivered by

SIMMONS, J.:—This is an appeal from the decision of Beck, J., setting aside a petition against the return of the respondent Lessard as a member of the Legislative Assembly upon a preliminary objection pursuant to the Controverted Elections Act, ch. 1907, Alberta. Sec. 10 of said Act provides that the respondent may at any time within twenty days after service of the petition apply to the Judge to set such petition aside on the following grounds, among others:

1. That the petitioner is not qualified to file a petition. 2. That the deposit has not been made as provided in sec. 5 of the Act. 3. That service of a copy of such petition has not been made on him as herein prescribed.

The respondent sets up each of these as a ground for setting aside the petition. The judgment appealed from dealt only with the last of these and found that service of a copy of the petition had not been made upon the respondent as required by the Act and set aside the petition.

The first objection, namely, that the petitioner was not qualified is purely technical and does not arise out of an act or omission of the petitioner. Just prior to the election in question on March 20, 1913, ch. 2 of Alberta, 1913, created the Electoral Division of St. Paul. Sec. 104 of the Elections Act, ch. 3, Alberta, 1909, provides that the elector must reside in the electoral division for three months immediately preceding the election; and as the writ for the election issued the next day after the coming into force of ch. 2 Alberta, 1913, the place of residence of the elector was not designated as the electoral district of St. Paul during the preceding three months. It is obvious that if this objection were tenable that no valid election was held as there could not be any qualified electors in the said constituency, sec. 2, sub-sec. 10 of ch. 3, 1909, enacts that

"*Electoral Division*" means a place or territorial area in Alberta entitled to return a member to serve in the Legislative Assembly of Alberta.

It is not disputed that three months before the election the petitioner did then reside in the territory which by virtue of the Act of 1913 received the designation of the Electoral district of St. Paul. It is quite evident that three months prior to the election the petitioner was residing in *the place* or *territorial area* which by virtue of the Act of 1913 became entitled to return a

member, and the mere change in the designation of the "place or territorial area" or any part thereof did not have the effect of depriving the petitioner of his status of a resident in said district.

Sec. 5 of the Controverted Elections Act provides that the petitioner at the time he files the petition shall deposit with the clerk of the Court the sum of $500 as security for the respondents costs. The petitioner admitted upon examination that the $500 deposited by him was not his own money but was given to him by one Garneau for the purpose of making the deposit. It is suggested that we should read into this section an apparent intention of the legislature that the petitioner must be a man of substance and not a straw man put forward by the *de facto* petitioner who advances the deposit. There is no disclosure of any such purpose in the plain reading of the section. The manifest and only purpose was security for the respondents costs. Objection was raised on the grounds of champerty and maintenance, but without expressing any view as to whether this ground might be raised at the trial it is clear that sec. 10 does not afford any ground for setting it up as a preliminary objection.

Very important questions of both law and fact have to be dealt with under the third head. The respondent's evidence is to the effect that immediately upon receiving what purported to be a copy of the petition he took the same to his solicitor, Sydney Woods, Esq., K.C., who compared it with the original and found that page 5 of the copy was missing. A portion of pars. 7 and 11 and the whole of pars. 8, 9 and 10 of the original were absent from the copy. Walter Marshall the sheriff's bailiff who made the service upon the respondent, says: "I read over the original and the copy and so far as I could judge with the eye there was no difference," and further, "I read them both through and compared the number of paragraphs of the original as far as I could remember," and in answer to the question, "Were the two the same," replied "As far as I could see." Mr. Lessard was quite positive that he held the document in his hand when served and immediately took it to Mr. Woods' office and Mr. Woods discovered the absence of the missing pages.

Counsel for the petitioner did not cross-examine Mr. Lessard, whereupon Mr. Biggar, counsel for the respondent, made the

ALTA.
S. C.
TESSIER
v.
LESSARD.
Simmons, J.

statement that Mr. Woods was away but that he would give evidence as to the condition of the document. Counsel for the petitioner observed that he did not intend to suggest that Mr. Lessard fabricated. It is obvious that an objection arising out of circumstances such as arose in this case require careful scrutiny because a dishonest respondent could mutilate the copy served upon him and then raise the preliminary objection that he had not been served with a true copy.

The learned trial Judge accepted the statement of Mr. Lessard which indeed was not questioned by counsel for the petitioner and under the circumstances the facts as found by the Judge should not be disturbed. As to the legal result although an amendment was asked for it does not appear that the trial Judge had any authority to grant it.

In *Re Centre Bruce Election*, 4 O.L.R. 263, the material part of the copy was intact but by an error on the part of a clerk a pen was run through the last clause of the copy which contained only the formal prayer of the petition and Mr. Justice Osler held that the objection was a purely formal one to which by R. LX. no effect ought to be given and ordered an amendment of the copy. R. LX. which is the Imperial rule pursuant to the Parliamentary Elections Act 1868, then applicable in Ontario provided that no proceedings should be defeated by any formal objection. We have no analagous rule, but sec. 18 of the Controverted Elections Act, ch. 2 of 1907, Alberta, provides that

> The said petition and all proceedings thereunder shall be deemed to be a cause in the court in which the said petition is filed, and all the provisions of the Judicature Ordinance . . . in so far as they are applicable and not inconsistent with the provisions of this Act shall be applicable, etc.

The statute having set out in detail the requirements for making service the provisions of the Judicature Ordinance as to amendment can not be made applicable, and the amendment was properly refused. *Lisgar Election Case* (1891), 20 Can. S.C.R. 1; *Burrard Election Case* (1901), 31 Can. S.C.R. 459.

The trial Judge having found in effect that service of a copy of the petition had not been made upon the respondent the petitioner might perhaps have applied under sec. 7 of the Act for an extension of time in which to make service but no such application was made. I would therefore dismiss the appeal with costs.

Appeal dismissed.

McDOUGALL v. PENTICTON.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. November 3, 1914.

1. ACTION (§ I B—5)—PREMATURE; CONDITIONS PRECEDENT—ENGINEER'S DECISION "TO PREVENT ALL DISPUTES AND LITIGATION"—EFFECT.

Where the contractor undertakes construction work for a municipality under terms by which the municipality is to supply the material necessary to carry on that work continuously thus forming together the entire undertaking, and the contract contains a clause whereby "to prevent all disputes and litigation" both parties agree that the engineer shall in all cases determine all questions in relation to the work and construction thereof and that his decision shall be a condition precedent to the commencement of any action by the contractor to recover any moneys under the contract or "any damages on account of any illegal breach thereof," an action by the contractor for damages for alleged delay of the municipality in supplying materials is premature and cannot be maintained where there has been no decision of the engineer and the latter's capacity as an arbitrator is not impugned.

[*McDougall* v. *Penticton*, 16 D.L.R. 436, reversed; *Hickman* v. *Roberts*, [1913] A.C. 229, *Bristol* v. *Aird*, [1913] A.C. 241, *Cameron* v. *Cuddy*, 13 D.L.R. 757, distinguished; *Walkley* v. *Victoria*, 7 B.C.R. 481, referred to; see also annotation on engineers' decisions under construction contracts, 16 D.L.R. 441.]

Statement

APPEAL from the Supreme Court of British Columbia, Macdonald, J., 16 D.L.R. 436.

The appeal was allowed, MACDONALD, C.J.A., and IRVING, J.A., dissenting.

S. S. Taylor, K.C., for appellants (defendants).

M. A. Macdonald, for respondents (plaintiffs).

Martin, J.A.

MARTIN, J.A.:—This is an action against a municipal corporation by a firm of contractors for damages because of losses incurred in the performance of the contract alleged to be due to the delay of the corporation in supplying a large amount of materials thereunder.

As a first and complete answer to the action the defendant sets up the following clause in the contract:—

ENGINEER THE REFEREE.—To prevent all disputes and litigation it is agreed, by and between the parties to this contract, that the engineer shall in all cases determine all questions in relation to the work and construction thereof; and he shall in all cases decide every question which may arise relative to the execution of the work under this contract, on the part of the contractor, and his estimate and decision shall be final and conclusive upon said contractor, and such estimate and decision in case any question shall arise, shall be a condition precedent to the right of the contractor to receive any money under the contract, and a condition precedent to the commencement of any action by the said contractor

B. C.

C. A.

McDOUGALL v. PENTICTON.

Martin, J.A.

to recover any moneys under this contract, or any damages on account of any illegal breach thereof.

And alleges that there has been no "determination" or "estimate and decision" by the engineer of this question of a claim for damages arising out of the contract and therefore this action is premature and must be dismissed. It is admitted that there has been no such decision but it is first submitted that the clause does not cover the present claim for damages and therefore is no bar to these proceedings. I am unable to take this view. The clause provides for several subject matters. It first deals with the power of the engineer to "determine all questions in relation to the work and construction thereof" without limitation, of which delay would clearly be one, irrespective of whom it was caused by, because it must be remembered that the "work" in relation to which all questions are to be determined by the referee is the whole undertaking, which is the subject matter of the contract, viz., the water works system. Under that contract there are reciprocal obligations, the municipality being bound to supply a large and valuable amount of material for "the construction of the work" (to use the very words of the preceding clause) according to specifications and the supplying of the balance of the materials and the doing of all the "work" (i.e., labour, manual and professional) upon the said work (undertaking) is the duty of the contractor. Clause 116 of the specifications shews what material the municipality was to supply and provides for the class of delays in so supplying that it is to be liable for to the contractor as damages, and for an extension of time to meet such an event. This is a vital matter in the contract to all concerned because by the preceding clause 115 the contractors are obligated to commence work on the ground within ten days "and to proceed therewith vigorously and continuously until completion." Once the true situation is grasped, can it for a moment be seriously contended that in such circumstances the contemplated delay and damage thus provided for, are not "questions in relation to the work and the construction thereof" which, "to prevent all disputes and litigation . . . it is agreed" shall be determined by the referee? I think not. This is not the case of a contractor

undertaking to supply all materials and work in constructing a water system, with the sole obligation of the other party of paying for it upon completion, and therefore any loss or damage for delay being only caused by the contractor; quite the reverse: the loss or damage herein could arise just as easily from the delay of the other party who took an active part in the performance of the contract, as the event, it is alleged proved.

Then the clause goes on to direct that "the engineer shall in all cases decide every question which may arise relative to the execution of the work under this contract on the part of the contractor" only. Then there is the general clause applicable to all claims, providing not only that the contractor must obtain such estimate and decision as a condition precedent to his right "to receive any money under the contract" but also that it shall be "a condition precedent to the commencement of any action by the said contractor to recover any moneys under this contract or any damages on account of any illegal breach thereof." This apt and comprehensive language clearly, to my mind relates to and covers the case of all the questions in relation to the "work" already referred to, and justifies the view that it was the intention to leave just such claims as the present to the decision of the engineer in order "to prevent all disputes and litigation" as the clause declares its object to be in its opening words. It should also be remembered that the plaintiffs themselves considered this clause covered their present claim for damages because they invoked it to obtain a decision in their favour in the manner hereinafter considered, and though this would not of itself decide the point against them, yet it is late in the day for them to say now that the clause does not contemplate something which they said it did contemplate when they invoked it: their actions shew what they considered the intention of the clause to be when they agreed to its being put in the contract.

To escape from this position the plaintiffs take the ground that they did, by their letter of the November 15, 1912, ask the engineer, under said clause, and, after recital thereof, for a determination of their claim for damages caused by "failing to furnish said material as required" and offering to afterward

B. C.

C. A.

McDOUGALL v. PENTICTON.

Martin, J.A.

"submit evidence touching the matters in question to enable you to fully determine the matters at issue," and calling upon the engineer to "make a finding of the amount due them for breach of said condition to supply material when required . . . etc." If this demand for a determination of the questions had stopped there no difficulty could have been experienced but it went on to make the following remarkable and illegal stipulation (which was also in part made in *Scott* v. *Corp. of Liverpool* (1858), 1 Giff. 216, 230), of which I shall speak later:—

> The undersigned, therefore, are willing and hereby express their willingness as aforesaid to have you adjudicate upon and make a finding on the questions at issue above referred to, and to accept your decision thereon if the same is just and reasonable, and to that end formally make this application to you. This application is made without prejudice to any legal rights of the undersigned under said agreement of the 21st of July, 1911.

In answer to this demand the engineer, Latimer, by his letter of December 2, 1912, after reciting said clause, fixed "a hearing" of the said claim thereunder at his office at Penticton, the site of the works, for December 16, but at the request of the claimants it was adjourned by the engineer to January 10, 1913, to suit their convenience. The plaintiffs' solicitors in their letter of December 6, 1912 to the defendants' solicitor, asking for said adjournment to January 10, say as follows, after referring to the notice to the engineer to "deal with the claim":—

> There is no need, to our mind, so far as the appearance before Mr. Latimer on the 10th prox. with evidence, etc., is concerned, of having any formal submission to arbitration prepared, as it is not an arbitration in its true sense. Mr. McDougall and his witnesses will appear on the 10th January and submit their evidence and await the finding of Mr. Latimer, after which they will take such action as may seem advisable to them by way of either accepting his finding or taking further action in the Courts, after compliance with this condition precedent to such action.

When the hearing was opened the said notice of November 15, was read and, as might have been expected, difficulty immediately arose, McDougall flatly taking the position that he would not abide by the decision of the engineer, saying "we have no right to submit to you as sole arbitrator" (A.B. 941). The defendants' solicitor very properly objected (A.B. 942) to going on under a notice which repudiated the finality of the hearing or determination and sought to fetter the jurisdiction

of the referee. To go on subject to a condition which gave one party to the dispute the power to decide whether or no the referee's decision was "just and reasonable" was a preposterous and impossible position to place either the referee or the other party in, and to agree to it and proceed in such circumstances would have been dangerous. The embarrassing situation was further heightened by the formal notification that the proceedings invoked by the plaintiffs were to be "without prejudice to any other legal rights." McDougall persisted in his unjustifiable and unfair contention saying that the notice had been drawn up by his solicitors (A.B. 943-44) and that "Mr. Russell is quite good enough for our expenses if he has not made the notice correct. We are acting on our legal instructions here." Also—

> I say that this notice is in order and I am prepared to proceed, and if you are not prepared there can be nothing done. This letter of Russell's to you on our behalf is what I am going to go on, and it is only under that I am going.

The engineer decided that he could not proceed under that notice and after further discussion, in the course of which the defendants' solicitor asked for a new notice to be given (which was really not necessary if the objectionable features of the existing one had been withdrawn), McDougall finally said, according to the accepted minutes of the meeting:—

> We are not going to alter that notice, and you have agreed under the contract to hear us on our claim and if you have a mind to, give us a decision of it.
>
> *Mr. Latimer*: Not in the present instance.

I take this to mean, clearly, not in the way the matter was then present before him, and there can be no doubt that he was perfectly right in so deciding.

Though it does not appear in the report of the proceedings it appears by the evidence that after this decision there was an interval of a few minutes in which there was a consultation between certain of the plaintiffs as to their position, after which this occurred, according to the minutes:—

> *Mr. McDougall*: You have ruled against us on our notice and we would ask you to proceed under the contract.
>
> *Mr. Latimer*: I have no power to go on except under that clause.

The minutes end here, and it is admitted that after that

B. C.

C. A.

McDOUGALL v. PENTICTON.

Martin, J.A.

nothing further was done on the hearing. McDougall explains it in his evidence thus:—

> Q. Then what happened? A. We just stayed. In a few minutes Mr. Gahan and the council left. Mr. Gahan bundled up his papers, and started to go out. I think he was the only one out of the door. My two boys sat still. I was there that day in town, and could not get away until the next morning. I was at the door, and my boys were inside. When the proceedings terminated we all began to scatter.

It is most unfortunate for the plaintiffs that they did not realize and define their position clearly and call their witnesses and submit their evidence in support of their claim as they said they would do in their solicitors' letter already quoted, because the onus was on them to establish the claim they had set up. There was no necessity on the part of the engineer to hear them. He had been placed in a very unfair and embarrassing position and hardly knew where he stood; but to the last he rightly took the ground that he would hear the claimants under one clause and one clause only viz.: the one they had invoked and which he had consented to sit under which conferred upon him the duty and right of making a sole and final adjudication of the claim, and unfettered by any unlawful curtailment of his jurisdiction which the claimants sought to impose upon him. Though McDougall finally said to him, "you have ruled against us on our notice," he even then did not withdraw his illegal conditions, but simply recited the fact of the adverse ruling, without saying that he accepted it, thereby still keeping a card up his sleeve in case the hearing went against him. Then he proceeded to say "And we would ask you to proceed under the contract." What does he mean by that general request? His claim had been launched under a specific clause and the engineer was sitting to hear it under that clause, so he made as safe and reasonable a reply as any much badgered and harrassed layman could have been expected to make in the circumstances—"I have no power to go on except under that clause." In other words "I have power under the clause you have invoked, and will sit under it alone and hear you if you wish." But the plaintiffs sat still and did nothing to support their claim before this their chosen tribunal and obtain the necessary decision in their favour, and by that default they put themselves out of Court under their

own contract and have lost their right to maintain this action, as matters now stand, whatever other rights they may have, if any. I find it impossible to say that the referee refused to do his duty. On the contrary, I think on the evidence he acted like a careful and conscientious man who in a trying position was anxious to do his duty between all parties, and if the proceedings that the plaintiffs instituted proved abortive that unfortunate result was brought about by their own equivocal conduct.

Out of deference to the learned trial Judge I briefly notice his reasons for not giving effect to this defence, which, in the view I take of it, renders it unnecessary to consider the others set up. He gets over it by finding that the engineer "by his course of action and surrounding circumstances placed himself in such a position that his independence was destroyed and he was no longer a free agent." It was, however, admitted before us that there was no evidence to support that finding, so the cases relied upon by the learned Judge have no application. They are both decisions of the House of Lords, the first of them, *Hickman* v. *Roberts*, [1913] A.C. 229, 82 L.J.K.B. 678; 2 Hudson (4th ed.) 426, being a case wherein the Lord Chancellor adopted the view of Fletcher Moulton, L.J., that the architect had so conducted himself that

he is no longer fit to be a Judge because he had been acting in the interests of one of the parties and by their direction. That taints the whole of his acts and makes them invalid, whatever subsequent matter his decision is directed to.

And Lord Shaw said that

the certificate was wrongly withheld on account of the submission of the arbitrators' judgment to the judgment of the proprietors the latter preventing the issue of that document.

The second case is *Bristol Corporation* v. *Aird*, [1913] A.C. 241, 82 L.J.K.B. 684, wherein a motion to stay an action so that the differences might be submitted to the adjudication of an engineer as provided by the contract was refused because the engineer would be placed in the position of both Judge and witness, and as Lord Parker, at p. 695 put it (in considering some circumstances wherein the Court will exercise its discretion) on the facts before the Court it appeared that there would be

a probable conflict of evidence on matters as to which the arbitrator him-

B. C.

C. A.

McDOUGALL v. PENTICTON.

Martin, J.A.

self will, in the normal course, be the principal witness on one side. In such a case it might lead to a miscarriage of justice if the arbitration were allowed to proceed, and one of the parties were in consequence deprived of the chance of testing the truth by means of cross-examination, or if the arbitrator had to determine whether he had himself done anything by which one of the parties might be estopped from raising any particular point.

It is unnecessary to note any other authority, except that of *Walkley* v. *City of Victoria* (1900), 7 B.C.R. 481, where I collected the principal ones up to that date, and later ones are to be found cited in Hudson (1914), 4th ed. vol 1, pp. 402 *et seq.*: 756, observing only that in the House of Lords cases above cited the engineer or architect who has been heretofore generally styled a *quasi* arbitrator is referred to as "arbitrator." The attitude that the Courts should adopt in considering clauses of this sort is thus laid down by Lord Moulon in the *Bristol* case:—

> It must consider all the circumstances of the case; but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties, though at the same time with a vigilance to see that it is not driving either of the parties to a tribunal where they will not get substantial justice.

It follows that the appeal should be allowed and the action dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I must confess that I experience no little difficulty in coming to a conclusion in interpreting the clause of the contract under the heading "Engineer the Referee" at p. 781, A.B.

This clause is as follows:—

> To prevent all disputes and litigation it is agreed, by and between the parties to this contract, that the engineer shall in all cases determine all questions in relation to the work and the construction thereof; and he shall in all cases decide every question which may arise relative to the execution of the work under this contract, on the part of the contractor, and his estimate and decision shall be final and conclusive upon said contractor, and such estimate and decision in case any question shall arise shall be a condition precedent to the right of the contractor, to receive any money under this contract, and a condition precedent to the commencement of any action by the contractor to recover any moneys under this contract, or any damages on account of any alleged breach thereof.

In view of the fact that certain materials had to be supplied by the defendants so as to enable the plaintiffs to continuously carry on the contract (see section 116, A.B. 807), I think the word "work" where it first occurs in the above quoted clause

must be taken to mean "undertaking," and there is nothing as I view it in what follows in that clause to change that character.

We have then a contract in which the parties agree the one to do the work and the other to supply the material necessary to carry on that work continuously, thus forming together the entire undertaking, and the parties in specific words agree to refer to the engineer for his determination all questions in relation to the work (undertaking) and the construction thereof.

In addition to the cases cited to us at the hearing, I find another case: *Lawson* v. *Wallasey Local Board* (1882), 52 L.J.Q.B. 302, 11 Q.B.D. 229, and if I read that case aright, had the circumstances there been as in the case at bar the contention of the defendants there which is the contention of the appellants here, viz.: that the claim for damages caused by delay would be a difference concerning a matter in connection with the contract, and therefore a matter for the decision of the engineer, would have been upheld. Denman, J., who delivered the judgment of the Court, points out at p. 308, that the dispute regarding the removal of certain staging in a river within a reasonable time was not part of the original contract but was one which arose out of a breach of an implied contract which was not part of or necessarily connected with the contract under seal. Here the breach complained of is one directly provided for in the contract.

Unless it can be said that the engineer has refused to arbitrate upon the difference between the parties (or it can be shewn that he is not a fit and proper person to do so, with which I shall presently deal) the appeal must be allowed. As to the refusal to arbitrate, I take the same view as my brother Martin and for the same reasons. As to whether the engineer is a proper person to act I see no reason why he cannot bring to bear upon the matter an unprejudiced mind.

He has done nothing which should disqualify him or render him unfit, as was the case in *Hickman* v. *Roberts*, [1913] A.C. 229, 82 L.J.K.B. 678, nor will he be placed in the position of judge and witness, which was the case in *Bristol Corpn.* v. *Aird*, [1913] A.C. 241, 82 L.J.K.B. 684.

B. C.

C. A.

McDOUGALL v. PENTICTON.

McPhillips, J.A.

McPHILLIPS, J.A.:—I am of the same opinion as my brother Martin. I think possibly if this case had been launched and tried as *Bush* v. *Trustees of Whitehaven* (1888), 52 J.P. 392, and the trial Judge had held as the jury did in that case the plaintiffs might have been entitled to succeed notwithstanding the conditions of the contract with respect to delay and submission—the headnote of the case at p. 392, reads as follows:—

Where a contract is made with reference to certain anticipated circumstances, and when it becomes wholly inapplicable or impossible of application to any such circumstances, without any default on the part of the plaintiff, it ceases to have any application: it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made.

B. contracted with W., (a water company) in the month of June, to lay a certain conduit pipe, and W. agreed to be ready at all times to give B. possession of the sites, to enable him to proceed with the construction of the works. By means of W.'s delay in giving possession of portions of the sites to B., B. was thrown into the winter months, when wages were higher and the works were more difficult to construct.

Held, that a summer contract having, by implication, been in the contemplation of the parties when the contract was made, B. was entitled to a *quantum meruit*, or damages in respect of the increased expenditure which he was thereby compelled to incur.

Jackson v. *The Union Marine Insurance Co.*, L.R. 8 C.P. 572, followed.

The present case though is one brought for breach of a contract treated throughout as subsisting—not put at an end—and the plaintiff is claiming damages for breach of contract on the ground of delays on the part of the defendant—the municipality—in furnishing materials which it was called upon to furnish by reason of the provisions of the contract and specifications. In the general clauses of the specifications the following provisions are found:—

115. The contractor shall commence the work herein contracted for to be done on the ground within ten days from the date of the award of this contract and to proceed therewith vigorously and continuously until completion.

116. It being understood and agreed that the parties of the first part are to supply the necessary pipe, hydrants, valves herein specified from time to time as required, so as to enable the parties of the second part to proceed continuously and that in the event of the parties of the first part being unable through any delays not caused by them or by their negligence, to deliver the said material or any part thereof as required by the parties of the second part, the parties of the first part are not to be held responsible or in any way liable for any loss or damage occurring to the parties of the second part thereby. In case of delay in delivering material

as aforesaid by the parties of the first part, an extension of time for completion of this contract equal to the time of such delay shall be allowed the contractor.

117. The whole work covered by this contract shall be completed and ready for use in every respect on or before the 31st of January, 1912, except as above provided for.

STIPULATED DAMAGES.

139. If the contractor fails to fully and entirely complete and finish the work in conformity to the terms and provisions of these specifications within the time herein before specified, he shall pay to the municipality of Penticton, B.C., the sum of thirty dollars ($30.00) for each and every day thereafter, including Sundays and holidays, that the finishing of the contract is delayed, which sum shall be construed as stipulated and liquidated damages and not as a penalty, and shall be deducted from the amount due by the terms of the contract, provided, however, that in the case of justifiable delay the Municipal Council shall have the right to extend the time for the completion of the said work, with or without the remission of the above-mentioned sum as agreed upon as stipulated and liquidated damages during the time of the said extension, but no extension of time for any reason beyond the time fixed therein for the completion of the work nor the doing of any part of the work called for by this contract, shall be deemed to be a waiver by the said Municipal Council to the right to abrogate this contract for abandonment or delay. And if the contractor shall fully complete the same before the time specified he shall receive an extra or additional payment of fifteen dollars ($15.00) for each and every day that this work is so finished before the time specified.

It will be seen that the question of possible delays were contemplated and dealt with in paragraph 116.

In referring to the contract in *Bush* v. *Whitehaven Trustees*, 52 J.P. 392, Lord Coleridge, C.J., at 393, said:—

> The contract is one substantially in terms common enough whereby the contractor is bound hand and foot to the other party and their engineer . . . Hence, the time may be extended under the authority of the engineer the effect of which would be to relieve the contractor of the penalty. In the first place it seems to me that the construction put upon the contract of the defendants is in a high degree oppressive because it is manifest that the delay being occasioned apart from corruption or *mala fides*, the only power under the contract is to relieve the plaintiff from a thing which he could never do. Nevertheless, the terms of the contract may be so plain that the plaintiff must be held to them.

Bush v. *Whitehaven Trustees*, *supra*, went to the Court of Appeal, and Lord Esher, M.R.—see Hudson on Building Contracts, 4th ed. (1914)—at p. 132, said:—

> If the first contract was gone, if the state of circumstances with regard to which it was made were really no longer in existence as between the

B. C.

C. A.

McDOUGALL v. PENTICTON.

M. Phillips, J.A.

parties, if the one did work for the other upon the new state of circumstances which the other accepted, knowing that it was being done on the terms of being paid for, that gives rise to a *quantum meruit*.

Lindley, L.J., at p. 133, said:—

I am of the same opinion . . . Now, the real difficulty in point of law arises from this, that the 11th and 22nd conditions of this contract shew that the parties had before their minds the contingency of delay, and of delay on the part of the defendants, in getting possession and giving possession to the contractor of the lands or parts of the lands over which he had to put his pipes, and they provided for delay. There is no stipulation as to how long the delay should be. The words are loose and general, but at the same time it is quite obvious that there must be some limit, and the jury have found here that the delay was so great as not to be fairly within the terms of the contract at all; that is to say, that the delay was so great that the contract cannot apply to the state of things to which the contractor and the defendants had imagined that it did. I think that the case of *Jackson* v. *Union Marine Insurance Company* (8 C.P. 572; 10 C.P. 125) does apply, and that the decision of the Divisional Court must be affirmed.

Now the present case must be looked at quite differently and whilst it has been very ably argued by counsel on behalf of the plaintiff that the judgment of the learned trial Judge is right and can be supported—it has been no less ably argued by counsel on behalf of the defendant that under the terms of the contract no damages are claimable based upon delay in the delivery of materials, but if it should be that the plaintiff has any claim requiring determination same is covered by the submission clause in the contract which reads as follows:—

Engineer the referee.—To prevent all disputes and litigation it is agreed, by and between the parties of this contract, that the engineer shall in all cases determine all questions in relation to the work and the construction thereof; and he shall in all cases decide every question which may arise relative to the execution of the work under this contract on the part of the contractor. And his estimate and decision shall be final and conclusive upon said contractor, and such estimate and decision in case any question shall arise, shall be a condition precedent to the right of the contractor, to receive any money under this contract, and a condition precedent to the commencement of any action by the contractor to recover any moneys under this contract, or any damages on account of any illegal breach thereof.

If this contention so strenuously urged by counsel for the defendant be the correct construction to be put upon the contract it follows that the present action is prematurely brought—being brought before the determination of the question by the

engineer—there being an absence of *mala fides* and no suggestion that the defendant has in any way identified itself with the engineer so as to prevent the plaintiff from obtaining what may be properly due.

In my opinion it is clear from the opening words of the submission clause above set forth—"To prevent all disputes and litigation it is agreed by and between the parties of this contract that the engineer shall in all cases determine all questions in relation to the work and the construction thereof etc." that the contract of the parties was that every question relative to the undertaking or adventure entered upon was to be determined by the engineer who was to be the final arbiter in respect thereof.

The submission in my opinion is absolute and leaves no question open for agitation in the Courts other than perhaps after an award the due enforcement thereof, i.e., in my opinion the submission or arbitration clause covers the question which is being litigated in this action and a determination thereunder is a condition precedent to any action being brought: *Edwards* v. *Aberayron Mutual Ship Ins. Co.* (1876), 1 Q.B.D. 563; *Alexander* v. *Campbell* (1872), 41 L.J. Ch. 478, at 484.

That a submission may oust the jurisdiction of the Court is well settled: *Scott* v. *Avory* (1856), 5 H.L. Cas. 811; *Collins* v. *Locke* (1879), 4 A.C. 674; *London Guarantee Co.* v. *Fearnley* (1880), 5 A.C. 911; *Caledonian Insurance Co.* v. *Gilmour*, [1893] A.C. 85.

Turning to the proceedings which took place before the engineer, in my opinion the engineer did not in any way refuse to act or abdicate his position as the named referee to finally and conclusively decide all questions—but the conduct of the plaintiff was such that the abortiveness of the proceedings was wholly due to the conduct of the plaintiff—it was the plaintiff's duty to then and there or at some subsequent time adduce all such evidence as was available to support the alleged claim for damages consequent upon the alleged delays.

The present case is not within the principle as defined by Lord Shaw in the judgment of their Lordships of the Privy Council in *Cameron* v. *Cuddy*, [1914] A.C. 651, 13 D.L.R. 757—which was that if for any sufficient cause the arbitration prove

B. C.

C. A.

McDOUGALL v. PENTICTON.

M. Phillips, J.A.

abortive it is then the duty of the Court to hear and determine the question—here there is no sufficient cause—the plaintiff should have proceeded before the engineer and the fault is the plaintiff's fault.

The plaintiff does not attempt in the pleadings to set up that the engineer refused to hear the alleged claim for damages and that in so doing he was acting in collusion with the defendant—the truth is the plaintiff would not appear to have been willing to proceed before the engineer save upon terms and conditions that the engineer could not admit of, viz.: any award made would only be acceded to by the plaintiff if just and reasonable, but not otherwise—this was an absolutely untenable position for the plaintiff to take and one that the engineer was rightly entitled to disagree with.

There is some suggestion in the evidence that the engineer was not in a position to bring to the consideration of the question that judicial and impartial mind that is to be expected and may be said to be required: *Hickman* v. *Roberts*, [1913] A.C. 229, H.L., but I do not so read the evidence.

In *Cross* v. *Leeds Corporation* (1902), C.A., reported in Hudson on Building Contracts, 4th ed. (1914), vol. 2, at p. 339, there is to be found this statement:—

> A named arbitrator who was an official of the Leeds Corporation wrote a letter in which he said that the claim of the contractors against the corporation was outrageous. The contractors brought an action against the corporation which the corporation applied to have stayed pending the arbitration, the contractors opposed. Held, that the arbitrator was not disqualified.

It follows that in my opinion the action has been wrongly conceived and upon the evidence as we have it before us, there can be but the one result—and that is that the action must stand dismissed and the appeal allowed with costs here and below.

Appeal allowed.

CANADIAN NIAGARA POWER CO. v. STAMFORD. ELECTRICAL DEVELOPMENT CO. OF ONTARIO v. STAMFORD. ONTARIO POWER CO. OF NIAGARA FALLS v. STAMFORD.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. June 19, 1914.

1. SCHOOLS (§ IV—70)—RIGHT TO TAX EXEMPTED COMPANIES—MUNICIPAL BY-LAWS FIXING ASSESSMENT OF COMPANIES—PUBLIC SCHOOLS ACT—MUNICIPAL ACT — VALIDATING LEGISLATION, HOW LIMITED.

That municipal by-laws fixing the assessment of certain power companies had been confirmed by the Ontario Legislature will not prevent the operation of the restriction imposed by the Public Schools Act and the Municipal Act, [R.S.O. 1914, ch. 266, sec. 39, and R.S.O. 1914, ch. 192, sec. 396 (*c*)] by which no municipal exemption by-law in whole or in part shall be held or construed to exempt from school rates; this restriction applies not only to by-laws passed under the general powers of a municipality but also to special by-laws exempting from municipal assessment of any nature or kind beyond the rates on an agreed annual assessment, and the assessment for school rates is not limited by the by-law.

[*Canadian Niagara Power Co. v. Stamford, sub nom. Re Ontario Power Co. and Stamford*, 18 D.L.R. 64, 30 O.L.R. 378, affirmed; *C.P.R. v. Winnipeg*, 30 Can. S.C.R. 558, distinguished.]

Statement

APPEAL from decisions of the Appellate Division of the Supreme Court of Ontario, 18 D.L.R. 64, 70; 30 O.L.R. 378, 384, 391, affirming in each case the order of the Ontario Railway and Municipal Board which dismissed an appeal from the Court of Revision confirming the assessment on appellant's property for school purposes.

In 1903 the Council of the Township of Stamford passed the following by-law.

By-law No. 9, 1903.

A by-law relating to the assessment and taxation of the property of the Canadian Niagara Power Company.

Whereas the undertaking and works of the Canadian Niagara Power Company are calculated to contribute materially to the prosperity and well-being of the ratepayers of the municipality of the Township of Stamford, and it is expedient to grant the request of the said company to the council, to exempt the said company and its property within the municipality from municipal assessment in part, and to agree to and fix the assessment as hereinafter set forth and apportioned as hereinafter set forth.

Be it therefore enacted by the Municipal Council of the Township of Stamford, acting under and by virtue of sec. 8 of 55 Vict., ch. 8, and all and every other authority enabling it in that behalf, for itself, its successors and assigns, and it is hereby enacted that the annual assessment of all the real estate property, franchises and effects of the Canadian Niagara Power Company, situate from time to time within the municipality of the Township of Stamford be and the same is hereby fixed at the sum of one hundred and sixty thousand dollars ($160,000), apportioned as follows, namely: One hundred thousand dollars upon tunnels, wheelpits, power house, inlets and inlet bridges, and other principal works of the said company, from

CAN.
S. C.
CANADIAN NIAGARA POWER CO. v. STAMFORD.
Statement

time to time situate in the Queen Victoria Niagara Falls Park, and sixty thousand dollars ($60,000) upon the other property of the said company from time to time situate in the said park or elsewhere in the said municipality, for each and every year of the years 1903 to 1923, both years inclusive, and that the said company and its property in the municipality be, and they hereby are exempted in each year of the said years, from all municipal assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year, to the said fixed assessment of $160,000, apportioned as aforesaid.

And be it further enacted that if the said company shall refuse to pay taxes on the above assessment in any of the above years, the corporation or any lawful authority on its behalf may, if the same are not paid within the time limited for the return of the collector's roll, thereafter assess and collect taxes upon the said company and its property as if no exemption or commutation had been made.

The by-law was passed in 1903, and, from that date up to 1913, the amount demanded and paid yearly for school rates, as well as for the other rates and taxes, was based upon the fixed assessment of $160,000. In the year 1913 the said township placed the assessment in respect of school rates at $900,000, which assessment forms the subject matter of the proceedings herein. Similar by-laws were passed in 1904 in favour of the other appellant companies and were acted upon in the same way.

The by-law in favour of the Ontario Power Co. was validated by special Act of the legislature which provided that it should be legal, valid and binding notwithstanding anything in any Act contained to the contrary. The other companies claimed that their respective by-laws were made valid by the provisions of the Municipal Act authorizing exemptions from taxation.

After being assessed for school rates in 1913 in addition to the amount fixed by the by-laws each company appealed to the Court of Revision which affirmed the assessment. Further appeals to the Ontario Railway and Municipal Board and thence to the Appellate Division being unsuccessful they brought this appeal to the Supreme Court of Canada.

Appeals dismissed, DUFF, J., dissenting.*

Nesbitt, K. C., *Grier*, K.C., and *Glyn Osler*, for the several appellants.

Kingstone, for the respondent.

*Applications for special leave to appeal to the Privy Council by the Canadian Niagara Power Co. and the Electrical Development Co. were refused, August 4, 1914.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

IDINGTON, J.:—The jurisdiction of this Court herein must be found in sec. 41 of the Supreme Court Act. Whether all the questions raised in argument or suggested by the opinion judgments of the Court below can fall within the said section may be very doubtful. In the absence of any argument it would be difficult to draw any satisfactory line defining just what is implied in the phrase "concerning the assessment of property." Originally no doubt it was intended to be relative to the amount assessed or assessable as against some person. Since that enactment was framed, 10 Edw. VII., ch. 88, sec. 19 has been passed to define the jurisdiction of the Courts below relative to such appeals as they have heard.

I doubt if the range of what is opened thus for the consideration of the Courts below is not much more extensive than that which sec. 41 has assigned to us to hear and determine. Of course it is only within the latter we can act.

In the view I am about to express these considerations may be of no consequence yet I do not wish to be considered hereafter as now holding that the appellate jurisdiction in each of these enactments is exactly co-extensive with the other.

The liability of the appellant to pay school taxes is what the parties no doubt desire to have determined. The assessment roll as it stands and as it has been maintained will if upheld herein no doubt so operate as to maintain the levy for school rates, objected to herein.

The eighth section of the Act incorporating the appellant is as follows:—

> It shall be lawful for the corporation of any municipality, in any part of which the works of the company or any part thereof pass or are situate, by by-laws specially passed for that purpose, to exempt the said company and its property within such municipality, either in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum, or otherwise, in gross, or by way or commutation or composition for payment, or in lieu of all or any municipal rates or assessments to be imposed by such municipal corporation, and for such term of years as to such municipal corporation may seem expedient, not exceeding twenty-one years, and any such by-law shall not be repealed unless in conformity with a condition contained therein.

CAN.

S. C.

CANADIAN NIAGARA POWER CO. v. STAMFORD.

Idington, J.

This was passed in the same session of the legislature in 1892, as was an Act dealing with public school questions and of which sec. 4 was as follows:—

> No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

In this session the legislature also repealed by the Municipal Assessment Act, 1892, sec. 28, the long standing legislation which had empowered the municipalities to grant bonuses in aid of manufacturers.

And, such means of aid having been so obliterated in same session, the municipal Acts were consolidated and what was intended as a complete code was enacted of which sec. 366 provided that municipal councils might by a two-thirds vote grant exemption from taxation (except as to school taxes) for a term of ten years renewable for the like term.

The incorporating Act in which the above quoted sec. 8 is found, formed ch. 8 of the statutes for the said session, and these other enactments are all in later chapters of the legislation of same session. And curiously enough in the same session there was passed as ch. 48 of the Acts of said session, the Consolidated Assessment Act, the result, if I am not mistaken, of a special commission to consider the questions of assessment and taxation.

This Act defined the duties of the assessor and amongst other things directed the assessment roll to be made in a form which provided for the assessment to be set out under columns shewing the actual values of each parcel of land, and then by sec. 49 thereof the assessor was required to swear that he had done so. There are numerous provisions for specific exemptions and reductions, but nothing that could justify any assessor or anybody else presuming to comply with such a by-law as before us herein discarding these provisions and inventing something else to work out this provision of sec. 8, possessing many alternative powers.

It was absolutely impossible for the Assessment Act and this by-law to stand together.

But the alleged power to make any such by-law was not invoked till eleven years later. Meantime, (almost impossible as it would seem from the beginning to have carried into execution

CAN.

S.C.

CANADIAN NIAGARA POWER CO. v. STAMFORD.

Idington, J.

such a statutory privilege by way of meddling with the assessment roll and all else that is the basis of what we have herein to deal with,) the legislature by the Municipal Amendment Act, 1900, sec. 8, added to sec. 366, above referred to, sec. 366 (*a*) by which it is declared that:—

> To render valid a by-law of the municipality for granting a bonus in aid of any manufacturing industry, the assent shall be necessary of two-thirds of all the ratepayers, etc., etc.

And by sec. 9 the bonus system was revived in the form and subject to the stringent requirements therein set forth for determining the matter. Then sec. 10 defines what is to be held to be a bonus within said sec. 366 (*a*), and other sections. And by sub-section (*g*) thereof:—

> A total or partial exemption from municipal taxation or the fixing of the assessment of any property for a term of years, etc., etc.,

is the gist of the definition relative to taxation, but the term is limited to ten years' renewal and exemption from taxation for school purposes is expressly excluded from the operation of the Act. The scope of this legislation is such as to leave no doubt of the purpose of the legislature in relegating to the people the power to pass any by-law in the nature of a bonus.

The sec. 8 of the Act relied upon by appellant in its relation to this later legislation may be considered in a two-fold aspect. In the first place it is to be observed that the language thereof as above quoted which renders it lawful for the corporation of any municipality . . . by by-laws specially passed for that purpose does not expressly enable the council to pass such by-law. The council never had any power but that expressly given it to represent the corporation and this was ever subject to such variation as the legislature chose to enact and to empower. The very language used excludes anything but the corporation itself making such a by-law. That corporate existence has always been the collective body of the inhabitants. Within this very language the old form of town meeting would in absence of any other enabling provision be alone what could determine anything relative to "a by-law specially passed" for any purpose.

The legislature has the right from time to time to vest such power of passing by-laws in such inhabitants or those representing them, and to declare who, as electors or otherwise, shall repre-

CAN.

S. C.

CANADIAN NIAGARA POWER CO. v. STAMFORD.

Idington, J.

sent them, and enable the corporate body to speak and act. The mode or forms assigned by the legislature to do so must be observed. Those acquiring from the legislature privileges by way of statute must above all others be presumed to know that the conditions upon which their privileges depend and that the mode of obtaining the enjoyment of such privileges, must be that assigned by the legislature and that the mode may vary from session to session.

If the appellant had chosen to act upon the privilege given it in 1892, then it might have been arguable that by sec. 10 of the Municipal Act of that time, the council might have had power to express the will of the municipal corporation.

At the time when the by-law in question was enacted this mode of expressing the will of the municipal corporation had ceased to exist in relation to the subject matter of conferring upon any one the benefit of such privilege as sought to be conferred. In the next place the right to claim any of the benefits alternatively contemplated by sec. 8 of the appellant's incorporating Act, seems to me so much in conflict with all this later legislation that it has been thereby impliedly repealed.

It may be arguable that the privilege was in substance within the scope of what might have been conferred by the Municipal Amendment Act, 1900, for the appellant may be held to be carrying on a manufacturing industry within same, but all such privileges became subject to the mode adopted by said Act for expressing the will of the corporation which involved the assent of the ratepayers, which was never got. Again of the many forms alternatively given by said sec. 8, the parties chose that which was least defensible in law and had been rendered impossible by the enactment of the Consolidated Assessment Act to which I have already adverted.

The appellant having failed to procure the due enactment according to law of "a by-law specially passed for the purpose," I am of opinion that the by-law relied upon was wholly void and gave no such privilege as claimed. The greater, of course, includes the less and leaves the appellant liable to the assessment complained of relative to school taxes.

If the legislation in conflict with the provisions upon which

CAN.

S. C.

CANADIAN NIAGARA POWER CO. v. STAMFORD.

Idington, J.

the appellant relies and the by-law rests, had been only that of the same session, I might have found it necessary to enter upon the question of the effect of such a conflict. But when we find all that so conflicting re-enacted at later sessions either directly or by implication before the alleged by-law was passed and such a definite settled form given to such conflicting legislation as appears in the enactments of 1900, as to render it impossible to conceive of such an ancient privilege being preserved merely by the supposed continuation of the powers of the council out of keeping with aught else bearing upon the subject, we must conclude that the section relied upon has been impliedly repealed.

The conflict is to my mind quite as expressive as that which was held in the House of Lords in the case of *Duncan* v. *Scottish North Eastern R. Co.*, L.R. 2 H.L. (Sc.) 20, in 1870, or in the case of *Great Central Gas Consumers' Co.* v. *Clarke*, 13 C.B.N.S. 838, in 1863, where the privilege was the other way about, to have such repealing effect. I only refer to these as typical of many more, some of which are collected in the more recent case of *Sion College* v. *London Corporation*, [1900] 2 Q.B. 581. I also agree with the further reasoning applied in the Courts below. I think there is no resemblance between this case and the *Canadian Pacific Railway Co.* v. *City of Winnipeg*, 30 Can. S.C.R. 558, so much pressed upon us.

The appeal should be dismissed with costs.

Since writing the foregoing the May number for 1914 of the law reports brings a report of *The Associated Newspapers* v. *Mayor, etc., of London*, [1914] 2 K.B. 603, which I have read and considered. Though I find nothing therein to vary my opinion yet the *Sion College Case*, [1900] 2 Q.B. 581, is, I observe, doubted therein, and a number of authorities are referred to which are instructive.

DUFF, J., dissenting, would allow the appeal.

Duff, J.

ANGLIN, J.:—Having regard to the relations between school boards and municipal corporations in Ontario and to the manner in which the legislature of that province has dealt with school taxes, I am satisfied that its legislation, whether general or special, empowering municipal councils to exempt from taxation, enacted at or after the session of 1892, however broad and gen-

Anglin, J.

CAN.
S. C.
CANADIAN NIAGARA POWER CO. v. STAMFORD.
Anglin, J.

eral in its terms, should not be construed as authorizing exemption from school taxation, in any form or to any extent, unless taxation for school purposes is expressly mentioned in such legislation. By a clause inserted in the Public Schools Act in that year (55 Vict., ch. 60, sec. 4), it is enacted that

> no municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

I respectfully concur in the construction put upon this provision by the learned Chief Justice of Ontario in his judgment in the Ontario Power Company's case. A corresponding restriction on the powers of exemption was at the time introduced into the Municipal Act (55 Vict., ch. 42, sec. 366). Both these provisions have since been continued in the legislation of Ontario and are now to be found in the R.S.O., 1914, ch. 266, sec. 39, and ch. 192, sec. 396 (*e*).

Had there been similar legislation in force in Manitoba when the by-law of the City of Winnipeg considered by this Court in the *C.P.R. Co.* v. *City of Winnipeg*, 30 Can. S.C.R. 558, was enacted, I cannot think that it would have held that the exemption from "all municipal rates, taxes and levies and assessments of every nature and kind whatsoever," for which that by-law provided, woould have been held to include exemption from school taxes.

As pointed out by the learned Chief Justice of Ontario, in his judgment in the Canadian Niagara Power Company's case, sec. 4 of ch. 60, of the statutes of 1892, is not

> an enactment prohibiting the granting of an exemption from school rates, but a mandate to all courts to hold and construe by-laws exempting from taxation as not extending to school rates.

The proper construction of the by-laws in question and of the legislative authorization on which they depend for their validity being that they do not extend to exemption from school taxation, we are not confronted with the difficulty which would be presented, did these cases involve attempts to derogate from the effect of prior special statutes by subsequent general legislation.

The authority of the judgments of Divisional Courts in *Stratford Public School Board* v. *Stratford*, 2 O.W.N. 499 (which

is probably distinguishable on other grounds), and *Way* v. *St. Thomas*, 12 O.L.R. 240, relied on by Mr. Nesbitt, is overborne by the judgment of the Ontario Court of Appeal in *Pringle* v. *Stratford*, 20 O.L.R. 246, and that of the Appellate Division in this case.

Notwithstanding Mr. Osler's ingenious attempt to differentiate the case of his clients, the Ontario Power Company, from the cases of the other appellants, if the view I take of the proper construction of exempting municipal by-laws passed since 1892 is correct, there is no real ground of distinction between them.

The appeal should be dismissed.

Brodeur, J.

BRODEUR, J.:—In these three cases the same question is in issue. We are asked to determine whether the municipal corporation respondent could exempt from school taxes the company appellant.

Prior to 1874 the school boards in Ontario made their own assessment, levied and collected their own taxes. In 1874 the legislature authorized the school boards to have their taxes collected by the municipalities. In 1879 the power for the school boards to collect their own taxes was discontinued and was vested in the municipality. The school boards have since that time the right to determine the amount of money necessary to meet their expenditures; they would inform the municipality of the money required and the latter in collecting its taxes would at the same time levy the amount of money that would satisfy the needs of the school board.

Under that legislation it is evident that an abuse sprung up by which industrial establishments that were exempt from taxation by the municipality did not pay anything for school taxes, for the legislature, in 1892, by ch. 60, sec. 4, declared that

> no municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

That policy adopted by the legislature has been re-enacted several times since and there seems to be not the least shadow of a doubt as to the intention of the province in that respect. The appellants in order to defeat that intention rely on special Acts conferring upon municipalities in which the works of the com-

CAN.

S. C.

CANADIAN NIAGARA POWER CO. v. STAMFORD.

Brodeur, J.

panies are situate, the power to exempt them from municipal assessment or taxation and they claim that those special Acts override the general provisions of the law. I am unable to accept such a conclusion. Of course, the legislature could have the right to exempt from school taxes any industrial establishment. But, in view of its settled policy it would require a formal enactment.

The instructions given by the legislature to the Courts are to construe the by-laws providing exemption from taxation in such a manner that the exemptions should not cover school rates.

With such instructions the Courts are powerless to find in any by-law an exemption from school taxes unless the legislature would formally declare by a special Act that the school taxes would be included in the exemption.

The appellants rely on the case of *C.P.R. Co.* v. *City of Winnipeg*, 30 Can. S.C.R. 558, decided by this Court. But in the Province of Manitoba, in which that case was instituted, there was no legislation similar to the one we find in Ontario.

I am of opinion that the appellant companies were not exempt from school rates and that their appeals should be dismissed with costs.

Appeal dismissed with costs.

ELECTRICAL DEVELOPMENT CO. v. TOWNSHIP OF STAMFORD.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of the opinion that this appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant's claim to exemption from assessment for public school rates differs somewhat from that made in the case of *Canadian Niagara Power Co.* v. *Township of Stamford*. In the assumption, however, that the ordinary municipal rates and school rates and the assessments upon which they respectively rest are identical, these cases present the same fundamental errors of law and fact.

The municipal corporation in its relation to the school rates is but the servant or agent of the Public School Board. The latter formerly collected its own rates and later had an option either to do so or require the municipal council and its officers to do so. There existed in the early stages of public school history great division of public opinion on the question of free

school education based upon the principle that everything taxable, whether or not its owner had children to educate, should bear an equal proportionate share of the burden of the support of the public schools.

The school boards had to resort to the collection of rates in a variety of ways determined by the ratepayers of the section. When the principle I have just adverted to became fully recognized and established by law the old forms of proceeding for levying the school rates existed in law, though gradually falling into disuse.

It was stated and not contradicted in argument that this survival in law of old methods of collection ceased in 1879. There are yet instances such as in the unorganized districts where the school boards have to see to both assessing and collecting. And I am not sure but in regard to separate schools there still remains a survival in law relative to the collection of school rates. All I am concerned with herein is to shew that it is simply as a matter of public expediency that the machinery of the municipal councils is used for the levying of the rates required to support the public schools, and that it is a long time since the obligation of property owners to contribute their share in proportion to their means to the maintenance of the free public schools, was finally established and fully recognized.

The argument presented by counsel for appellant that it had no children to educate and that its existence or non-existence was a matter of indifference to the school board, who could not suffer thereby, sounded like an echo of that fierce argument, and vehement expostulation, heard half a century ago upon the wickedness of taking the money of the rich childless man to educate the pauper's child. When due heed is paid to the history of the relations between the school board and the municipal corporation, and the settled policy of Ontario, in relation to the system of taxation to execute it, we are not so ready to assume that exemption from municipal assessment or taxation as a matter of course must involve all assessment and taxation carried into execution by municipal councils and their officers.

In order to make the matter clear the Public Schools Act was amended by ch. 60, sec. 4, of the Ontario statutes, in 1892, which expressly declared as follows:—

CAN.

S. C.

ELECTRICAL DEVELOPMENT CO. v. STAMFORD.

Idington, J.

No municipal by-law hereafter passed for exempting any portion of the taxable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

And when the Assessment Act was consolidated in 1894, it was declared by sec. 22 defining the duties of the assessor that he should set out in separate columns of his roll, each parcel of land assessed, the actual value of the parcel exclusive of the buildings, the total of the actual value of the parcel of real property, the total amount of taxable real property and "the total value of the parcel if liable for school rates only."

This continues substantially the same in the Act under which the roll in question was made up. It is clearly implied that there is to be no diminution of the assessment so far as the basis for school rates, though there might be a "taxable value" as basis for other rates.

It was the next session after this consolidation that the curious Act now relied upon was passed and the attempt made thereby to ratify and confirm a by-law which respondent's council had passed in the previous month of September, 1904, without any authority. The by-law itself which this enactment is alleged to have validated, by the last clause thereof, says:—

And be it further enacted that this by-law and the provisions thereof shall come into full force and effect immediately after the municipality shall be authorized by sufficient legislative or other authority to pass the same.

If, as we are strongly urged to do in other matters herein, we are to apply the strict reading of the Act relative thereto, then as the legislature never "authorized" such a by-law to be passed, it never has been brought into force. I place no stress upon this beyond shewing that we must apply common knowledge and common sense or we should never make much out of some Acts of the legislature by an absolute adherence to the letter thereof. But it is to be observed relative to this by-law and statute, as to all statutory enactments conferring privileges, that the enactment establishing such must be clear and express, and it is somewhat difficult in light of the foregoing considerations to find that this by-law and statute are so.

The language can be given a reasonable meaning without going so far as to read therein a privilege quite repugnant to the

sense of right of that portion of mankind in Ontario as evinced by its legal history and the persistent Acts of its legislature. For these reasons alone I should hold that the municipal assessments and taxes had in view were those strictly such in the sense of the term ordinary men understand to be such, and not such as would extend it to such as concerned the school boards acting by and through the municipal machinery, even though in a wider sense a school board might be spoken of as a municipal corporation.

It must never be forgotten that the council representing and acting for the corporation, and the school board though acting for and on behalf of those within the same territorial area, had for their respective constituents a different set of electors, and entirely different purposes and powers to execute.

All the ratepayers elected the school board, but only a limited number thereof elected the councils, and a still more restricted class had a voice in determining the concession of special privileges to any one. The substantial difference of qualification between the two former classes, may not be great, but it illustrates the contention that the constituent bodies are not the same. And whilst the municipal corporation consists of all the inhabitants, the school board is constituted a corporation by itself. Then if there be any doubt of the correctness of my view when I hold that upon all the foregoing grounds the appellant must fail, we find the legislature has in very expressive terms put an end to the contention set up, by the following enactment in the Public Schools Act of 1909:—

> 39. No by-law of a municipal council passed after the 14th day of April, 1892, or hereafter passed, for exempting any part of the ratable property in the municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind.

This enactment surely puts an end to all argument of the question. It was enacted after the alleged validation of the by-law in question, and comprehends it as well as others of a like kind.

The appeal should be dismissed with costs.

DUFF, J. (dissenting), would allow the appeal. Duff, J.

ANGLIN, J.:—The opinion of Mr. Justice Anglin is reported at page 267, *ante*. Anglin, J.

CAN.

S.C.

ELECTRICAL DEVELOPMENT CO. v. STAMFORD.

BRODEUR, J.:—The opinion of Mr. Justice Brodeur is reported at page 269, *ante*.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Ingersoll & Kingstone.*

THE ONTARIO POWER CO. v. TOWNSHIP OF STAMFORD.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—This appeal was argued at the same time as the appeals of the Canadian Niagara Power Co. and of the Electrical Development Co. against same respondent, and the appellant seeks similar relief to that claimed therein relative to exemption from assessment for school rates. The council of respondent, acting without authority passed a by-law fixing "the annual assessment" (whatever that may mean) of appellant's property. The same curious form is adopted as in the case of the by-law relative to the Electrical Development Co. Both were passed on the same day.

The Act of the legislature validating same was more direct in its language than in the by-law and Act involved in the latter case, and not so absurdly retrospective in its form.

I need not repeat what I have said in regard to the appeals in each of the other cases. Much that I said in my opinions in same applies herein. Indeed, all that I have said in regard to the claim of the Electrical Development Company, except the statement of one of the arguments by counsel for the appellant, is applicable to this appeal. Counsel for this appellant did not use same argument, yet what I was led, as result thereof, to say may be well applied here. And I think that the following section, 39, of the Public School Act of 1909.

> 39. No by-law of a municipal council passed after the 14th day of April, 1892, or hereafter passed, for exempting any part of the ratable property in the municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind,

is destructive of the possibility of any such claim as made herein. This enactment is but a reiteration of what had previously been

enacted but operates from this later date and impliedly repeals if there was anything in regard to school rates in the legislation relied upon to repeal.

It would seem as if there was one small corner of the legislative domain in which the privilege hunter has, in Ontario, no ground for hope. The legislature seems to have been persistent and emphatic. Idington, J.

The cases I cited in the case of the Canadian Niagara Power Co. seem to answer the appellant's pretensions.

The appeal should be dismissed with costs.

DUFF, J. (dissenting), would allow the appeal. Duff, J.

ANGLIN, J.:—(The opinion of Mr. Justice Anglin is reported at page 267, *ante*.) Anglin, J.

BRODEUR, J.:—(The opinion of Mr. Justice Brodeur is reported at page 269, *ante*.) Brodeur, J.

Appeal dismissed with costs.

STEBBINS, SPINNING & WALKER v. WILLIAMS & SEARS.

B. C.
S. C.

British Columbia Supreme Court, Gregory, J. September 11, 1914.

1. SHERIFF (§ I—1)—LEVY BY, UNDER EXECUTION—JUDGMENT CREDITORS' PRIORITY ON MONEYS REALIZED — RIGHT TO, OUT OF SHERIFF'S BANK ACCOUNT — TRUST.

While the relation of debtor and creditor exists between the sheriff who has levied money under an execution and the judgment creditor entitled thereto, there is also a fiduciary relationship between them, and the judgment creditor can follow the moneys so received by the sheriff at least where the actual cheques received by the latter were paid by him into his "in trust" bank account and so separated from his personal funds; and the judgment creditor is entitled to such moneys in bank in priority to a garnishment thereof attempted by the sheriff's personal creditor.

TRIAL of an interpleader issue. Statement

Judgment was given for the plaintiffs.

Maclean, K.C., for plaintiffs in the issue.
Martin Griffin, for defendants in the issue.

GREGORY, J.:—This is an interpleader issue in which Stebbins, Spinning & Walker are plaintiffs and the judgment creditors, defendants. The judgment debtor, the sheriff for the County of Victoria, has realized moneys from the sale of goods seized by him in execution for the plaintiffs, and has placed the Gregory, J.

B. C.

S. C.

STEBBINS, SPINNING & WALKER v. WILLIAMS & SEARS.

Gregory, J.

same in the bank in an account which he calls "Trust Account," and into which he pays all moneys received by him in his office of sheriff, also the moneys received by him for the sale of marriage licenses. No other moneys were paid into this account except moneys received by him as bailiff when acting as such in distress proceedings. The moneys to which he was personally entitled as costs, etc., in all these matters were also paid into this account, but in no other way was the account a personal one.

The judgment creditors, Williams & Sears, having obtained a judgment some years ago, have garnisheed all moneys now standing to the credit of the sheriff in the bank, and claim that they are entitled to do so as the relation between the sheriff and a judgment creditor is that of debtor and creditor only after the execution of the process. Many authorities have been cited to support the view that the sheriff may be sued in debt or for money had and received for moneys realized by him in execution; this, however, does not in my opinion dispose of the case. While the relation of debtor and creditor exists, there is also a fiduciary relation existing between the sheriff and judgment creditor, and in such case the judgment creditor can follow the moneys so received by the sheriff, at least where as here the actual cheques received by the sheriff were paid by him into the bank to the credit of this trust account. It would be inequitable to permit a private creditor of the sheriff to seize these moneys, and so force the person who is really entitled thereto to have recourse to the sheriff's bondsmen, as has been suggested is their remedy.

It appears to me that the cases referred to by plaintiffs' counsel support this view—*Lovely* v. *White* (1863), 12 L.R. Ir. 384; *In re Hallett's Estate* (1879), 13 Ch.D. 696; and *Stobart* v. *Axford* (1893), 9 Man. L.R. 18—and certainly before I can depart from a principle so equitable and just I will have to have the direct authority of some higher Court. There will therefore be judgment for the plaintiff in the interpleader issue with costs.

Judgment for plaintiff.

TWEEDDALE v. CITY OF CALGARY.

ALTA.

S. C.

Alberta Supreme Court.

1. HIGHWAYS (§IV D—232)—DEFECTS — IMPLIED NOTICE OF — NEGLIGENCE OF MUNICIPALITY — WORK DONE BY PRIVATE PARTIES.

Where it must be inferred from the nature of the work on a city sidewalk and the length of time it was carried on before the accident to a pedestrian that the city officials having supervision of streets must have been aware of the work, the fact that it was not done under their authority but by private parties interested in adjacent lands without a permit which the terms of the City Charter required, will not absolve the city from responsibility for the unsafe condition of the sidewalk.

[*Vancouver* v. *Cummings*, 46 Can. S.C.R. 487, 2 D.L.R. 253, applied.]

Statement

ACTION for damages for personal injuries alleged as caused by an unsafe sidewalk on a city street.

Judgment was given for the plaintiff against the defendant city, with judgment over in the city's favour against the other defendants.

Moffatt, for the plaintiff.

Ford, for the city.

Clarke, K.C., for the third parties.

The plaintiff's claim is for damages for injuries sustained by her caused by her falling through a hole in the sidewalk on Eighth Avenue in Calgary. I hold upon the evidence that the hole was dangerous, was insufficiently protected to avoid injury to persons traveling upon the sidewalk and that sufficient warning of its existence was not given. I also hold that there was not contributory negligence on the part of the plaintiff.

One of the defences relied upon by the city is that the hole was made without its permission either express or implied and that it is therefore not liable for the injuries sustained by the plaintiff.

The hole was made by the firm of Bland & Olsen in the performance of necessary work which they were doing under a contract with the third parties, the work consisting of the removal and replacing of the upper two inches of the concrete sidewalk opposite the store of Glanville Co. on the corner of Eighth Avenue and Third St. W. for a distance of 115 ft., and the removal, repairing and replacing of certain prisms therein. The hole was cause by the removal of one of the prisms. The work began on April 2 or 3, 1913, and the accident happened on the 17th of the same month.

ALTA.

S. C.

The work referred to was not done by the city but was done for and on account of the owner of the Glanville Store premises for whom the third parties were acting as agents. The necessary permission from the city required by sec. 158 of the City Charter (Ord. 33 of 1893), and the city by-laws for the performance of the work was not obtained. It is not alleged, nor has it been shewn that the city had not had notice of the fact that the work was in progress. Both the city building inspector and the city engineer gave evidence on behalf of the city but neither of them denied that he was aware that the work was being carried on. If, in order to entitle the plaintiff to recover, it was necessary for her to shew that the city had such notice, I think it only reasonable to hold that, from the nature of the work, its extent and the length of time it was carried on before the accident, the officers of the city whose duty it was to exercise supervision over the city streets must have been aware that it was being carried on.

In *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 46 Can. S.C.R. 457, Idington, J., who delivered the judgment of the majority of the Court says at 460:

> It may, however, be fairly inferred, from what we are told, that it would have been quite impossible to have done the job during that day without attracting the attention of those entrusted, or who should have been entrusted, by the appellant, with the police and other official oversight guarding that street in the way that must, in such regards, be established in such communities to enforce the law and protect the public and the municipality's own property.

The fact that permission of the city to perform the work was not obtained by the third parties does not in my opinion relieve the city from liability to the plaintiff for the injuries sustained by her. I give judgment for the plaintiff against the city for $500 with costs.

The third parties appeared at the trial and defended the action. The evidence shews that they did not apply for or obtain permission to do the work referred to. As the injuries resulted from their unauthorized act the city is in my opinion entitled, as against them, to indemnity and I therefore give judgment for the city against them for the amount of the judgment obtained by the plaintiff against it. The city will also have judgment against them for its costs.

Judgment for plaintiff.

BERGSTROM v. EDWARDS.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Brown and Elwood, JJ. November 28, 1914.

1. APPEAL (§ VIII D—680)—DEFAULT JUDGMENT—CONDITIONAL ORDER — PAYMENT OF COSTS—WAIVER—NEW TRIAL.

The payment of costs under a conditional order setting aside a default judgment for the plaintiff on terms of paying costs within fifteen days and of going to trial at the next sittings which commenced five days after the making of the order, is not waived by the plaintiff appearing at such sittings within the fifteen days and requesting an early trial; and a dismissal of the action on the trial being called in plaintiff's absence within the fifteen days and without payment of such costs will be set aside and fresh terms imposed for proceeding to a new trial.

APPEAL from a District Court. Statement

Appeal allowed.

T. P. Morton, for appellant, plaintiff.

J. C. Martin, for respondents, defendants.

HAULTAIN, C.J., concurred with BROWN, J. Haultain, C.J.

BROWN, J.:—This is a District Court action in which there is a claim and counterclaim. On May 5, last, at the sittings of the District Court at Watrous, judgment was given in the plaintiff's favour for the amount of his claim and costs. Owing apparently to some misunderstanding, the defendants were not present at the trial, nor were they represented by counsel. Application was made to have this judgment set aside, and on July 2 the following order was made:— Brown, J.

Judgment herein will be set aside on the following terms:—

1. That the defendant pay the costs of entering such judgment, the costs of the day, which I fix at $15, exclusive of witness fees; that he pay the costs of opposing this application, fixed at $20, and that he proceed to trial at the coming sittings of the District Court here; these costs payable within fifteen days; in the event of the defendant not complying with this order, this application to be dismissed.

On the same day the plaintiff's solicitors sent the defendants' solicitors a statement of the costs which they claimed were payable under the order, amounting in all to $55.35. These costs were not taxed, and the correctness of the statement is disputed by the defendants. There does not, however, appear to have been any objection taken to them until July 14. The defendants are by the order given fifteen days within which to pay the costs, and the Court at which they were ordered to pro-

SASK.

S. C.

BERGSTROM v. EDWARDS.

Brown, J.

ceed with the trial opened its sessions on July 7, just five days after the order was made. Counsel for both plaintiff and defendants appeared at the opening of the Court, and this case was spoken to. There is to some extent a conflict in the affidavit material filed by counsel as to what took place at that time. The Judge must, I think, have accepted the defendants' version as correct, in view of his subsequent action in refusing to open up the judgment. The Judge himself would, at least to some extent, know what took place, having presided at the trial. Assuming, therefore, as I think this Court should, that the defendants' version is the correct one, counsel for the plaintiff asked that this case be placed on the list among the first cases to be tried. This request was opposed by counsel for the defendants on the ground that the defendants were not prepared for trial at that stage. In the result the case appears to have been set down on the list to be tried on July 10, but was in fact not reached until the 13th. On the 13th counsel for the defendants appeared, but counsel for the plaintiff failed to appear, and judgment was given dismissing both the claim and the counterclaim with costs. Plaintiff's counsel explains his absence by saying that the case was called a day earlier than he expected. The plaintiff now in his turn applies to the trial Judge to have this latter judgment set aside on the ground, *inter alia*, that the costs had not been paid before trial as ordered. The Judge dismissed the plaintiff's application with costs, and it is from that order that the plaintiff now appeals to this Court.

Counsel for the defendants met the plaintiff's application with the statement that in view of counsel for the plaintiff urging the early trial of the action he assumed that the payment of the costs was not being insisted on as a condition precedent to the trial because, as yet, the 15 days within which these costs were to be paid had not expired. Apparently the question of payment or non-payment of the costs was not mentioned to the trial Judge by either counsel, and he must very naturally have assumed that they were paid or that payment was waived.

SASK.

S. C.

BERGSTROM v. EDWARDS.

Brown, J.

I am of opinion that all this trouble and unnecessary expense has been clearly brought about by needless misunderstanding, of which both sides have been equally guilty. I think justice will be done by putting both parties where they were when the order of July 2, was made. I would set aside the judgment of July 13, and direct that the action should proceed on the basis of the order of July 2. The costs referred to in that order should be taxed and paid within 15 days after taxation. If so paid the parties should be allowed to proceed with the trial of the action as they may be advised. If the costs are not so paid, the original default judgment of May 5, should stand. Neither party should have any costs of any proceedings taken subsequent to the order of July 2.

Elwood, J.

ELWOOD, J.:—On July 2, 1914, the District Court Judge at Saskatoon ordered a judgment theretofore entered by the plaintiff against the defendants to be set aside on the following terms, namely: that the defendant pay the costs of entering such judgment, the costs of the day—which he fixed at $15 exclusive of witness fees; that he pay the costs of opposing the application to set aside the judgment—fixed at $20; and that he proceed to trial at the then coming sittings of the District Court at Saskatoon, these costs payable within 15 days. In the event of the defendant not complying with the said order, the application to set aside the judgment to be dismissed. On the same day the plaintiff's solicitors wrote to the defendant's solicitors enclosing a memorandum of the costs. To this letter the defendants' solicitors never replied until July 14, 1914. The costs mentioned in the letter of July 2, in addition to the above items of $15 and $20 were as follows: witness fees, $7.40; judgment and taxation of costs, $12.95. The sittings of the District Court next following July 2, commenced on July 7, and on the same day the solicitors for the defendant and plaintiff consented to have the action placed on the peremptory list to be tried on July 10, 1914. The action was apparently not reached on July 10, but on July 13, 1914, it was reached. The plaintiff was not present at the trial, and was not represented by counsel, and the District Court Judge dismissed the plaintiff's action

SASK.

S. C.

BERGSTROM v. EDWARDS.

Elwood, J.

with costs. None of the costs mentioned in the order of July 2, 1914, have ever been paid, and the letter of July 2, 1914, distinctly stated that the costs which must be paid before the judgment could be set aside were as stated in that letter. It was contended by the respondents that the appellants, by consenting to have the action placed on the list for trial on July 10, waived his right to have his costs paid as a condition precedent to the trial, and that, the sittings of the District Court having been fixed for a period within 15 days of July 2, it must have been intended that payment of the costs was not a condition precedent to the trial. I cannot give effect to either of such contentions. The order of July 2 did not set aside the judgment, but states that the judgment "will be set aside on the terms therein contained being complied with," and provides that in the event of the defendants not complying with the order the application be dismissed. Now, the only terms that the defendants were to comply with were that they proceed to the trial and pay the costs. So far as the proceeding with the trial is concerned, the trial could not proceed until the judgment then entered had been set aside, and it seems to me, therefore, obvious that the sole condition upon which the judgment would be set aside was the payment of the costs. The defendants did not pay these costs; they never objected to the amount of the costs until after they had obtained judgment dismissing the action. If they had wished to object to the amount of the costs or to have the costs taxed they should have notified the plaintiff's solicitors; and not having done that, and not having paid the costs, they were not entitled to proceed with the trial of the action.

In my opinion the judgment dismissing the plaintiff's action should be set aside and the defendants should pay the costs of the application of the plaintiff to the District Court Judge to set aside such judgment and of this appeal.

REX v. HOWES.

SASK.

S.C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Elwood, JJ. November 28, 1914.

1. SECRET COMMISSIONS (§ I—10)—EMPLOYEE RECEIVING SECRET COMMISSION —CRIMINAL OFFENCE—RAILWAY FREIGHT CONDUCTOR SPOTTING CARS.

Where a railway conductor was charged under the Secret Commissions Act, Can., 1909, for taking money for his own use from a farmer for "spotting" cars required under the Grain Act, Can., and which it was the conductor's duty to place at a station where there was no agent, and the defence developed on cross-examination of the Crown witnesses was that the amounts paid to him by the farmer at various times were tips or gratuities made after the location of the cars and not sums bargained for, it is competent for the Crown to adduce evidence in rebuttal of the suggested defence by calling other farmers who had at approximately the same time made similar payments to him for the allocation of cars to them for an agreed consideration; such evidence, although not admissible to prove the main facts of the case, was admissible to rebut by anticipation the indicated defence of innocent motive and want of design and to shew the state of mind of the parties with regard to the facts proved, although no witnesses were called for the defence.

[*Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57, applied; *R.* v. *McBerny*, 3 Can. Cr. Cas. 339; *R.* v. *Collyns*, 4 Can. Cr. Cas. 572; *R.* v. *Pollard*, 15 Can. Cr. Cas. 74; *R.* v. *Wilson*, 21 Can. Cr. Cas. 105, cited.]

CROWN case reserved.

MacKenzie, K.C., for the Crown, referred to the following authorities: Law Quarterly Review, [1907], vol. 23, p. 28; Archbold, 28th ed., 366-371; *Reg.* v. *Geering* (1849), 18 L.J. (M.C.) 215; *Makin* v. *Attorney-General for N.S. Wales*, [1894] A.C. 57; *Reg.* v. *Ollis*, [1900], 2 Q.B. 758; *Reg.* v. *Wyatt*, [1904], 1 K.B. 188; *R.* v. *Fisher* (1910), 1 K.B. 149; *R.* v. *Ellis* (1910), 2 K.B. 746; *R.* v. *Boyle* (1914), 3 K.B. 339; *Reg.* v. *McBerny*, 3 Can. C.C. 339; *Reg.* v. *Collyns*, 4 Can. C.C. 572; *R.* v. *Pollard*, 15 Can. C.C. 74; *R.* v. *Wilson*, 21 Can. C.C. 105.

No one for accused.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The case reserved by the learned trial Judge for the opinion of this Court is as follows:— Haultain, C.J.

"The accused was a conductor in the employ of the C.N.R. Co., and he was charged under the Secret Commission Act, 1909, for having taken certain sums of money for spotting cars at a way station on the C.N.R. Co.'s line of railway where there was no agent. It was a part of his duty to spot these cars, and there was no provision, nor had he any right to get compensation from the farmers who required cars for spotting

SASK.

S. C.

REX v. HOWES.

Haultain, C.J.

them. These cars were being placed at the station for farmers under the provisions of the Grain Act.

"On the first trial of the accused, he having been tried twice, and the jury having disagreed on the first trial, Mr. MacKenzie, K.C., the Crown prosecutor, asked me to admit evidence of farmers other than the complainant who had also paid to the accused sums of money for spotting cars for them. As I was under the impression that evidence of this kind would be similar to evidence of other thefts in a case of theft, and would go more to prove the general bad character of the accused than to prove him guilty of the offence, I refused to admit the evidence. On the second trial, however, I came to the conclusion that the offence with which he was charged was that of taking money for spotting cars at this station, which spotting was a part of his duty under the terms of his engagement, and for which he was not entitled to charge the farmers for whom he spotted the cars any consideration; and that the fact that the charge specified one particular instance of the paying of money to a particular farmer would not of itself shut out the evidence of other farmers paying the accused for doing the same work. I therefore on the second trial admitted the evidence of a large number of farmers, whose names were not mentioned in the charge, who had paid various sums of money to Howes in order to get him to spot cars for them at the same station. The jury in the second case brought in a verdict of 'guilty,' and I bound the accused over to appear for sentence, and decided to submit a case for the opinion of the Court as to whether I was correct in admitting this evidence at the second trial.

"The question to be submitted for the opinion of the Court is: Was the evidence of these other farmers, whose names were not mentioned in the charge, that they had paid the accused for spotting cars, proper evidence to be admitted under the charge in this case?"

As no one appeared on behalf of the accused, we are doubly indebted to Mr. MacKenzie for his very comprehensive and impartial presentation of the cases bearing on the point reserved for our decision.

The facts of the case are not in dispute, and no evidence for the defence was offered on the trial.

SASK.

S. C.

REX v. HOWES.

Haultain, C.J.

The accused was a conductor in the employ of the Canadian Northern Railway Co. As a part of his duty he was required to take and place cars at a station called Birdview for the use of farmers, under the provisions of the Grain Act. It was not part of his duty, and he was not authorized, to allocate any particular car to the use of any particular farmer. A farmer called Buchanan, being anxious to obtain a car for loading his grain at Birdview, had some negotiations with the accused, in the course of which the accused undertook to secure him a car if he would pay him five dollars. This arrangement was carried out on several occasions, on each of which the payment of $5 was made.

Although there was no evidence put in for the defence, the cross-examination of the witnesses for the Crown clearly developed an attempt on the part of the defence to shew that these payments made to the accused were not made as an agreed consideration for services rendered, but were simply gratuities or tips made to the accused after the event by a grateful farmer. Evidence was then offered by the Crown of other cases where the accused was paid money by farmers for securing cars for them. This evidence was objected to, and the question now submitted for our consideration is whether this evidence was properly admitted.

In the case of *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57, at 65, Lord Herschell, in delivering the judgment of the Judicial Committee of the Privy Council, stated the principles upon which evidence to shew intent is admitted as follows:—

> "In their Lordships' opinion, the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indict-

SASK.

S. C.

REX v. HOWES.

Haultain, C.J.

ment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

In the case before us, the doing of the act, that is, the taking of the money, and the connection of the parties with that act, were sufficiently proved by Buchanan. The evidence objected to was not offered and would not have been admissible to prove the main facts of the case. It was clearly put in to rebut by anticipation the defence of innocent motive and want of design, and to shew the state of mind of the parties with regard to the facts proved. The evidence given proves other acts of the same kind as that in question and proximate in point of time. It clearly shews that payments of a similar character were exacted by the accused in several other cases as a condition upon which cars would be furnished, and completely rebuts the defences suggested by cross-examination.

In my opinion, therefore, the evidence was admissible, and the question submitted to us should be answered in the affirmative.

Conviction affirmed.

MAN.

K. B.

Re LAKESIDE PROVINCIAL ELECTION.
TIDSBURY v. GARLAND.

Manitoba King's Bench, Galt, J. October 17, 1914.

1. ELECTIONS (§ IV—90)—ELECTION PETITION — PETITIONER'S DEPOSIT FOR COSTS — DEPUTY PROTHONOTARY — INTERPRETATION ACT.

That the petitioner's deposit for costs of an election petition under the Controverted Elections Act (Man.) sec. 19, was made with the deputy prothonotary of the King's Bench although the Act requires that the deposit be made with the prothonotary is not a valid preliminary objection for the deputy is included by virtue of the Interpretation Act, Man., sec. 15.

2. ELECTIONS—(§ I A—6) — RIGHT TO VOTE — OBJECTION TO — FINAL REVISED VOTER'S LIST—NAME ON.

The status of the petitioner is established *primâ facie* where on the hearing of a preliminary objection charging that he was not entitled to vote, proof was adduced that his name was on the final revised list in use at the election and that he did vote.

3. OATHS (§ IA—1)—SWEARING WITHOUT KISSING THE BOOK, LEGALITY OF —JUDICIAL DISCRETION — LACK OF FORMAL REQUISITES.

The swearing of an affidavit without touching or kissing the Book but by the uplifted hand is sufficient if the witness considers the latter form binding on his conscience; and, *semble*, there is a judicial discretion under the Evidence Act, Man., sec. 56, to receive an affidavit notwithstanding the lack of formal requisites.

[*McGillivray* v. *Anglo-Klondyke*, [1902] W.N. 5; *Mildrone's Case*, 1 Leach 459, referred to.]

4. ELECTIONS (§ IV—90)—ELECTION PETITION — PUBLICATION NOT NECESSARY—CONTROVERTED ELECTIONS ACT (MAN.)

Publication in the Manitoba Gazette and in a local paper of notice of the presentation of an election petition under the Manitoba Controverted Elections Act is no longer necessary as it was prior to 1914.

5. ELECTIONS (§ IV—93)—PETITION — PUBLICATION OF — COPY OF PETITION — PAYMENT OF FEES — NON-PUBLICATIONS — OBJECTIONS — CONTROVERTED ELECTIONS ACT (MAN.)

Where the petitioners had done all that they were bound to do to secure the publication of the returning officer's notice of an election petition under the Manitoba Controverted Elections Act, having supplied that official with a copy of the petition and sufficient money for the publication of the notice, its non-publication will not constitute a good preliminary objection.

HEARING of preliminary objections to an election petition. Statement

Preliminary objections dismissed.

H. J. Symington, for petitioners.

A. J. Andrews, K.C., *M. G. Macneil* and *F. M. Burbidge*, for respondent.

GALT, J.:—The petition in this case is presented by Robert Tidsbury, David W. Yuill and William M. Stewart against the election of John J. Garland at the recent provincial elections. The petition sets forth a number of grounds upon which the respondent's election is impeached. The respondent's preliminary objections to the petition are contained in thirty-nine paragraphs all ready printed, with blanks to be filled up for any case which might arise. As a matter of fact, the only objections argued before me were five in number. Galt, J.

The reason for this extraordinary procedure is said to be that the times limited by the Manitoba Controverted Elections Act are so short that parties concerned have to frame their proceedings in advance, and with a view to covering every possible point or objection which might prove serviceable.

I cannot find any justification in the Act for this method of procedure, on the grounds alleged. Under sec. 16 the petition need not be in any particular form, and under sec. 17 the petitioner has thirty days after the day of publication in the Manitoba Gazette of the notice of election by the Clerk of the Executive Council within which to present his petition. Under sec. 24, the respondent has five days after the service of the petition, or such further time as any Judge shall grant for that purpose, to produce in writing his preliminary objections. I am therefore

MAN.
K. B.
RE LAKESIDE PROVINCIAL ELECTION.
Galt, J.

unable to see the propriety of the practice in vogue. It is evidently mere guess-work.

In the present case the respondent alleges in his objections, but wholly abandoned at the hearing, a number of charges, of which I shall only refer to one. He says that the petitioners were, before, at and during the said election, guilty of committing, or were parties to the commission, of the offences set out in secs. 285 and 286 and secs. 288 to 295, both inclusive, of The Manitoba Elections Act, and thereby became disqualified from voting at such election, and were incompetent at the time of the presentation of the said petition to present the same. Sec. 285 provides that any act or offence punishable under any of the provisions of the next following section, or any of the provisions of secs. 288 to 295 of this Act, shall be corrupt within the meaning of this Act and of the Manitoba Controverted Elections Act. Sec. 286 alleges 13 different acts, including lending money, etc., in order to induce any elector to vote or refrain from voting, or promising an office, or making gifts, etc., or advancing funds for corrupt practices. Sec. 287 provides, as a liability for any of these acts, a penalty of $200 and imprisonment for six months in default of payment. Secs. 288 to 295 set forth such offences as corrupt treating, undue influence, intimidation, abduction, subornation of perjury, inducing persons to personate or swear falsely, etc.

It appears to me that criminal accusations such as these, when placed upon the files of the Court without justification and then abandoned by the persons filing the same, are an abuse of the process of the Court. I am, of course, dealing wholly with the preliminary objections, but the same view should also be taken of similar allegations (when made) in an election petition, founded upon nothing but guess-work, and abandoned later on.

The first preliminary objection is that at the time of the presentation of the petition security for the payment of all costs, charges and expenses that may be payable by the petitioners was not given on behalf of the petitioners as required by sec. 19 of the Act.

It was shewn in evidence that the petitioner deposited twenty $50 bills of the Northern Crown Bank with the deputy pro-

thonotary of this Court, and a receipt was given by such deputy and was filed as an exhibit. Under sec. 19, sub-sec. (2) the security shall be to the amount of $1,000 and shall be given by a deposit of money with the prothonotary of the Court; ss. (3). Such deposit shall not be valid unless it is made in gold coin which is legal tender under the statutes of Canada at the time when the deposit is made, or in Dominion notes, or in the bills of some chartered bank doing business in Canada. Sec. 20 says, "The prothonotary of the Court shall give a receipt for such deposit, which shall be evidence of the sufficiency thereof."

It was argued by Mr. Andrews, on behalf of the respondent that because the deposit was made with the deputy prothonotary the Act had not been complied with. Sec. 15 of the Interpretation Act provides that words directing or empowering a public officer or functionary to do any act or thing, or otherwise applying to him by his name or office, shall include his successors in such office, and his or their lawful deputy.

Evidence was given on behalf of the petitioners that the Northern Crown Bank was a chartered bank doing business in Canada, and that the bills in question were bills of the bank which would be honoured on presentation. I did not think at the time, and I do not think now, that any such evidence was necessary, because, under sec. 20, the prothonotary's receipt must at least be taken to be *primâ facie* evidence of the sufficiency of the deposit. I therefore overrule this objection.

The second objection is that the petitioners are not, nor is either of them, nor were they, nor was either of them, persons who had a right to vote at the election to which the petition relates, nor was either of them a candidate at such election, nor were they, nor was either of them at the time of the presentation of the said petition, persons who might by law present the petition herein.

In the *Stanstead Election Case*, 20 Can. S.C.R. 12, the respondent in his preliminary objections claimed that the petition should be dismissed because the said petitioner had no right to vote at said election. On the day fixed for proof and hearing of the preliminary objections, the petitioner adduced no proof and the respondent declared that he had no evidence and the

MAN.

K. B.

RE LAKESIDE PROVINCIAL ELECTION.

Galt, J.

preliminary objections were dismissed. The Supreme Court of Canada held that the *onus probandi* was upon the petitioner to establish his status and that the appeal should be allowed and the election petition dismissed.

In the *Richelieu Election Case*, 21 Can. S.C.R. 168, the Court again held that where the petitioner's status is objected to by preliminary objections the petitioner must establish it, and it was found that the evidence given on behalf of the petitioner failed to establish his status, but in delivering judgment, Strong, J., says at p. 177:

> It is to be remembered in connection with this point that the appellant does not prove, nor does he even allege in his petition, that he actually voted at the election.

In the present case the petitioners put in evidence the list of voters as revised by Judge Dawson, the revising Judge of the Lakeside list, and also the final revised list in the hands of the clerk of the Executive Council, and one of the copies printed by the King's Printer, and published for use at the election. It was also shown that the names of the petitioners were in each and all of these lists. In my opinion this evidence was amply sufficient to establish the rights of the petitioners to vote at the election. But, in addition to this, two of the petitioners, who were called as witnesses shewed that they had actually voted at the election. I would hold that where a man's vote has been accepted by the officer in charge of a poll, it should be presumed that he has the right to vote without regard to any formalities or evidence about election lists. Where acts are of an official nature, or require the concurrence of official persons, the presumption arises in favour of their due execution. In these cases the ordinary rule is *omnia praesumuntur rite esse acta*. I therefore overrule this objection.

The third objection is that the petitioners did not at the time of the presentation of the said petition present therewith an affidavit of each of the petitioners that he had good reason to believe and verily did believe that the several allegations contained in the said petition were true. To all appearances the petitioners have complied with this requirement, which is to be found in sec. 11 of the Manitoba Controverted Elections Act. Each of the petitioners has signed an affidavit purporting to be

sworn before E. A. McPherson, a commissioner, etc., in the following words:

1. Hereunto annexed and marked with the letter "A" to this my affidavit is the petition referred to herein. 2. I am one of the petitioners named in the said petition and my name is subscribed thereto as one of the petitioners. 3. I have good reason to believe and do verily believe that the several allegations contained in the said petition are true.

The petitioners Tidsbury and Stewart were called as witnesses on this subject, and so was Mr. E. A. McPherson, the commissioner before whom the affidavits purport to be made. The deponents were shown to have acquainted themselves with the allegations in the petition before they signed the affidavits, but it appears that Mr. McPherson had no bible with him when he administered the oath, and that the deponents swore to the affidavits with uplifted hand. I am asked to say that a document so attested is not an affidavit at all.

Every legal practitioner in this province and every Judge, I am quite sure, has frequently experienced the making of affidavits in this manner. In my own experience (if I may be permitted to say so), this is a more usual form than by kissing the Book. If it be wholly unauthorized and illegal I fear a great many titles and proceedings throughout the province which are dependent upon proof by affidavit would be robbed of their support.

In the Weekly Notes for 1902, p. 5, there is a "practice note" of some remarks made by Byrne, J., when delivering judgment in *McGillivray* v. *Anglo-Klondyke Mining Co.*, where he says:

There is a matter to which I wish to draw particular attention, it being one to which I have had occasion to refer several times. For some time past my attention has been called to the fact that witnesses occasionally refrain from kissing the Book when the oath is administered, and kiss their thumb or some other part of their hand. During the last fortnight this has occurred three times, and that not in cases of ignorant or uneducated witnesses, but in the case of people in a comparatively good position, one of the witnesses to whom I refer being a solicitor, I do not attribute to any of these witnesses, and I do not suggest for a moment, that they were actuated by any other motive than that arising from the notion that seems to have grown very prevalent, namely, that disease may be communicated by means of kissing the Book. It is sufficiently well known that, amongst the ignorant and uneducated, there are a considerable number of persons who think that they can rid themselves either of the validity or moral sanctity of the oath, or of the punishment which may follow upon giving false evidence, by refraining from kissing the Book; and it would be

MAN.

K. B.

RE LAKESIDE PROVINCIAL ELECTION.

Galt, J.

wrong for a Judge, speaking for myself, to abstain from taking notice of it when he sees a witness, whatever his motives may be, take the oath not in the duly prescribed form. I do not know whether it is as widely known as it should be that any witness may take the oath without kissing the Book; because under the Oaths Act of 1888, sec. 5, it is provided that "If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question." It is open, therefore, to a witness to elect whether he will be sworn in the English form or in the Scottish form; and, if he elects the Scottish form, he is not asked his reason for so doing.

The English statute of 1888 has not been introduced, so far as I am aware, into this province, but long before that date it was held in England in *David Mildrone's Case* (1786), 1 Leach Rep. 459, that a witness who objected to kissing the Book upon religious grounds might be admitted as a witness to swear by the form of holding up his hand without touching the Book or kissing it, and the question was afterwards referred to the opinion of the twelve judges who determined that the witness had been legally sworn. Here we have no statutory directions to observe, and I think our every-day custom cannot be nullified unless by statute. Under sec. 56 of the Evidence Act, no formal requisites to any affidavit shall be an objection to its reception in evidence, if the Court or Judge thinks proper to receive it, provided the discretion of the Court or Judge be exercised according to authority and law.

It was argued by Mr. Andrews that the only methods of administering an oath known to the law in Manitoba were, kissing the Book, or, after claiming the privilege on the ground of religious objection, in the Scottish form, with uplifted hand. I think it is impossible to accept this limitation. Jews, Chinamen, Poles and others are sworn every day in our Courts in a different manner than that suggested. I think the principle to be considered is whether a witness is or is not sworn in that form which he considers binding on his conscience: See Best on Evidence, 11th ed. p. 154. I am quite satisfied in the present case that the petitioners Tidsbury and Stewart complied with this principle, and that the affidavits in question are properly sworn. This objection also is overruled.

The fourth objection is that the petitioners did not immedi-

ately upon the presentation of the said petition give notice of the presentation thereof in the Manitoba Gazette and in a local newspaper, and such notice was not properly dispensed with. This objection seems to have been based upon the law in force prior to the present year. There is no provision in the present Act requiring it; but it is argued that the Election Rules in force, and which are to be found at the back of vol. 8 Man. L.R., require the publication of this notice, and that such rules are still in force.

Sec. 90 of the present Act provides:

> Until rules of Court have been made by the Judges of the Court in pursuance of this Act, and so far as such rules do not extend, the principles, practice and rules on which election petitions touching the election of members of the House of Commons in England were, on the twenty-sixth day of May, one thousand eight hundred and seventy-four, dealt with, shall be observed, so far as consistently, with this Act, they can be observed by the Court and the Judges thereof.

No rules of Court have been made by the Judges of this Court in pursuance of the said Act, and no rule in force in England was referred to as requiring such notice. Accordingly this objection is overruled.

Lastly, it is objected that no notice of the presentation of the petition was published by the returning officer, as provided for in sec. 21 of the Act.

The petitioners shewed that they had furnished the Returning Officer with a copy of the petition and $10 to cover any fees for publication of the notice, so that they did all that they were called upon to do. Mr. Andrews admitted that under such circumstances, he could not press this objection. It is therefore overruled.

All the preliminary objections are dismissed with costs.

Re ADAMS AND McFARLAND

Alberta Supreme Court, Walsh, J. May 23, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ VIII—80)—ASSURANCE FUND—REGISTRAR NECESSARY PARTY WHEN.

The Registrar of Land Titles is a necessary party to a case stated by private parties for the opinion of the Court as to the liability of the assurance fund upon admitted facts.

2. LAND TITLES (TORRENS SYSTEM) (§ V—50)—FORGED TRANSFER—LAND CERTIFICATE BASED THEREON—EFFECTIVENESS OF, HOW LIMITED.

No estate or interest passes under a forged transfer purporting to be made under the Land Titles Act, Alta., apart from the consideration of what effect may be given to a certificate of title based thereon in favour of a *bonâ fide* purchaser for value.

[*Gibbs* v. *Messer*, [1891] A.C. 248, 60 L.J.P.C. 20, referred to.—

ALTA.

S. C.

RE ADAMS AND MCFARLAND.

3. LAND TITLES (TORRENS SYSTEM) (§ V—50)—LAND CERTIFICATE—CANCELLATION OF, BASED ON A FORGED TRANSFER—HOW CONSTRUED UNDER LAND TITLES ACT.

The cancellation of a certificate of title on the registration of a forged transfer is not a cancellation under the Land Titles Act, and, so long at least as the registered title remains in the transferee named in the forged transfer, or in some one having no better standing, the owner in fraud of whom the certificate has been cancelled (but not under the Act) upon the recording of the forged transfer is entitled to the land.

[*Gibbs* v. *Messer*, [1891] A.C. 248, 60 L.J.P.C. 20, referred to.]

HEARING of stated case.

Judgment accordingly.

S. H. Adams, in person.

Lathwell, for McFarland.

Walsh, J.

WALSH, J.:—This is a case stated for the opinion of the Court, the essential facts of which are as follows:—McFarland, one of the parties to the case, being the recorded owner of the land in question, agreed to sell it to one Patterson, who, in turn, agreed to sell it to one Andrew F. Adams, a brother of S. H. Adams, the other party to the case. Andrew F. Adams paid his full purchase money and interest to Patterson, and called upon him for a transfer, to which call Patterson responded by presenting him with a transfer which purported to be executed by McFarland, but to which McFarland's signature was in fact forged. The duplicate certificate of title to this land had properly come into Patterson's possession shortly before this to enable him to record a genuine transfer from McFarland of another parcel of land covered by it, and the registration of the forged transfer of the land in question was thus rendered possible. McFarland did not know Adams in the matter, and was not aware of the fact that his signature had been forged to the transfer or that the transfer had been recorded until some months after its registration, when he at once recorded a caveat. Adams, the transferee, did not know of the forgery. He transferred the property to his brother, the party to the case, who took it with a knowledge of all the facts. The case does not disclose the nature of the transaction between these brothers, but Mr. Adams, who argued his own case, frankly stated in the argument that he stood in no better position in the matter than did his brother, the transferee under the forged transfer.

Three questions are submitted upon these facts:—

1. Was the forged transfer when registered effective to pass the title

from McFarland to Andrew F. Adams? 2. Was said transfer effective to pass said title clear of all claim of said McFarland? 3. In any event, is the assurance fund under the Land Titles Act liable to either party?

I stated on the argument that I would not answer ques. 3, as the registrar is not a party to the case, and no opinion which I might give would be binding upon him.

Gibbs v. *Messer*, [1891] A.C. 248, 60 L.J.P.C. 20, is decisive of this case, unless there is some difference between the statute there in question and our Land Titles Act. It is a judgment of the Privy Council on appeal from the Supreme Court of Victoria. The plaintiff's signature to a transfer was forged and the forged transfer recorded, the transferee named in it being a fictitious person. A mortgage of the land purporting to be executed by this non-existent transferee was afterwards recorded against the land, the mortgagee, in perfect good faith, advancing on this security the amount named in it. The action was brought by the former registered owner against the mortgagee and the registrar for an order for the calling in and cancellation of the certificate issued upon this forged transfer and for the issue to her of a new certificate free from the mortgage and for payment out of the assurance fund of any sum required to accomplish this.

Lord Watson, in delivering the judgment of the Board, says, at pp. 254 and 255:—

[The Judge here cited pp. 254 and 255 from the judgment of Lord Watson in the above case.]

That case arose under the transfer of Land Statute No. 301 of 1866 of the colony of Victoria, and was, of course, decided upon a construction of its provisions. I have not been able to find the statute itself, and none of its language is reproduced in the Privy Council judgment, nor is there in it any extended reference to any of its provisions. From the report of the judgments in the Court below, 13 V.L.R. 854, enough appears to shew that, in its general scheme and in many of its main features, so far at least as the question here involved is concerned, it is very like our Land Titles Act. But without having the statute itself before me, I am unable to say just how far that judgment is a binding authority under our Land Titles Act.

At common law a forged transfer is void. Is there anything in the Land Titles Act which gives force or effect to a certificate of title issued upon a forged transfer? I am not considering the

ALTA.
S. C.
RE ADAMS AND McFARLAND.
Walsh, J.

question as to whether or not such a document may become the root of a good title in one who, in good faith and for valuable consideration, buys from the registered transferee under it, for that question does not arise here. But does the transferee named in the forged document, who in good faith and without knowledge of the forgery, succeeds in having himself registered the owner of the land, or does one who takes from him, with knowledge of the facts, acquire, as against the former registered owner who has been thus wrongfully deprived of it, an indefeasible right to the land?

The only sections of the Act which can support such a claim are 42 and 44. Section 42 provides that

> The owner of land . . . shall hold the same subject . . . to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has participated or colluded.

I do not think that this section helps such a transferee, for an owner is defined by sec. 2 (*b*) to be

> any person or body corporate entitled to any freehold or other estate or interest in land at law or in equity, in possession, in futurity or expectancy,

and the transferee named in a forged transfer does not come within this definition.

Section 44 provides that, subject to certain exceptions or reservations, which it is not necessary to notice,

> Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded), so long as the same remains in force and uncancelled under this Act, be conclusive evidence in all Courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified.

Section 48 provided that, when land is intended to be transferred, the "owner" as defined above may execute a transfer in the statutory form, and sec. 50 provides that the transferor shall deliver up his duplicate certificate of title. Section 46 enacts that no instrument shall be effectual to pass any interest in land as against any *bonâ fide* transferee unless it is executed in accordance with the provisions of the Act and is duly registered thereunder. Section 38 provides for a registered owner furnishing the registrar with his signature so as to prevent personation as far as possible. Section 39 provides that, upon every transfer of ownership, the certificate of title of the transferor and the duplicate

ALTA

S. C.

RE ADAMS AND MCFARLAND.

Walsh, J.

thereof shall be cancelled. The expression "transfer" means, under sec. 2 (*c*), the passing of any estate or interest in land under the Act.

It is apparent from the provisions that it is only a transfer executed by the registered owner which can be recorded, and that it is only the registration of such a transfer which justifies the cancellation of his certificate of title. No estate or interest passes under a forged transfer, so that the condition which alone justifies the cancellation of an existing certificate of title, namely, a transfer of ownership, does not arise under it. The cancellation of a certificate on the registration of a forged transfer is, therefore, not a cancellation under the Act, and so long, at least, as the registered title remains in the transferee under it or in some one having no better standing than him, the owner, whose certificate has been cancelled, but not under the Act, is entitled to the land, for it is still under such circumstances and against such parties conclusive evidence of his ownership.

I, therefore, answer questions one and two in the negative, and the costs will be against Adams.

NOVICIAT DE NOTRE DAME DES ANGES v. BELL TELEPHONE CO.

(File No. 3574. 115.)

CAN.

Ry. Com.

Board of Railway Commissioners. July 17, 1914.

1. TELEPHONES (§ I—4)—TOLLS—HOUSE OF A RELIGIOUS COMMUNITY—BUSINESS TOLL.

A telephone in the house of a religious community is properly charged the business toll.

[*Newman* v. *Bell Telephone Co.*, 17 Can. Ry. Cas. 271, followed.]

THE application was heard at Montreal, May 15, 1914.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

Rev. S. Lajoie, for the applicant.

H. L. Hoyles, for the respondent.

COM. MCLEAN.

MR. COMMISSIONER MCLEAN:—Complaint is made of the rate of $81 per annum which is being charged this institution. There is involved in this complaint, as in the complaint of C. P. Newman, file 3574.113, the question of the proper basis of rates. It is contended by the applicant that the religious community which he represents is not a business organization.

CAN.

Ry. Com.

NOVICIAT DE NOTRE DAMES DES ANGES v. BELL TELEPHONE CO.

Com. McLean.

The company points out, in its answer, that, prior to the decision of the Board in the Montreal Telephone Case, the business rate had been used as a basic rate within the primary rate area. The increase in rate complained of is brought about by the same conditions as have already been set out in my memorandum on the Newman complaint.

The telephone in question is located on the Lower Lachine road, at a distance of three and one-quarter miles beyond the intersection of that road and the six-mile circle established by the Board, the circumference of this circle being the boundary of the primary rate area. So far as the rates are concerned, the situation presented in this application is almost identical to that presented in the Newman complaint. The increase in rates is due to the same re-adjustments as were referred to in the Newman complaint. The applicant is served by a four-party line, although but three persons are making use of it. There is a difference as to the excess mileage distance, the applicant being one-quarter of a mile further away from the primary rate area than Newman.

While the religious community concerned in the present application comes somewhat closer to the border line between the business rate and the residence rate than does the Newman complaint, it seems to me to fall within the reasoning of the memorandum I have already written on the Newman complaint, and, in my judgment, the present application should be disposed of in the same way.

The Chief Commissioner

THE CHIEF COMMISSIONER concurred.

N. B.

S. C.

PACIFIC COAST FIRE INSURANCE CO. v. HICKS.

New Brunswick Supreme Court, Sir Frederic Barker, C.J., McLeod, and Barry, JJ. November 21, 1913.

1. INSURANCE (§ III A—48)—POLICY—DELIVERY OF NECESSARY—INSURANCE ACT (CAN.).

Delivery of the policy or contract of fire insurance completed in other respects is necessary to its binding obligation on both parties, and the illegal issue in Canada of a policy of insurance by a foreign company not licensed under the Insurance Act (Can.) leaves it an incomplete and unenforceable contract, and not available by a licensed company as a breach of a condition of its concurrent policy with the assured that no other insurance should be effected without due notice to such licensed company.

[*Equitable Fire, etc., Co.* v. *The Ching Wo Hong*, [1907] A.C. 96; *Xenos* v. *Whickham*, L.R. 2 H.L. 296; *Allison* v. *Robinson*, 15 N.B.R. 103, referred to.]

APPEAL by the plaintiff from judgment of White, J., in favour of the defendant.

H. A. Powell, K.C., and *W. H. Harrison*, for the plaintiff.

M. J. Teed, K.C., and *G. R. McCord*, for the defendant, *contra*.

The judgment of the Court was delivered by

BARKER, C.J.:—This is an action for money had and received to recover the amount of insurance paid by the plaintiff company, as it says, under a mistake of facts or by reason of a false representation made by the defendant in regard to the amounts insured on his property, in addition to that carried by the plaintiff company.

Agreeing, as I do, not only with the conclusion arrived at by White, J., before whom the case was tried without a jury, but also with his reasons, I shall confine my remarks to the argument addressed to us on appeal. The condition in the plaintiff's policy upon which the liability depends forbids any other insurance on the property made without due notice to them, and the policy is rendered void by any such insurance effected in violation of that condition. In *Equitable Fire, etc.*, v. *The Ching Wo Hong*, [1907] A.C. 96, it appeared that the company had effected two policies with the defendant which contained a similar additional insurance clause. He afterwards effected a further insurance with the Western Assurance Co. without giving the necessary notice. The Western policy was duly delivered. It contained a receipt for the premium and also a clause to the effect that it would not be in force until nor would the company be "liable in respect of any loss or damage happening before the premium or deposit on account thereof is actually paid." The premium never was paid and no deposit was made. The Judicial Committee held that, inasmuch as the premium had never been paid, the Western policy never became effective, and there was, therefore, no breach of the condition in the Equitable policy. In delivering the opinion of the Committee, Lord Davey said:—

> The question, therefore, is whether, the premium not having been paid either wholly or partially, the policy executed by the Western Assurance Company *ever became effective*, and this must be decided in the same way as if an action had been brought by the respondents on that policy.

Mr. Harrison cited several cases to shew that the two foreign policies were, in fact, made and completed out of Canada, and, therefore, in no way affected by the Canadian Insurance Act, which prohibits the issue in Canada of insurance policies by unlicensed companies. He contended that there was a complete

N. B.

S. C.

PACIFIC COAST FIRE INS. CO. v. HICKS.

Barker, C.J.

delivery in Philadelphia and a complete contract made there binding upon both parties, and, therefore, enforceable and governed by the law of that place. *Xenos* v. *Whickham* (1866), L.R. 2 H.L. 296, and particularly at 312, was principally relied on in support of this view, more especially in reference to the question of delivery discussed by White, J.

I have examined this and various other cases, and they all agree that delivery of the contract, completed in other respects, is necessary to its binding obligation on both parties. What constitutes a delivery in each particular case depends upon its circumstances. In *Xenos* v. *Whickham, supra,* it appeared that there was a well-understood usage among insurers and the brokers acting for the insured, that, when a policy was made out according to the "slip" and executed by the directors as a completed contract, it was left by the insurers with one of their officers, as the property of the insured to be delivered to the insured's broker when called for. The custody, as well as the control, passed to the insured by force of the well-established usage of the business. In *Fielding* v. *Seymour,* [1913] 1 Ch. 475, and other cases in which the subject is treated, it is clear that, while no precise form of words or any precise formality may be required in order to constitute a delivery of a document so as to render it obligatory on the party delivering it, there must be some declaration or act which expressly, or, in view of the circumstances of the particular case, impliedly, shews that the one party has executed a perfect agreement and abandoned the control of it to the other party with the intention of completing the transaction.

Allison v. *Robinson* (1873), 15 N.B.R. 103, is a case much like the present. It was there held that the contract of insurance was incomplete until delivery, and, as that took place at St. John, it amounted to a "doing business" there, and was, therefore, in violation of the statute then in force, which prohibited companies incorporated elsewhere than in the province from doing business there without having first deposited in the provincial secretary's office a statement of their business and position. In the present case it is, I think, clear that, if you eliminate all that took place in Canada in reference to the two foreign policies, they would be incomplete and unenforceable contracts.

This appeal must be dismissed with costs.

Appeal dismissed.

INDEX OF SUBJECT MATTER, VOL. XX., PART 2.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XX., PART 2.

ROMANIUK v. GRAND TRUNK PACIFIC R. CO.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 2, 1914.

1. MASTER AND SERVANT (§ III B—300)—INJURY TO SERVANT OF CONTRACTOR—JOINT LIABILITY OF PROPRIETOR AND OF INDEPENDENT CONTRACTOR, WHEN NEGATIVED—ABSENCE OF SUPERVISION—TESTS.

Rock-filling in a bay for the protection of a railway embankment is not work of such a dangerous character as to impose upon the railway company any duty to safeguard the servants of independent contractors executing the work under the general supervision of the railway company's engineer as to the actual construction of the "fill," where the injury took place from the fall of rock in quarrying the material upon the railway lands with the company's permission, but the latter had under the contract no control over the manner in which the material should be taken out nor as to where or how the contractors should procure the material, and, in fact, exercised no supervision over the quarrying.

[*Dallantonio* v. *McCormick*, 8 D.L.R. 757, 14 D.L.R. 613, 29 O.L.R. 319, and *Penny* v. *Wimbledon Council*, [1899] 2 Q.B. 72, distinguished; *Hole* v. *Sittingbourne*, 6 H. & N. 488, applied.]

Statement

APPEAL from the judgment of Metcalfe, J., withdrawing the case from the jury and nonsuiting the plaintiff.

The appeal was dismissed, HAGGART, J.A., dissenting.

T. J. Murray, for appellant, plaintiff.

C. H. Locke, for respondent, defendant.

Perdue, J.A.

PERDUE, J.A.:—The injury in respect of which this action is brought was caused to the plaintiff while engaged in loading stone on a stoneboat for use on a piece of work then being done for the defendants near Quibell in the Province of Ontario. The plaintiff was at the time of the accident in the employment of a contractor who had undertaken to do the work for the defendants, and the injury was caused to the plaintiff while he was performing his duties in that employment. The work consisted in constructing a rock fill in a bay of the Wabigon River for the protection of the defendants' railway embankment. This rock fill was intended to prevent the embankment from sliding and to protect it from the action of the water. The rocks which were used in the work were blasted out of the banks of the river, a quarry being opened at the top of each bank. The rock was blasted out with dynamite and thrown down the steep face of the bank. A rope operated by an engine was used to haul the boats and also to move the heavier pieces of rock. At the time of the accident a heavy piece of rock had been pulled on a boat by means of the rope and engine. In doing this another large piece of rock was disturbed, which rolled down the slope and crushed the plaintiff against the boat where

MAN.

C. A.

ROMANIUK v. GRAND TRUNK PACIFIC R. CO.

Perdue, J.A.

he was working, injuring his right leg and arm. There is no evidence that the accident took place on the defendants' property.

The contract under which the work was being performed was made between the firm of McCarthy & Mann, as contractors, and the defendants. The parts of the contract, material in this case, are as follows:—

5. The engineer (*i.e.*, the chief engineer of the defendants) may at any time before the completion of the work, order extra work to be done, or make any changes he may deem expedient therein, and may furnish other plans either by way of supplement or in substitution of the plans referred to, etc.

6. The contractor shall, at his own expense, furnish all the labour, material and tools necessary for the said work; prosecute the same in a skilful and efficient manner and under the control and supervision of the engineer, to whose direction he shall at all times conform; afford every facility for inspection and testing by the engineer of the work as done and being done and of the materials provided therefor; re-execute any work that, in the opinion of the engineer, is not in accordance with the plans and specifications, removing material objected to by the engineer and replacing same with other material to his satisfaction; and in all respects follow and observe the instructions of the engineer, whose authority shall be paramount in and about the construction of the said work. Provided, however, that omission by the engineer at the time of any estimate to reject imperfect work shall not be deemed an acceptance thereof.

7. The engineer shall be sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material shall be final.

8. The contractor shall keep a competent foreman on the ground, during all working hours, to receive orders of the engineer, such foreman to be engaged and retained only with approval of the engineer.

It is argued that the reservation by the defendants of control over the work rendered them responsible for negligence in the performance of it whereby a workman employed upon it was injured. In this connection the provisions of clause 6 of the contract are of most importance. That clause declares that the contractor shall furnish all the labour, material and tools for the work, that he shall follow and observe the instructions of the engineer, "whose authority shall be paramount in and about the construction of the said work." This plainly intends to give the engineer complete authority over the construction, but does not extend that authority to the manner of procuring the material and bringing it to the place where it is to be used. The clear intention is to give the engineer full supervision and authority over the actual construction, and to make his decision final in respect of the quality of the material and the proper performance

of the work. The engineer has no control over the contractor as to where or how the latter procures the material. An engineer of the defendant, who appears to have superintended the work in question, states that the contractors selected the quarries from which the rock was to be taken, and that these were satisfactory to him. He also states that the rock was taken from the defendants' property with the defendants' permission. There was nothing, however, to prevent the contractors from obtaining the material in any other place, as long as it was suitable for the work. There is nothing to shew that the defendants exercised any supervision or control over the manner in which the quarries were worked or over the means taken of bringing the material upon the work.

The plaintiff relies upon *Dallantonio* v. *McCormick*, 8 D.L.R. 757, 14 D.L.R. 613, 29 O.L.R. 319. In that case the plaintiff was injured by the fall of a mass of rock while he was working on a tunnel which was in process of being constructed for the C.P.R. Co. by a contractor. Under the terms of the contract under which the work was undertaken, it was provided that the work should be carried on in the manner directed by the railway company's engineer. By a change in the contract the work was done by "force account" and under the supervision of the engineer. In an action against both the contractor and the company, negligence was found as against both in not guarding against the danger of falling rocks. It was held by the Appellate Division that the nature of the work was not such as to render the company liable at common law independently of the contract, but that such complete control over the manner of doing what was necessary in connection with the work was reserved to the company by the contract as to make it liable for the negligence.

Without venturing to discuss in any way the correctness of the conclusion arrived at in the *Dallantonio* case, as based upon the particular set of facts there existing, I would point out that the decision does not apply in the present case. Here the injury complained of was not caused by anything done or any negligence that occurred during the actual construction of the work, over which construction the engineer was given such wide power of supervision and control. The accident took place while the contractor was procuring and taking out material for use on the work, an operation over which the engineer had no such power.

MAN.

C. A.

ROMANIUK v. GRAND TRUNK PACIFIC R. CO.

Perdue, J.A.

The negligence of the contractors in the present case appears to me to have been casual or collateral, as defined in *Hole* v. *Sittingbourne*, 6 H. & N. 488, 497, that is, arising incidentally in the course of performance of, and not directly from, the act authorised.

A principal is not liable for damage resulting from the casual or collateral negligence of an independent contractor, or of the latter's servants, while doing the work contracted to be done:

21 Hals. 473; *Pickard* v. *Smith*, 10 C.B.N.S. 470; *Penny* v. *Wimbledon*, [1899] 2 Q.B. 72.

Penny v. *Wimbledon Urban Dist. Council*, [1898] 2 Q.B. 212, was cited by the plaintiff as an authority in his favour. In that case a District Council had employed a contractor to repair a highway, the work to be executed according to instructions to be furnished to the contractor by the District Council's surveyor. The contractor left on the road a heap of soil and grass unlighted and unprotected. The plaintiff, while walking on the highway after dark, fell over this and sustained the injury. Bruce, J., held the District Council liable upon the ground that they knew the highway was being used by the public, and must have known that the works to be executed would cause some obstruction to traffic and some danger, unless means were taken to give warning to the public. This case was affirmed in appeal ([1899] 2 Q.B. 72), and the principle of the liability is there emphasized, that the work itself would be dangerous to the public unless necessary precautions were taken to guard against accident. I cannot see how it can be reasonably contended that the work which the contractors in the present case were employed by the defendant to perform, namely, to construct a rock fill, was naturally of a dangerous character, or that a duty was imposed upon the defendant to take steps to safeguard the servants of the contractors during the execution of the work.

I think the appeal should be dismissed with costs.

Howell, C.J.M.
Richards, J.A.
Cameron, J.A.
Haggart, J.A.

HOWELL, C.J.M., RICHARDS and CAMERON, JJ.A., concurred with PERDUE, J.A.; HAGGART, J.A., dissenting.

Appeal dismissed.

DOMINION TRUST v. MASTERTON.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. November 3, 1914.

1. ESTOPPEL (§ II C—36)—BY JUDGMENT — ACTION TO RECOVER POSSESSION OF LANDS.

Where an action to recover possession of land and for mesne profits brought by a trustee was not competent under the Land Registry Act, R.S.B.C. ch. 127, sec. 104, by reason of the transfer to the trustee not having been registered, but at the trial the *cestui que* trust as the registered owner was at the trustee's request substituted as a party plaintiff and after a trial of the merits to which the trustee proceeded under cover of the substituted plaintiff's name the action was dismissed and it was adjudged that neither the trustee nor the *cestui que trust* was entitled to possession, such judgment may be set up as *res judicata* in a subsequent action for possession brought by the trustee as to the merits disposed of in the former action; nor is the trustee's position improved as to the second action by the intermediate registration of his title and the operation of the Land Registry Act where the real issue in both proceedings did not affect the validity of the registered title but concerned the amount which the defendant should pay under a purchase agreement from the *cestui que trust*.

2. RECORDS AND REGISTRY (§ III D—30)—AS NOTICE—EFFECT OF RECORDING—ACTUAL NOTICE, EFFECT OF.

Section 104 of the Land Registry Act, R.S.B.C. ch. 107, does not operate to establish a title in a registered owner as against the equitable interest of a purchaser in possession of whose claim the registered owner had notice on acquiring the property.

[*Chapman* v. *Edwards* (1911), 16 B.C.R. 334, applied.]

Statement

APPEAL by the plaintiff from the judgment of Morrison, J., dismissing, as *res judicata*, an action for the possession of lands.

The appeal was dismissed.

A. C. Brydon-Jack, for appellant.

S. S. Taylor, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appellant in 1912 brought an action against the respondent claiming possession of the real property in question in this action. That action was, after a trial, dismissed. It then brought this action claiming the same relief. Respondents rely on estoppel. The record and the evidence in the former action are before us, and shew that an amendment was made at the former trial by which William George was, at the request of the appellant's counsel, and on his undertaking to obtain George's consent, added as a party plaintiff. The reason for this amendment clearly appears: William George was the registered owner of the land, but had conveyed it to the appellant in trust ultimately for the benefit of George's children. As this conveyance had not then been

B. C.
C. A.
DOMINION TRUST v. MASTERTON.
Macdonald, C.J.A.

registered, appellant's counsel was met with the difficulty created by sec. 104 of the Land Registry Act, which he surmounted by obtaining said amendment. The trial with the assent of all parties was then proceeded with, with the result that judgment was given in favour of the respondent on the merits.

The facts, shortly, are that William George authorized his son and his son's partner to erect buildings on lands belonging to the father with a view to selling the same. The partners, with the father's consent, agreed to sell the land and building in question in this action to the respondent for $2,416 payable in instalments. Before the building was completed the respondent was let into possession.

A dispute arose between the parties with respect to some alleged extras put into the building. William George claimed that the price of the alleged extras should be added to the purchase price of the property. On defendant's refusal to consent to this, the said first action was brought by appellant—to whom the property had in the meantime been conveyed in trust as aforesaid. The real dispute between the parties therefore was as to the recovery of the price of the extras. After the dismissal of the first action, the appellant registered the trust deed and brought the second action, which raised precisely the same issues as were raised in the first action.

Had the appellant not consented to the said amendment and proceeded with the trial on the merits, I should have had to consider its rights apart from those of the immediate parties to the transaction, but in view of the course taken by appellant at the first trial, I think it is estopped from setting up the case now insisted on.

The appellant's whole argument was that there can be no estoppel in ejectment cases. That is too broad a statement. *Davies* v. *Evans* (1841), 9 M. & W. 47, is a good illustration of the application of the doctrine of estoppel to possessory actions. The first action in that case failed because the termination of the tenancy was not proven, and therefore manifestly it would have been absurd to hold that the tenant could thereafter never be ejected, though in another action termination of the tenancy were clearly proved. In such cases it is the possessory title for

B. C.
C. A.
DOMINION TRUST v. MASTERTON.
Macdonald, C.J.A.

the time being which is in issue. In the case before us it was the title to the land itself and the right of possession forever which was tried and determined in the first action.

Apart, therefore, from the merits which appear to be entirely with the respondent, I think the action was rightly dismissed on the ground that the claim therein made was *res judicata*.

I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—I think this judgment can be supported on the ground taken by the learned trial Judge. Although *res judicata* cannot be regarded in all cases as an answer to an action for possession of real estate: see *Doe d. Strode* v. *Seaton* (1835), 2 Cr. M. & R. 728; 5 L.J. Ex. 73; 1 Tyr. & G. 19, yet in the circumstances of this case I think it is an answer.

The learned trial Judge did not deal with the second point namely that the conveyance of September 4, under which the plaintiffs obtained their certificate of title was a fraudulent device to obtain an advantage under the Land Registry Act. On that point the defendant has a good defence to an action brought by William George for possession of this land. The question now is as to sufficiency of that defence in an action brought by the present plaintiffs in the absence of a counterclaim to set aside the conveyance from George to the plaintiffs as voluntary and to rectify the register of the title to the lots in question.

In the case of *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] A.C. 491, at 504, the powers and duty of a Court to direct rectification of a register even in countries where registration is compulsory, by causing fresh entries to be made or the correction of existing entries to carry out the principle that (where rights of third parties do not intervene) no person can better his position by doing that which it is not honest to do, are considered.

On the power of the Court to make such rectification, the cases of *Hodson* v. *Sharpe* (1808), 10 East 350, and *Ballison* v. *Hobson* (1898), 2 Ch. 403, may be referred to.

The principle on which the duty of the Court rests is one of general application and has been acted upon by this Court

B. C.

C. A.

DOMINION TRUST v. MASTERTON.

Martin, J.A.

in *Chapman* v. *Edwards* (1911), 16 B.C.R. 334. On this second ground I am of opinion that the defendant is entitled to succeed.

I would dismiss the appeal and the action.

MARTIN, J.A.:—I agree that upon the issue defined by the pleadings in this and the former action, and because of the substitution of a new plaintiff with the consent of the present plaintiff, said issue must be deemed to be *res judicata* by the result of the former action and therefore the appeal should be dismissed. It should not be forgotten that formerly, in purely ejectment actions, there were no pleadings (Bullen and Leake on Precedents of Pleading, 465), which explains the reason for certain decisions. Here the title was pleaded and determined. Holding this view it is unnecessary to express an opinion on any other point.

Galliher, J.A.

GALLIHER, J.A.:—This was an action to recover possession and for mesne profits.

The case was first tried before Clement, J., on January 31, 1913. At the time of the trial the Trust Company held a trust deed from William George, but were not the registered owners of the land in question, the registered title being in William George. Objection was taken that the Trust Company could not maintain the action by reason of sec. 104, R.S.B.C. ch. 127, and the learned trial Judge gave effect to that contention, but substitued William George the registered owner as plaintiff. The case was fully tried out and judgment given dismissing the action with costs against both William George and the company.

Subsequent to the trial, plaintiffs became the registered owners of the property in question and brought this action on March 28, 1913. To this the defendant pleaded *res judicata* and also claimed right to possession by virtue of an agreement of sale from Granger George & Co., as vendors and the defendant as purchaser, which agreement was ratified by William George, the owner of the property by agreement under seal prior to the said William George having any dealings with the plaintiffs, which facts were known to the plaintiffs. This latter plea was in issue in the former trial.

B. C.

C. A.

DOMINION TRUST v. MASTERTON.

Gallihier, J.A.

The case came on for hearing before Morrison, J., on September 24, 1913, who held that the defendant was entitled to plead the previous trial and had done so effectually, and dismissed the action. From this judgment the appeal is taken.

It was submitted by appellant that the doctrine of *res judicata* does not apply to actions in ejectment, and several cases were cited and reference made to Halsbury's Laws of England, vol. 13, pp. 49, 349 and 354; also vol. 24, par. 612. This latter paragraph reads as follows:—

> Judgment in the action being merely for the possession of the property is not conclusive as to the title of the parties. It follows that an unsuccessful claimant may immediately commence another action. . . .

If the judgment in the former trial had been simply that the Trust Company had no status to maintain the action by reason of sec. 104 of the Land Registry Act, I quite agree that they could after they had overcome that objection have brought a new action of ejectment, but that is not the position of the appellant.

At the first trial William George, the registered owner, was substituted as plaintiff, and the whole matter as to dealings between Granger George & Co., William George and the defendants, and the right, title and claims of the defendant adjudicated upon, the only dispute between the parties being as to whether the defendant was obliged to pay for certain extras in connection with a house built upon the premises in question, or whether he was entitled under his agreement and upon payment of the balance of purchase-money as specified in the agreement to a conveyance in fee of the property.

The learned trial Judge found in defendant's favour, and that judgment stands and was not appealed from.

Had the plaintiffs been registered owners of the property when they started their first suit, they could have been in no better position than William George for whom they held the property in trust, and as the course pursued then was a trial of the whole rights of the respective parties the judgment as it stands unappealed is a bar to the present action.

The appeal will be dismissed.

McPHILLIPS, J.A., concurred.

McPhillips, J.A.

Appeal dismissed.

N. S.

S. C.

PUBLICOVER v. POWER.

Nova Scotia Supreme Court, Graham, E.J. November 9, 1914.

1. EASEMENTS (§ II A—5)—RIGHT OF WAY—PARTITION AGREEMENT—PLAN ON PARTITION DEED—SUBSEQUENT PURCHASERS WITH NOTICE — BOUND BY.

A right to go on abutting land to draw water from a well there situate may be the subject of an easement created by a partition agreement and evidenced by indicating the well and path to same running from the house on the adjoining lands on the plan accompanying the partition deeds; and such easement will be binding on parties subsequently acquiring the parcel on which the well is situate with notice of such plan and partition agreement.

2. EASEMENTS (§ IV—46)—NON-USER—INTENTION TO ABANDON—STATUTE OF LIMITATIONS.

An easement not barred by the Statute of Limitations is not lost by non-user unless there is some act clearly indicative of an intention to abandon the right; an acquired right to use a neighbour's well is not lost by commonly using a newer well on his own lands if resort is made to the former well in pursuance of the easement when the new well runs dry.

[*Ward* v. *Ward*, 7 Ex. 838, referred to.]

Statement

ACTION claiming damages and an injunction for obstruction of a right of way to a well.

Judgment for plaintiff.

A. Roberts, for plaintiff.

V. J. Paton, K.C., for defendant.

Graham, E.J.

GRAHAM, E.J.:—It is quite clear that the right to go on a neighbour's close and draw water from a spring there constitutes the subject of an easement: *Rice* v. *Ward*, 4 El. & Bl. 702. I am of opinion that an easement was created by reason of the agreement and plan entered into between the sons of Frederick Publicover under the circumstances of this case.

The father of these sons, one of whom is the plaintiff, devised to them certain land mentioned in his will. There was necessary in order to enjoy this land a partition of the same among these sons. And the late Judge of Probate Mr. Solomon, was chosen by them to make this partition. And he made the partition. No doubt about that. He did it by means of a plan and agreement under seal. The plaintiff got the house of the homestead but the line between him and his brother Lemuel's lands allotted by Mr. Solomon and clearly indicated as two homestead lots ran between that house and the well that had been in use for that house. There was a path to the well shewn on the ground before the partition. So

that Mr. Solomon on his plan shewed extending from the kitchen or back part of the house a way to this well which he marked with a round spot. Nearly halfway between the well and the house this line is shewn. The legend written on the plan along the way is as follows: "Pathway to well." The plaintiff says "We all told him about the well and he put that on." Those marks must have been placed there to indicate an easement. I think that anyone would say at once that lot No. 1 was over No. 2 to have the way to the well there and nothing more was required to indicate the fact. In the agreement under seal the words indicating the partition and the creation of the easement by reference to the plan are as follows: After the parties,

> Have agreed and by these presents mutually and severally agree to the plan of division as delineated hereon of a certain lot of land situate at Lower Dublin—and being part of the estate of the late Frederick Publicover and are fully satisfied and contented to hold the lots on which our names are respectively written and affixed to the plan aforesaid, to have and to hold the same each for himself and herself in severalty, and to our respective heirs and assigns forever.

I think those words are ample.

There is first a technical objection, namely, that one son, Enos, who had his land laid off in another place was not a party to that agreement. I must explain. Mr. Solomon made the partition, but before he finished his very nice plan, which took some months apparently, this son Enos died and therefore was not forthcoming to sign the instrument. But meanwhile Enos had made a deed in which for a consideration of $300 he sold to the plaintiff parts of his land. In that deed he recognized the Solomon partition in the following words:—

> All their right, title and interest in to and upon the estate of the late Frederick Publicover situate at, etc., and fully described in a plan of division of the aforesaid estate now in course of preparation by Edward Solomon, etc., except the house lot upon which stands the house occupied by the parties of the first part, the one-fourth part of the beach undivided, the lot upon which the house stands, one-fourth part of a lot of land upon which Solomon Publicover now resides and a strip of uncultivated land on the northern side of the pasture all of which the said parties of the first part reserve for themselves.

Now Mr. Solomon when he came to get the deed of partition signed, Enos being dead, thought no doubt that Enos's daugh-

N. S.
S. C.
PUBLICOVER
v.
POWER.
Graham, E.J.

ter the heir, an infant, would be the correct party and she being an infant he wrote in over Enos Publicover's name already written on it lots excepted by way of amendment, the name of her mother her natural guardian as follows: "Isabella Publicover by her guardian Malinda Publicover, etc." And in the agreement he made her a party by the following description:—

"Malinda Publicover, guardian to Isabella Publicover, the surviving daughter of Enos Publicover, deceased."

The subsequent amendments on the Enos Publicover lots, both those excepted and those sold, are clearly indicated on the plan. And neither the infant nor the mother ever executed the agreement. In my opinion that is not a defect which affects this partition between the plaintiff and Lemuel Publicover, under whom the defendant claims. The recognition of the Solomon partition in the deed from Enos and his wife to the plaintiff before the plan was fully finished is binding. The plaintiff says the plan was made at that time when he bought Enos out and by that partition Enos had no rights in the land of the dominant or servient tenement. The land allotted to Enos, or to the infant or guardian, he having died, was in another place altogether. Enos would be bound by that partition and his heir. Clearly, the four of them assented to this way to the well. And further, if the interest of the infant in that land is not barred by the Statute of Limitations, I know of no rule which would prevent the plaintiff from recovering a proportion of the damages for interfering with the right of way.

It is contended that the whole document is void, because Isabella having been made a party, the want of execution by her rendered the instrument ineffective, and it was only delivered conditionally and as an escrow. It must be taken after this lapse of time, Isabella, having taken the benefit of her house all her life as set off to her by occupation and after the circumstances I have detailed, that she, as well as those who did execute it, assented to the partition according to its terms.

The defendant has raised another objection, namely, that the agreement and plan to which I have been referring were never registered under the statutes relating to registry of

deeds. They were merely filed in the office of the registrar of deeds. But the first purchaser and the subsequent purchaser of the Lemuel Publicover lot had actual notice of this agreement and plan. Take the deed to the first vendor, John Francis Mackenzie, of March 15, 1881, the description is made by reference to that plan. It could not be described in the way it was without reference to it. It is "lot No. 2" and that is the number of the lot on the plan and after a description by bounds and distances continues:—

As will more fully appear by plan of division of the late Frederick Publicover's lands, drawn by E. H. Solomon on the 26th day of January, 1876.

The reference is carried into the deed from the Mackenzies to Bell and from Bell to the defendant under date of August 22, 1907. There could not be better proof of actual notice.

I refer on the subject of actual notice to the cases cited by Strong, J., in *Ross* v. *Hunter*, 7 Can. S.C.R. 289, at 321.

And, to go back to a former point, the description in the defendant's deed of August 22, 1907, by the description, clearly recognizes the validity of the instrument of partition in the boundaries and the reference.

That an easement was created by reason of the facts I have mentioned I refer to *Pugh* v. *Peters*, 11 N.S.R. 139, 2 Russ. & Chesley 139, at 142, and *Espley* v. *Wilkes*, L.R. 7 Ex. 298, 26 L.T. 918.

The defendant raises another question. He contends that the way has been exhausted by non-user. It appears that the plaintiff dug another well nearer to his residence, but this well runs dry in some seasons and he has been frequently obliged to resort to the former well. This is an explanation of why there has been at times non-user. I refer to *Ward* v. *Ward*, 7 Ex. 838. There must not only be the cesser of use, but there must be some act clearly indicative of an intention to abandon the right. I refer to Goddard on Easements, 7th ed., 563. No Statute of Limitation has run against the plaintiff. When has there been before the removal of the gate and recent acts anything which would enable the plaintiff to bring an action and set any such statute running against him?

N. S.

S. C.

PUBLICOVER v. POWER.

Graham, E.J.

I adopt the evidence of the plaintiff's witnesses as to the existence and use of the pathway and well and of two successive gates in the fence on the division line for the use of those using the pathway. It would be an easy matter for the witnesses for the defendant not to notice them.

The plaintiff is entitled to the declarations claimed, to $1 damages for converting the gate and to an injunction with costs.

MAN.

K. B.

Re PHILLIPPS & WHITLA.

Manitoba King's Bench, Galt, J. October 17, 1914.

1. SOLICITORS (§ II C—33)—FEE ON SETTLEMENT—TAXATION—APPEAL—REFERENCE BACK — NEW EVIDENCE — FINDING FOR SAME AMOUNT.

The allowance of an appeal from the taxation between solicitor and client of a lump sum (in this case $3,500), as a fee on settlement and a reference back for reconsideration will not invalidate another finding by the taxing officer of the same amount where new evidence has been taken by him to fix the value of the services in question.

[*Re Phillipps & Whitla*, 12 D.L.R. 106, 23 Man. L.R. 92, considered.]

Statement

APPEAL from taxation.

Appeal dismissed.

R. F. McWilliams, for clients.

H. Phillipps, for solicitors.

Galt, J.

GALT, J.:—This is an appeal from the certificate of G. H. Walker, senior taxing officer of this Court, in respect of a fee of $3,500 allowed to Messrs. Phillipps & Whitla, solicitors for the plaintiff in a taxation between solicitors and client. Several preliminary objections to the appeal were overruled by me during the argument.

The circumstances are extremely unusual. It appears that the solicitors were retained by the plaintiff to inquire into and, if necessary, commence an action against the defendants to set aside the sale of some valuable real estate in Winnipeg which had been made by the defendants on behalf of the plaintiff for the sum of $155,000. The solicitors had been engaged in a somewhat similar piece of litigation on behalf of another client and had carried the case to a successful conclusion. The plaintiff was aware of this and desired to take advantage of the special knowledge supposed to be possessed by the solicitors in connection with the subject matter to be litigated. The action had

not proceeded far before negotiations for settlement were opened, during the course of which the plaintiff expressed a willingness to his solicitors to accept $65,000 from the defendants in full of his claims; but the solicitors, believing that the land in question justified a further value of $90,000 from the defendants, did not act upon the authority they had, but proceeded with the negotiations, and in the result secured a settlement covering the additional value in land above mentioned. In addition to this, they secured a re-conveyance of the land with a Torrens title (which it did not possess when the plaintiff originally conveyed it), in respect of which the defendants, or their other customer, had paid $487. The solicitors also procured the return of the commission paid by him to the defendants on the former sale, amounting to the sum of $3,875, and they succeeded in eliminating a set-off for interest which had been claimed by the defendants, amounting to the sum of $2,100.

The negotiations for settlement continued for about a month. The solicitors at first rendered a bill of costs which, apart from disbursements, consisted of one single item, namely, "Fee on settlement, $9,500." The taxing officer considered that the case was one in which he should allow a lump sum, and he fixed $7,976.44, being 5 per cent. on his calculation of the difference between $155,000, and the value asserted by the client, some fractional frontage probably accounting for the odd figure. See *Re Phillipps & Whitla* (No. 2), 1 D.L.R. 847; 22 Man. L.R. 154.

An appeal from this taxation came before Robson, J., (reported as above), who held that although the solicitors were entitled to substantial remuneration, they were not entitled to have it fixed on a percentage basis, and accordingly, the bill was referred back to the taxing officer to deliver an amended itemized bill. This was done and numerous charges were itemized, but the bill contained the following item: "Fee on settlement as per negotiations, October 18th to November 24th, $8,480." The senior taxing officer reduced this item to $3,500. From this taxation the client appealed to Metcalfe, J., who refused to interfere, and dismissed the appeal with costs.

MAN.
K. B.
RE PHILLIPPS AND WHITLA.
Galt, J.

The client then appealed to the Court of Appeal, 12 D.L.R. 106; 23 Man. L.R. 92. In the result the appeal was allowed and the bill of costs was referred back for taxation in respect of the item of $3,500 aforesaid.

The appeal now before me is from the allowance of exactly the same amount by the taxing officer on this third taxation as he had allowed on the second. He says in his report on the taxation: "I have considered the evidence of Messrs. Andrews, Pitblado and Anderson, and see no reason to change my mind as to the amount to be allowed, and I allow it at $3,500."

At first sight it would appear that the taxing officer has failed to observe the express directions of the Court of Appeal.

The Judges of the Court of Appeal, when the matter was before them, came to the conclusion that $3,500 was too much to be allowed for the fee on settlement.

[The Judge here cited extracts from judgments of Howell, C.J.M., Perdue and Cameron, JJ.A., 12 D.L.R. 106 at 107, 109 and 111.]

As I said before, at first sight it would seem that the allowance of $3,500, by the taxing officer is in direct conflict with the opinions expressed by the Judges of the Court of Appeal. No doubt the Court itself could have fixed the amount to be allowed if they had chosen to do so, but possibly feeling that further evidence might be adduced before the taxing officer, the reconsideration of the item was expressly left to him, and incidentally their lordships specially referred to matters which it would be proper for the taxing officer to consider on the review —for instance: Perdue, J., says:

> The item in the tariff relating to fee on settlement, referred to by Robson, J., in his judgment, gives the taxing officer the very widest discretion as to the amount to be allowed, subject, of course, to appeal. In arriving at the quantum to be taxed on such item, the taxing officer may well take into account the amount involved, the time expended, the skill exercised in the negotiations and the success achieved. In the present case the client obtained everything he sought to recover by the suit. The solicitors are to be credited with having conducted the litigation and the negotiations for settlement with great professional skill and business capacity, and with having been completely successful in their efforts. The taxing officer should, therefore, allow them a fee which would, in his judgment and discretion, be commensurate with the services rendered.

The senior taxing officer is also registrar of the Court of Appeal, and it cannot for a moment be supposed that he would intentionally disregard the clear instructions of the Court.

In *Knight* v. *The Gravesend R. Co.*, 27 L.J. Ex. N.S. 8, the question of interfering with a master's taxation of costs was dealt with. Pollock, C.B., said:

> If, however, he has, in fact, exercised his discretion in the matter, we shall not review his decision, as we cannot see that it was manifestly wrong. And whether he has done so or not, we will ascertain by reference to him. If he has done so, we shall decline to re-enter into the matter. Upon reference to the Master, it was found that he had exercised his discretion; whereupon—
>
> "Per Curiam—That makes an end of the matter. We shall not interfere."

In *Pobjoy* v. *Rich*, 27 L.J. Ex. 10, another somewhat similar case arose, when the Court, composed of Pollock, C.B., Bramwell, B., Watson, B., and Channell, B., said:

> There has already been a review of taxation, and we are asked to send the matter back to the Master a third time. That would be contrary to the practice of this Court. The Masters are the constituted authorities as to questions of costs; and this Court never interferes in what may be called matters of detail. It only settles principles. If there had been a deviation from right principle, we should have granted a rule to review the taxation, or if a strong case to show error had been made out; but the matter having already been before a Judge as to the point of principle, and it having been sent back to the Master, we cannot send it back to him again upon a disputed question of fact, with an additional affidavit.

A considerable portion of the respondents' argument on this appeal was directed to the question as to whether or not the decision of the senior taxing officer is subject to appeal at all, and reliance was placed upon the case of *Boswell* v. *Coaks*, 36 Ch.D. 444. There, an action to set aside on the ground of fraud, the sale of a life interest to C. and B., on behalf of themselves and four other defendants, was dismissed by the House of Lords with costs, and it was ordered that in taxing the costs the taxing master should consider whether any of the defendants who appeared separately had sufficient reason for severing, and if and in so far as it should appear that they had not, then the taxing master should allow only one set of costs, or only as many sets of costs as he should think right. The taxing master allowed the six defendants costs of separately defending. Held, by North,

MAN.

K. B.

RE PHILLIPPS AND WHITLA.

Galt, J.

J., that there was no appeal from the discretion of the taxing master; Held, on appeal, that as the House of Lords had delegated the taxing master the decision of the question how many sets of costs should be allowed, no appeal would lie from his decision unless he altogether omitted to exercise his discretion.

In the very recent case of *Spalding* v. *Gamage*, [1914] 2 ch. 405; *Boswell* v. *Coaks*, 36 Ch.D. 444, was distinguished by Sargant, J., who said, at p. 411:

> In my opinion that decision was not a decision at all upon the terms of the sub-rule now in question. It was a decision upon the meaning of the special order made by the House of Lords in that particular case, and the reason for the decision is perhaps most neatly put in an interlocutory observation of Bowen, L.J., where he says, "Has not the House of Lords delegated its jurisdiction as to costs to the taxing master?"

The learned Judge held that the case before him was not one purely for the discretion of the taxing master, but that he had power to review the taxation, and the matter was accordingly referred back for review.

It appears to me that the Court of Appeal has in the present case followed the course adopted by the House of Lords in *Boswell* v. *Coaks*, *supra*, and has delegated its jurisdiction regarding the quantum to be allowed under the item in dispute to the taxing officer. But I do not base my judgment wholly upon this ground.

The general allowances provided for in the Manitoba tariff of fees include many items which are fixed definitely, but also several which are expressly left to the discretion of the taxing officer. I refer, for the sake of brevity, to items 85, 94, 96, 107, 129, 131 and 132. The ordinary fee with brief at trial is $10; yet this fee is very often increased to $100 and, occasionally, in cases of importance, to even as much as $1,000, or one hundred times the amount of the tariff charge.

I am not impressed with the argument that the taxing officer has manifestly adhered to his original view of allowing the fee on the basis of a commission by reason of the circumstance that the figures support that inference. The fee admittedly should be dealt with on the footing of a counsel fee. Suppose in an action for $2,000, involving some difficult questions of fact or law, a barrister and solicitor succeeds in settling the case and

taxes a fee of $100 by way of a fee on settlement against his own client, would this allowance be objectionable because it happens to coincide with a commission of 5 per cent. on the sum recovered. I cannot think so.

I have taken advantage of the liberty recognized by the Court in *Knight* v. *Gravesend*, 27 L.J., Ex. 8, *supra*, and have referred to the senior taxing officer, with a view to ascertaining just what he did and why he did it on this third taxation. The taxing officer informs me that he took additional evidence and obtained the opinions of three leading practitioners in our Courts, namely, Messrs. A. J. Andrews, Isaac Pitblado and E. Anderson, all of whom considered that, under the circumstances of this case, a fee of $4,500 or $5,000 would be a perfectly proper fee to be allowed. The taxing officer was further authorized by the Court to take into account the other fees which had been allowed on a liberal scale on the previous taxation, and which were not objected to. He informs me that he took all these matters into consideration and felt that he could not justly allow any lower fee than $3,500 and that he did not allow the fee on the basis of a commission at all.

While it is true the different members of the Court of Appeal on the material before them, expressed a strong opinion that the allowance of $3,500 was excessive, still they remitted the taxation of this item to the taxing officer without restricting him in any way from taking further evidence and leaving the quantum to be allowed to his discretion. I think the principles applicable to new trials may well be applied to this case.

I feel satisfied that the taxing officer has honestly exercised his discretion to the best of his ability upon both the former material and the new evidence before him, and I am quite unable to see that he has erred in respect of any principle. I think, therefore, the appeal should be dismissed with costs.

BRITISH CANADIAN AGRICULTURAL TRACTOR v. EARLE.

Saskatchewan Supreme Court, Lamont, J. September 11, 1914.

1. ACTION (§ I B—5)—PREMATURE; CONDITIONS PRECEDENT—DISMISSAL WITHOUT PREJUDICE.

On dismissal of an action for the price of an engine for non-delivery of a material part thereof, leave may be reserved to plaintiff to bring another action on completing the contract.

SASK.

S. C.

BRITISH CANADIAN AGRICULTURAL TRACTOR v. EARLE.

Lamont, J.

ACTION on lien notes.

Action dismissed, without prejudice.

D. Maclean, for plaintiff.

A. E. Bence, for defendant.

LAMONT, J.:—This action is brought upon two lien notes or agreements made by the defendant in favour of E. A. Wild. The notes were given in payment of the balance due upon a tractor manufactured by the plaintiffs. By an arrangement between the plaintiff and Wild, the notes were taken in Wild's name as trustee for an English firm which held the tractors, as security. Subsequently the English firm was paid off, and Wild assigned the notes to the plaintiffs. Since the action was begun these notes have been lost. The notes stipulated that the property in the tractor was to remain in Wild, and it further provided that should the defendant make default in any note made by him in Wild's favour Wild had authority to declare all notes due and payable. The second note sued on was not due when the action was begun, but had been declared due by both Wild and the plaintiffs after it had been assigned. As to this note the plaintiffs' action fails. After he assigned the note to the plaintiffs, Wild could not declare the note due and payable, because the defendant was not then in default to him. Neither could the plaintiffs declare it due, because the defendant had never agreed that they should be able to accelerate the maturity of the note. As to the other note, I find that when the defendant agreed to purchase the tractor in question it was understood between himself and Wild, who was the plaintiffs' agent making the sale, that as part of the tractor purchased the defendant would get one of the shafts then on its way from England, and that the plaintiffs would put it on the tractor. Until that shaft should arrive the defendant was to use the tractor with a soft-metal, second-hand shaft with which Wild and himself fitted it up. The defendant took home the tractor with the soft-metal shaft as a temporary substitute for the proper shaft. The proper shaft arrived from England, but the plaintiffs did not put it on. They say the defendant told them there was no hurry in putting it on. The defendant denies this, and in this I accept the defendant's statement. Owing to the twisting of the soft-metal shaft the gear-box was broken, and has not since been repaired. The plaintiffs subsequently sent out the shaft,

SASK.

S. C.

BRITISH CANADIAN AGRICULTURAL TRACTOR v. EARLE.

Lamont, J.

but never put it on nor offered to do so. The defendant attempted to repudiate the contract, but the plaintiffs would not agree to this. Not having put on the new shaft, which was part of the engine purchased, they have not performed their part of the contract, and therefore cannot recover the price. Before they can recover they must shew that they have done all they were to do under the contract. If they put on the shaft I am of opinion that the defendant, on the evidence before me, would be liable for the price, less whatever damages he may be found entitled to. He took the engine out with the soft-metal shaft, and cannot repudiate the contract because it would not do the work of a proper shaft. To enable him to repudiate the contract for the failure of the plaintiffs to put on the proper shaft he would have to shew that he gave them a reasonable time in which to do it, with notice that if they did not put it on in that time he would not pay for the tractor.

This action will be dismissed with costs, but without prejudice to the plaintiffs' right to bring another action when they have performed their part of the contract.

Action dismissed.

McARTHUR & CO. v. DUBREUIL.

SASK.

S. C.

Saskatchewan Supreme Court, Lamont, J. September 11, 1914.

1. ASSIGNMENT (§ III—32)—RIGHT OF ASSIGNEE TO SUE IN OWN NAME—ENTIRE BENEFICIAL INTEREST—SASKATCHEWAN STATUTE—OPEN ACCOUNT.

Under R.S.S. 1909, ch. 146, an assignee of a chose in action, suing in his own name, must plead and prove that he is entitled to the entire beneficial interest.

[*John Deere Plow Co.* v. *Tweedy*, 15 D.L.R. 518, applied.]

Statement

ACTION by the plaintiff in his own name only under an alleged assignment of an open account against the defendant in favour of plaintiff's assignor and involving other issues.

The action was dismissed as to the account.

Borland & Co., for plaintiffs.

Squire, for defendant.

Lamont, J.

LAMONT, J.:—At the trial I disposed of all matters involved in this action except the open account sued on. This account was due and owing by the defendant to one D. F. McArthur, which the said D. F. McArthur, on February 3, 1913, by a docu-

SASK.

S. C.

MCARTHUR & CO. v. DUBREUIL.

Lamont, J.

ment in writing, assigned to the plaintiff company. The assignment recites that for valuable consideration D. F. McArthur transfers, assigns and sets over unto J. D. McArthur & Co. (the plaintiffs) the sum of $603.77, being the balance owing to him by D. Dubreuil as per statement attached. For the defendant it was argued that the plaintiffs were not entitled to succeed upon the claim based on this assignment, as they neither alleged in their pleadings nor proved at the trial that they had the entire beneficial interest in the debt assigned.

By sec. 1 of the Act respecting the Assignments of Choses in Action, R.S.S. 1909, ch. 146, it is provided that every debt or chose in action arising out of a contract is assignable at law by any form of writing containing apt words in that behalf, and that the assignee thereof may bring an action thereon in his own name. But under sec. 2 of the Act, the assignee, to bring an action in his own name, must, at the time the action is instituted, be possessed of the whole and entire beneficial interest in the debt or chose in action assigned. The right on the part of the assignee to sue in his own name depends on the statute. It did not exist at common law. In Odgers on Pleading and Practice, 6th ed., at 96, the learned author says:—

> Whenever the right claimed or the defence raised is a creature of statute, being unknown at common law, every fact must be alleged necessary to bring the case within the statute.

See also *Bradley* v. *Chamberlyn*, [1893] 1 Q.B. 439, 441, 442. To come within the statute the plaintiffs must therefore be possessed of the entire beneficial interest in the debt, and, if they sue in their own name, must plead such possession. In *John Deere Plow Co.* v. *Tweedy*, 15 D.L.R. 518, at 520, my brother Elwood said:—

> I am of opinion that the plaintiff company, not having alleged in its pleadings and not having proved at the trial that it was at the time of the trial entitled to the whole and entire beneficial interest in the debt assigned, its action must fail.

Under our statute, therefore, it is necessary for an assignee, suing in his own name, to allege in his pleadings and to prove at the trial that he was possessed of the entire beneficial interest in the debt assigned at the time he instituted his action. Not having done so, the plaintiffs cannot recover on this count.

SKUBINIUK v. HARTMAN.

MAN.

K. B.

Manitoba King's Bench, Galt, J. June 4, 1914.

1. TORTS (§ I—1)—NEGLIGENCE—DEATH CAUSED BY FUMIGATING A BUILDING —RULE OF CONTRIBUTION BY BLAMABLE PARTIES.

The liability attaching for the death of a person in the basement of a block caused by fumes of dangerous gas during the fumigation of other parts of the building by the fumigating contractor, under contract with the owner, attaches to the contractor for having generated the dangerous gas and for having failed to confine it to the rooms he was fumigating; against the defendant owner for having, through the order for the work given by his son on his behalf, brought a dangerous substance upon a portion of the premises, and for having failed to confine it; and against the owner's son for having directly ordered the work to be done; the rule applies that in actions of tort all parties concerned are treated as principals.

[*Fletcher* v. *Rylands*, L.R. 3 H.L. 330; *Wing* v. *London General*, [1909] 2 K.B. 652; *Dalton* v. *Angus*, 6 A.C. 740; and *Dominion Natural Gas* v. *Collins*, [1909] A.C. 640, applied.]

Statement

ACTION for damages for death of husband from poisonous fumes.

Judgment for plaintiff.

W. A. T. Sweatman and *A. G. Kemp*, for plaintiff.

A. J. Andrews, K.C., for defendant Hartmann.

A. B. Hudson and *H. V. Hudson*, for J. Gunn and W. Gunn.

Galt, J.

GALT, J.:—This action is brought by the plaintiff, suing on behalf of herself and Annie Skubiniuk, her infant child, against the defendants, for damages for the death of the plaintiff's husband from poisonous fumes created by the defendant Hartmann in fumigating certain premises upon instructions from the defendant William Gunn, as agent for the defendant John Gunn, the owner of the premises.

It appears that John Gunn was the owner of a block of four tenements situate on the corner of Jarvis and Derby Streets, in Winnipeg, being Nos. 256, 258, 260 and 262 on Jarvis Street. Hyman Waldman had leased tenements Nos. 256, 258 and 260 from John Gunn, by lease dated April 1, 1912. No. 262 was occupied by one Rosen and used as a fruit store. Waldman utilized the ground floor of No. 256 as a barber shop, No. 258 for ladies' baths, and No. 260 as a residence. There was a basement under Waldman's premises, consisting of the above three tenements, which was utilized as men's bath-rooms of various kinds. The usual entrance to the men's baths appears to have been through the barber shop and down a back stairway. The block also contained a second and third storey above the premises

MAN.

K. B.

SKUBINIUK v. HARTMAN.

Galt, J.

referred to. Complaints had been made by the tenants of the block in respect of the presence of vermin (bed-bugs and cock-roaches) throughout the building. The management of the block was left by John Gunn in the hands of his son, William Gunn.

On April 7, 1913, a letter was written by William Gunn, in the name of John Gunn & Sons, to the defendant Hartmann (under the name of the Vermin Destroying Co.) as follows:—

Dear Sirs,—We hereby accept your tender of one hundred and twenty-five dollars ($125) to fumigate the Gunn Block, on the corner of Jarvis and Derby. You agree to destroy all vermin and keep it clear for one year. You will make the necessary arrangements with the tenants in order to do this work. Payments to be made only when we are satisfied that the work has been done satisfactorily. Yours very truly.

On April 8 Hartmann answers this letter as follows:—

Dear Sirs,—We are in receipt of your letter accepting our tender for fumigating the Gunn Block. This means, in our estimate, the 17 suites on the second and third floors, also the ladies' bath and rooms occupied by the barber, but not the basement. The basement cannot be fumigated, as there is no way of getting the gas out; but we are willing to supply powder for exterminating roaches in this part of the building. Our guarantee is for bed-bugs only, as mentioned by our Mr. Hartmann to Mr. William Gunn. As the cash outlay on this contract is well over $100, our terms must be thirty days. The written guarantee safeguards you. We guarantee all fumigated rooms to be free of bed-bugs twelve months. If during this time any vermin should re-appear, we will re-clean any such room free of charge.

The upper rooms of the block were duly fumigated within a day or two after the above last-mentioned letter.

On Monday, April 14, Hartmann, shortly after 8 a.m., commenced to fumigate the ground floors of tenements Nos. 258 and 260. It had been arranged that he should not fumigate the barber shop, No. 256, or the fruit store, No. 262.

The process used by Hartmann in his fumigating operations was to create a very poisonous gas, namely, prussic acid, by mixing commercial sulphuric acid and water with potassium cyanide. In fumigating the two rooms aforesaid, Hartmann used 5 lbs. of potassium cyanide and 7½ lbs. of sulphuric acid and water. It was stated by Professor Parker, of the University of Manitoba, that this mixture would create a sufficient quantity of prussic acid gas to kill about 12,000 people. The extreme danger of utilizing such material in the neighbourhood of human beings is apparent, and, of course, Hartmann realized that careful precautions upon his part would be necessary.

The steps he took for protection were stated by him as follows:—

First, I locked the front doors and put up notices (similar to one produced and marked ex. 10, which is a notice about 10 inches square, with the words "Fumigated—Keep Out—Danger," etc., in large, red ink print); I sealed up all windows, all holes in walls and floors; a man helped me; I looked after his work when he had finished; then I prepared my mixture, 3 parts of water, 1½ of sulphuric acid, 7½ lbs.; then I looked all around again and could not find any hole; then I put in charge of 5 lbs. hydro-cyanic acid; then went out at back, locking back doors and sealing them and putting up notices. Then I walked through barber shop and found no smell, and then to fruit store and found no smell.

Hyman Pearlman, a witness for the plaintiff, testified that he was in the barber shop and had no notice prohibiting the use of the bath-rooms. On the day in question, April 14, 1913, Pearlman states that he sold two tickets for baths to two men at 12.20 p.m. The plaintiff's late husband was in charge of the baths, as an employee of Hyman Waldman, the tenant, and was in the basement at the time. One of the men who went down to take a bath was Nick Woznik. He testified that when he first went down he did not notice any smell, but when he was in the bath he noticed a smell and then began to feel faint. He tried to get on his underwear and reach the door, but fell down, and remembers nothing further till he found himself in the hospital. Pearlman had occasion to go down to the basement shortly after the two men, and he noticed a man lying on the floor, whereupon he got assistance and took this man upstairs, and had him sent to the hospital. This man was Nick Woznik. The other bather, name unknown, was already dead, and so was Skubiniuk.

Dr. William Rogers was sent for, and came to the conclusion that the two men had died from hydro-cyanic acid poisoning. Dr. Abraham Bercovitch was also called in and examined the dead men, and states that they shewed quite clearly that they died from poisoning of some kind. He states that their faces were swollen, there was froth in the mouth, they were livid in colour, the pupils of the eyes were dilated, etc. He also came to the conclusion that their death had been caused by hydro-cyanic acid, or prussic acid gas.

Edward H. Rodgers, the building inspector of Winnipeg, was also summoned to the premises, and arrived there at about 4 p.m. on the day of the accident. He made a careful inspection of the

MAN.

K. B.

SKUBINIUK v. HARTMAN.

Galt, J.

premises, and found only one point where the floor of the fumigated rooms was not properly sealed up. He found a spot in the floor which he describes as a sliver or aperture about 9 inches long and varying from three-quarters of an inch at one end to a mere crack at the other end. This aperture had been sealed up with a small strip of paper, but the adhesive used on the paper had apparently failed to adhere to the floor and had curled up, leaving the small aperture open.

The plaintiff bases her claim, firstly, on the ground that her husband, George Skubiniuk, was killed by reason of the escape of said gas; and, secondly, that her husband was killed by reason of the negligence of the defendants or some or one of them, which negligence consisted in failing to take precautions to prevent the gas escaping into said bath-house. The defendant Hartmann denies that he was guilty of any negligence, and pleads that Skubiniuk was aware of the use of gas in the said building, and might have avoided the accident by the use of reasonable care.

The defendant John Gunn admits his ownership of the said lands and buildings, and he also admits par. 4 of the statement of claim, which states that on a date prior to April 14, 1913, the defendants Gunn employed the defendant Hartmann to exterminate vermin in part of said buildings by the use of poison.

The defendant William Gunn also admits the allegation in said par. 4 of the statement of claim, but says that his employment of said Hartmann was solely as agent and on behalf of his co-defendant John Gunn. Both the defendants Gunn plead that they employed the defendant Hartmann, who was a proper and competent person to exterminate vermin in said buildings, and that said Hartmann was an independent contractor, and that these defendants retained no control over his actions and are not responsible for any default on the part of the said Hartmann. The defendants adduced no evidence, but relied upon their respective motions for a nonsuit.

Counsel for the defendants naturally directed their efforts mainly to distinguishing the facts of this case from those dealt with in *Fletcher* v. *Rylands*, L.R. 1 Ex. 260, 37 L.J.Ex. 161.

There it was held that a person who, for his own purposes, brings on to his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and, if

he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God.

I need not make any detailed extracts from this well-known decision.

The case was then appealed to the House of Lords (L.R. 3 H.L. 330), when judgment was given affirming the decision of the Exchequer Chamber. Lord Cranworth says:—

My Lords,—I concur with my noble and learned friend (Lord Cairns) in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

Counsel for the defendants endeavoured to distinguish this case from *Fletcher* v. *Rylands*, *supra*, in the following respects. It was pointed out, on behalf of Hartmann, that he was not the owner of the land or buildings. Counsel for the defendant John Gunn contended that this defendant had personally nothing to do with the matter; that it was ordered by his son William Gunn, and that the fumigation was performed at the request and for the benefit of the tenants of the building. It was further urged on his behalf that the noxious fumes in question had not occasioned any injury by escaping from this defendant's land to a neighbour's land, as was the case in *Fletcher* v. *Rylands*, *supra*. Counsel for the defendant William Gunn relied upon the fact that he was merely acting as an agent, and in any case could not be liable for the negligence of Hartmann, an independent contractor.

The rule of law enunciated in *Fletcher* v. *Rylands*, *supra*, has been amplified rather than contracted since the decision of that case. It is now identified with the law applicable to wild animals and other dangerous instruments. See Salmond's Law of Torts, 3rd ed., 389. And it is not confined to cases where the dangerous instrument remains upon a defendant's premises.

In *Baker* v. *Snell*, [1908] 2 K.B. 825, the owner of a dog, known by him to be savage, entrusted it to the care of a servant, who incited it to attack the plaintiff, in the defendant's house, and

MAN.

K. B.

SKUBINIUK v. HARTMAN.

Galt, J.

thereupon the dog bit the plaintiff, who brought an action against the owner in the county court for damages. The county court Judge having nonsuited the plaintiff, the Divisional Court and the Court of Appeal held that the action must go down for a new trial, on the ground that the question whether the servant was acting within the scope of his employment ought to have been left to the jury, and on the further ground that a person keeping an animal *feræ naturæ*, or an animal *mansuetæ naturæ*, which is known to him to be savage, is answerable in damages for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person.

In delivering judgment, Kennedy, L.J., says, at p. 835:—

I desire to say that, if authority be referred to, we have the authority of Blackburn, J., delivering the judgment of the Court of Exchequer Chamber in *Fletcher* v. *Rylands*, for saying that, whatever a man keeps which is likely to do mischief, he is subject to an equal degree of liability, and that judgment was expressly referred to and approved by Lord Cairns in the House of Lords.

It will be observed that in that case the dog was kept in the premises of the defendant throughout, and did the damage in question to a servant of the defendant in the house. If in the present case anything turned upon the question of the escape of the gas from the room in which it was made to the basement, I should be disposed to hold that, for the purposes of liability, the defendant Gunn had resumed possession of the ground floor temporarily, with the consent of his tenant Waldman, during the fumigation, but that he had not resumed possession of the basement.

In *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652, Fletcher Moulton, L.J., says, at 665:—

This cause of action is of the type usually described by reference to the well-known case of *Rylands* v. *Fletcher*. For the purposes of to-day it is sufficient to describe this class of actions as arising out of cases where, by excessive use of some private right, a person has exposed his neighbour's property or person to danger. In such a case, should accident happen therefrom, even through the intervention of an event for which he is not responsible, and without negligence on his part, he is liable for the damage. The best-known cases of this type are associated with the use by a person of land belonging to him, as when a man collects a large volume of water on his land or carries on some dangerous manufacture there.

It is argued, on behalf of all the defendants, that the evidence is wholly insufficient to connect the death of George Skubiniuk

with the escape of gas from the upper floor. It is urged that both Professor Parker and the defendant Hartmann shew that the gas in question is lighter than air, and it is urged that for this reason it was quite impossible for the gas to escape downwards through the small aperture in the floor during the fumigation.

A faint attempt was also made, during cross-examination of one of the plaintiff's witnesses, to suggest that the accident in question had occurred through fumes arising from some kalsomining mixture in the basement; but nothing was shewn as to the nature of this mixture, with a view to shewing that any injurious fumes could be emitted from it.

I think no weight can be attached to the argument that, because prussic acid gas is lighter than air, it could not escape downwards, for the following reason. The diffusion of gases is wholly unlike the operation which occurs between oil and water. In Arnott's Elements of Physics, 7th ed., sec. 459, I find the following illustration of the behaviour of gases:—

> If a bottle of chlorine gas be connected by a long tube or pipe with a bottle of hydrogen, which is placed at a height above it, the chlorine, although about thirty-six times as heavy as the hydrogen, will gradually rise to the height of the upper vessel. After a few hours, the green colour of the chlorine will be quite perceptible in the upper bottle, and in the course of time the two will be thoroughly mixed, and will never again separate themselves.

In Ganot's Physics, 17th ed. (1906), sec. 189, it is said:—

> If a communication is opened between two closed vessels containing gases, the gases at once begin to mix, whatever be their density, and in a longer or shorter time the mixture is complete and will continue so unless chemical action is set up, each gas filling the whole available volume. The mixture takes place rapidly and is homogeneous; that is, each portion of the mixture contains the two gases in the same proportion. The law was shewn experimentally by Berthollet, by means of an apparatus represented in figure 175. It consists of two glass globes provided with stop cocks, which can be screwed one on the other; the upper globe was filled with hydrogen and the lower one with carbonic acid gas, which is twenty-two times the density of hydrogen, the pressure being the same in each. The globes, having been placed together, were placed in the cellar of the Paris Observatory, the globe containing hydrogen being uppermost. After some time, Berthollet found that the pressure had not changed, and that, in spite of the difference in density, the two gases had become uniformly mixed in the two globes.

The defendant Hartmann himself admits that he smelt the gas when he went to the basement a few hours after. I think

MAN.

K. B.

SKUBINIUK v. HARTMAN.

Galt, J.

there is no room for doubt that the death of the plaintiff's husband was caused by inhaling the prussic acid gas from the room above. The facts of this case bring it clearly within the rule of law laid down in *Fletcher* v. *Rylands*, 37 L.J. Ex. 161, and the complementary case of *May* v. *Burdett* (1846), 9 Q.B. 101.

It is a wrong independent of contract and all the defendants are liable; the defendant Hartmann for having generated this dangerous gas and for having failed to confine it to the rooms fumigated; the defendant John Gunn, as owner of the property, for having, through the agency of his son, brought this dangerous substance upon a portion of his premises, and for having failed to confine it; and the defendant William Gunn for having directly ordered the work to be done.

Moreover, I am of opinion that, apart altogether from *Fletcher* v. *Rylands*, *supra*, the defendants are all liable to the plaintiff by reason of the negligence of the defendant Hartmann. He stated in his evidence that he has been conducting this kind of business for five years, and he has not yet discovered that this deadly gas which he uses will escape downwards as well as upwards. It was negligent on his part not to make sure that the small strip of paper which was pasted over the crack or aperture in question adhered securely to the floor before he liberated the gas. The duty imposed by law in such a case is laid down in several authorities.

In *Dalton* v. *Angus*, 6 A.C. 740, at 831, Lord Watson says:—

> When an employer contracts for the performance of work, which, properly conducted, can occasion no risk to his neighbour's house, which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is, therefore, liable, as well as the contractor, to repair any damage which may be done.

In *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, Lord Dunedin, in delivering the judgment of the Privy Council, at 646, says:—

[The learned Judge here cited from the judgment of Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640.]

In *Charing Cross* v. *London Hydraulic*, [1913] 3 K.B. 442, Scrutton, J., says, at 448:—

The defendants sought to distinguish this case by pointing out that the plaintiff in *Midwood's* case, [1905] 2 K.B. 597, was an owner of land to whom the exact words of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, as to rights of owners might apply, but that here the plaintiff was not an owner of property, but a licensee, who must take the road as he found it, namely, with their pipes, with all their risks, already there. This distinction was, however, absent in the case of *London Hydraulic Power Co.* v. *St. James Electric Light Co.* (Unreported), tried before Farwell, J., in March, 1906, of which I was furnished with a shorthand note. . . . Farwell, J., treated that case as deciding that the doctrine of *Rylands* v. *Fletcher*, *supra*, applied, and that the plaintiffs, unless they could bring themselves within the exceptions to that doctrine, brought their high-pressure water to the road for their own profit, and must keep it there at their own risk, and were, therefore, liable for damage done by the burst. Without the guidance of these two cases, I must have given the matter more careful consideration, as it is not clear at first sight that an isolated damage not immediately caused by the act of the defendant is a "nuisance," or that *Rylands* v. *Fletcher* applies between co-users of a road. I think, however, the two cases cited bind me to decide that the defendants, who have brought for their own profit a dangerous thing, water at a very high pressure, which, if it escapes, does enormous damage, into a road used by others, are liable if it escapes without their negligence, unless they can bring themselves within one of the exceptions to the doctrine of absolute liability which have been established.

This case has since been affirmed by the Court of Appeal. See Weekly Notes, 1914, p. 170.

For the reasons above given, and applying the rule that in actions of tort all parties concerned are treated as principals, I find all of the defendants liable for the loss which the plaintiff has sustained.

The plaintiff had been married about two years to the deceased, George Skubiniuk, and she had one child, a daughter, Annie Skubiniuk, born on January 8, 1913. She states she has no means of support apart from her husband, and has now to subsist on charity, because she cannot leave her baby yet to work for a living. She also states that her husband was a healthy man.

Waldman says that he was paying Skubiniuk at the rate of $45 a month for managing the baths.

James Forbes, an actuary in the employ of the Great West Life Assurance Co., testified that the expectation of life of a healthy man of 22 years of age is 42 years more; also that $9,505 would buy an annuity of $500 a year for such a life, and that $5,703 would buy an annuity of $300. Of course, contingencies might arise which would shorten such a life.

The infant child, Annie Skubiniuk, is substantially interested

MAN.

K. B.

SKUBINIUK v. HARTMAN.

Galt, J.

in any moneys recovered in this action, as the matter must be decided once and for all. The plaintiff will for many years have to bear the expense of supporting the infant.

I think that the total damages for which the defendants should be held liable in this action are $6,000, of which the plaintiff should receive $5,000, and the remaining $1,000 should be invested for the benefit of the infant by the plaintiff, with the approval of the official guardian, and the interest on this sum will be payable, until further notice or application, to the plaintiff.

The importance and difficulty of the points involved warrant me in awarding the plaintiff her costs of action irrespective of the statutory limit.

[The Manitoba Court of Appeal, HOWELL, C.J.M., PERDUE, CAMERON and HAGGART, JJ.A., reduced the damages to $3,500.—NOV. 2 1914.]

ONT.

S. C.

TURNER v. EAST.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Lennox, JJ. November 30, 1914.

1. MASTER AND SERVANT (§ V—340)—PERSONAL INJURY—NEGLIGENT ORDER OF SUPERINTENDENT—WORKMEN'S COMPENSATION FOR INJURIES ACT.

The master is liable for personal injuries sustained by the workman by reason of conformity to the negligent order of the superintendent under the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3, but it is not essential that conformity to the order should be the *causa causans* of the injury, if it were a *sine qua non*.

[*Wadsworth* v. *Canadian Ry. Acc. Ins. Co.*, 49 Can. S.C.R. 115, 16 D.L.R. 670, referred to; *Wild* v. *Waygood*, [1892] 1 Q.B. 783, followed.]

2. COURTS (§ II A 2—155)—APPELLATE COURT—JURISDICTION UNDER — JUDICATURE ACT (ONT.).

If the answer of the jury to a question in a negligence action requiring them to state in what the negligence consisted is that there was "negligence on the part of the foreman" and is open to the objection that the answers do not further indicate wherein the negligence of the foreman consisted, the appellate Court, may under the Judicature Act, R.S.O. 1914, ch. 56; sec. 27(2), make the omitted finding on the evidence instead of sending the case back for a new trial.

[*Phillips* v. *Canada Cement Co.*, 6 O.W.N. 185; *Smith* v. *Norther'n Construction Co.*, 30 O.L.R. 494, 19 D.L.R. 380, followed.]

Statement

THE plaintiff, a workman in the employ of the defendants, was injured by the walls of a trench falling in on him. He brought this action in the District Court of the District of Rainy River against his masters; and, after a trial before the District Court Judge and a jury, he obtained judgment for $500 and costs. The defendants appealed.

Appeal dismissed.

H. E. Rose, K.C., for the appellants.

Casey Wood, for the plaintiff, respondent.

November 30. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts):—There is nothing in the answers to shew in what the negligence of the foreman consisted; and the charge does not assist, it is of the most meagre and perhaps misleading kind. Possibly the matter had been so fully discussed in the addresses of counsel that the learned District Court Judge thought it unnecessary to charge at any length on the point. At all events what he said is as follows: "The third question, 'If so, state in what such negligence consisted?' depends on whether you find the defendants guilty of negligence or not."

In *Phillips* v. *Canada Cement Co.*, 6 O.W.N. 185, at p. 188, it is said: "If the answer of the jury is open to the objection . . . that it does not indicate wherein the negligence of the foreman consisted, the case is one in which we should exercise the powers conferred on us by the Judicature Act, and, instead of sending the case back for a new trial, find the facts which the jury have omitted to find." The same course was pursued in *Smith* v. *Northern Construction Co.* (1914), 19 D.L.R. 380, and in many other cases.

The statute referred to is now R.S.O. 1914, ch. 56, sec. 27(2); the powers therein conferred upon the Court should be exercised whenever a clear case is made out.

Of the acts of negligence that might be and are complained of, there is only one which, in my view, is so clearly proved as to justify us in applying the statute; and, if that should fail, there should be a new trial.

A main contest at the trial was, whether the plaintiff was at the place where the accident happened by the order of his foreman, McLeod, or at his own wish. The jury have found that it was by the order of the foreman. The criticism by Mr. Rose that the finding is only that he was in the trench by such order cannot, in view of the course at the trial, and especially the finding as to want of contributory negligence, receive any countenance. The learned District Court Judge in his charge on contributory negligence says: " 'Was the plaintiff himself guilty of

ONT.
S. C.
TURNER
v.
EAST.
Riddell, J.

any act of negligence which led to the accident?' That is, if a man goes into a position where he has no business to be, a position which places him in danger, the law says he is guilty of contributory negligence.'' And the jury have given an answer in the negative.

There was no dispute as to the nature of the place, it was dangerous; but that is not enough. Workmen are daily and hourly sent into a place of danger without thereby imposing liability on the master; some places are necessarily dangerous, and yet workmen must go to and work in these very places. But the defendant himself says that on the morning of the accident he ordered two men (he says the plaintiff and another, but, in view of the jury's finding, he must be mistaken as to the plaintiff) out of that place, ''told them to get out or I would fire them.'' ''I thought it was'nt a fit place for a man to be if he could'nt see danger.'' McLeod says: ''I . . . saw Mr. Turner . . . I called to him to jump out of there . . . because that was no place for a man.'' On that evidence, no jury would be allowed to find a verdict that it was not negligence of the grossest kind to send the plaintiff to work at this spot; and we should find the foreman negligent in this respect.

The Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3(*c*), renders the master liable ''where personal injury is caused to a workman by reason of . . . the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed.'' It will be seen that the Legislature wisely refrained from using the technical or quasi-technical terminology ''where his having so conformed was the cause of the injury;'' the looser and more comprehensive ''by reason of'' and ''resulted'' is employed. This enables the Court to avoid giving a technical interpretation to the sub-section, and to say that the obedience to the order need not be the *causa causans* of the accident. The difficulties arising from the distinction between *causa causans* and *causa sine quâ non* are illustrated in the recent case of *Wadsworth* v. *Canadian Railway Accident Insurance Co.* (1914), 49 S.C.R. 115, 16 D.L.R. 670.

In *Wild* v. *Waygood*, [1892] 1 Q.B. 783, a workman was ordered by Duplea, his superior, upon a plank across the well of a lift, and another employee negligently started the lift, occasioning injury to the first. The master was held liable. Lord Herschell says (p. 788): "It is said that although the injury to the plaintiff may have arisen by reason of the negligence of Duplea, and although the plaintiff may have been bound to conform to the orders of Duplea, yet that the injury did not result from his having so conformed. In the present case there was obviously a most intimate connection between the conformity with the order, the negligence, and the injury, because the negligence was in starting the lift whilst the plaintiff was in the position which he had been ordered by Duplea to take up. If the plaintiff had not been on the plank there would have been no negligence in Duplea starting the lift; the negligence was in starting the lift while the man was upon the plank, and the man was upon the plank in conformity with an order which he was bound to obey. Therefore, it appears to me, as I have already said, that there was the most intimate connection between the two. But then it is said that the conformity to the orders of Duplea was not the *causa causans* of the injury—that the *causa causans* was the starting of the lift. I do not think, on the true construction of this sub-section, that it is necessary that conformity to the order should be the *causa causans* of the injury, because the provision is that the action may be brought where personal injury is caused by reason of the negligence. . . . Now, in this case it appears to me, and I do not propose to lay down any general rule upon the subject, that it is quite clear the injury did result from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go there was guilty of negligence. That person having been guilty of negligence created the danger and caused the injury, it seems to me the case is within the very terms of the Act."

This case has not been overruled or questioned, and I think it should be followed.

We should therefore find the specific negligence of the foreman as has been indicated, and dismiss the appeal with costs.

B. C.

C. A.

HALLREN v. HOLDEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. November 3, 1914.

1. PLEADING (§ II K—246)—LIBEL—FACTS IN AGGRAVATION OF DAMAGES—MAY BE PLEADED, WHEN.

Facts relied on by the plaintiff in aggravation of damages in a libel action may properly be pleaded if relevant to the issue of libel. [*Millington* v. *Loring*, 6 Q.B.D. 190, applied.]

2. PLEADING (§ I N—124)—AMENDMENTS—STRIKING OUT—RE-INSERTION IN ANOTHER FORM, HOW TREATED.

An order striking out paragraphs of a pleading precludes their re-insertion in another form in an amended pleading under cover of leave reserved to plead "any matters which may properly be pleaded in aggravation of damages."

Statement

APPEAL from an order of MORRISON, J., striking out part of a pleading in a libel action.

Appeal allowed, varying order below.

R. M. Macdonald, for appellant (plaintiff).

S. S. Taylor, K.C., for respondent (defendant).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In an earlier statement of claim in this action, which is one of libel, the plaintiff, in aggravation of damages, pleaded the following paragraph:—

5. The defendant subsequently, by divers threats and other means, attempted to drive the plaintiff from the city of Vancouver, and caused her to be ejected from the Hotel Dunsmuir, in the city of Vancouver, and also attempted to have her removed from the Hotel Vancouver, and upon the plaintiff leasing a suite of apartments in Holly Lodge, Vancouver, the defendant hired detectives for the purpose of harassing and embarrassing the plaintiff, and for the purpose of espionage.

From the context of the statement of claim in which this appears it is manifest that "subsequently" means subsequently to the divorce and prior to the publication of the libel. This paragraph was, on application of the defendant, struck out by order of a Judge, and leave was given to deliver an amended statement of claim. No reasons were given by the learned Judge—at least none were brought to our attention. The plaintiff did not appeal, but delivered an amended statement of claim, which omitted the allegations so struck out, but contained the following paragraph:—

8. The defendant both before and after the publication of the said false statement shewed that he was actuated by express malice against the plaintiff in publishing the matter complained of. Particulars of the facts and circumstances shewing such express malice will be furnished to the defendant, if demanded, and evidence thereof will be adduced upon the trial hereof in aggravation of damages.

Defendants moved to strike this out, but the application was dismissed, and from the order of dismissal an appeal was taken to this Court, which, on April 14, we allowed, but gave leave to amend the statement of claim by pleading "any matters which may be properly pleaded in aggravation of damages." Pursuant to such leave plaintiff amended by setting up a new paragraph 8, sub-paragraphs (*a*), (*b*), (*c*) and (*d*) of which are repetitions in an amplified form of the allegations contained in said paragraph 5. The other sub-paragraphs are as follows:—

(*e*) The defendant compelled the plaintiff's children to convey messages over the telephone to the plaintiff, while he (the defendant) was standing over them threatening them and ordering them to convey messages to the plaintiff indicating that the children had lost faith in her virtue and integrity and were heartbroken in consequence, and requested his daughter Helen to write insulting letters to the plaintiff.

(*f*) The defendant called upon the plaintiff's mother and falsely told her that the plaintiff was living shamelessly with Hallren.

(*g*) The plaintiff further relies upon the conduct of the defendant in the present case as shewn in his pleadings and in the manner his defence was conducted on the first trial herein.

This new paragraph 8 was struck out by order of a Judge at the instance of the defendant, and from that order this appeal was taken.

The propriety of pleading all facts relied on by the plaintiff in aggravation of damages was considered by the Court of Appeal in England, in *Millington* v. *Loring* (1880), 6 Q.B.D. 190, where a very strong Court reversed a Divisional Court, and held that such facts were "material facts," and should be pleaded pursuant to O. 19, r. 4, of which our O. 19, r. 4, is a copy. It was further stated in that case that, even if the allegations objected to were not within that rule, it was not improper to plead them. *Millington* v. *Loring* has been criticised in Odgers on Pleading, 7th ed. (1912), 103-4, where it is suggested that it had been in effect over-ruled by *Wood* v. *Earl of Durham* (1888), 21 Q.B.D. 501, and *Wood* v. *Cox* (1898), 4 Times L.R. 550. The learned text writer erroneously attributes the decision in *Millington* v. *Loring* to a Divisional Court, whereas it was that of the Court of Appeal. It could, therefore, not have been over-ruled by the decision of a Judge, as was that in *Wood* v. *Earl of Durham*, *supra*, or of a Divisional Court, as was that in *Wood* v. *Cox*, *supra*. Whatever view one may take of the soundness of the decision in *Millington* v. *Loring*, *supra*, the fact remains that it is the most

B. C.

C. A.

HALLREN v. HOLDEN.

Macdonald, C.J.A.

authoritative case on the subject. The cases above referred to as over-ruling *Millington* v. *Loring* do not, in my opinion, really conflict with it. They have to do with allegations in statements of defence, and not in statements of claim, and were influenced by Rules of Court specially relating to statements of defence.

This brings me to the point already decided in the former appeal that the plaintiff should plead all facts which he intends to rely upon in aggravation of damages, and which are relevant thereto.

The defendant's case is that, as to said sub-paragraphs (*a*), (*b*), (*c*) and (*d*), they cannot now be pleaded, because of the order striking them out of the earlier statement of claim. Secondly, as to the whole paragraph, that the matters alleged are not relevant to the question of damages as not being closely enough connected with the alleged libel. In my opinion, said paragraphs (*a*), (*b*), (*c*) and (*d*) cannot now be pleaded. I do not decide upon the relevancy of the allegations contained therein. I think the order striking them out precluded their insertion in an amended pleading. Apart from estoppel or *res judicata* (as to which I express no opinion), I think it would be a mistake to disregard such orders which, if erroneous, the party dissatisfied had not had rectified at the proper time and in the proper manner.

It was urged by plaintiff's counsel that our order of April 14 gave leave to plead all material facts affecting damages, but it will be observed that that order was confined to matters which might be *properly* pleaded, and, therefore, did not authorise the inclusion of allegations which had theretofore been finally rejected by order of a Judge unreversed. Sub-paragraph (*g*) was properly struck out.

The remaining question is as to whether or not sub-paragraphs (*e*) and (*f*) contain allegations relevant to the damages claimed in the action. If believed, they shew that defendant was making slanderous statements concerning the plaintiff of a nature similar to those complained of in the libel. The issue of malice goes to the defendant's state of mind at the time he published the alleged libel, and his conduct as set forth in said sub-paragraphs would lead to the fair inference that the malice then exhibited continued and influenced him in publishing the libel.

No doubt care must be taken not to go too far afield, and

words and conduct relied on as proof of malice must be reasonably proximate in time and character to the main offence, but I think it can be said that the allegations in these two sub-paragraphs, read in connection with the rest of the statement of claim, fulfil these conditions. It is true that nearly all of the reported cases have to do with words and conduct which had direct reference to the libel complained of and which were subsequent to the publication, but in none of them is it suggested that only matters subsequent to publication can be relevant.

In *Saunders* v. *Mills* (1829), 6 Bing. 213, evidence of matters before publication of the libel was admitted in mitigation of damages, and in *Anderson* v. *Calvert* (1908), 24 T.L.R. 399, there is at least the *dicta* of the Judges who decided it that circumstances tending to prove malice could be given in evidence whether they arose before or after the publication of the libel.

I would allow the appeal and reverse the order appealed from except as to said sub-paragraphs (*a*), (*b*), (*c*), (*d*) and (*g*), which, for the reasons above-mentioned, I think were improperly pleaded. As the appellant has succeeded upon a substantial part of her appeal, she should have the costs.

IRVING, J.A.:—I would allow the appeal. The statement of claim delivered May 11, 1914, seems to me to be in accordance with the judgment of this Court delivered April 14, 1914, and is right in form: Odgers on Pleading, 7th ed., p. 103.

Irving, J.A.

If sanction were given Mr. Taylor's argument that, as he has not pleaded privilege, malice would be presumed, and, therefore, evidence of malice is not necessary because these allegations are not relevant to any issue and, therefore, should be struck out, would possibly have the effect of depriving the plaintiff of her right to press for vindictive damages. It has been established for years that circumstances going to shew the spirit and intention of the defendant cannot be excluded: see *Pearson* v. *LeMaitre* (1843), 5 Man. & G. 700.

The jury, in considering the damages for the slander, is justified in taking into consideration all the facts—prior as well as subsequent to the slander—going to shew malice.

It would be proper for the Judge at the trial to warn the jury that, though it was open to give punitive damages for malice, it was not open to them to give damages for a separate and inde-

B. C.
C. A.
HALLREN
v.
HOLDEN.
Irving, J.A.

pendent cause of action: *Anderson* v. *Calvert* (1908), 24 Times L.R. 399.

As to the argument that it is too late to appeal in view of the previous order, I do not think the amended statement of claim as it now stands is the same as that dealt with by Gregory, J., on November 27, 1913. Nor do I think that the order of Gregory, J., of November 27, 1913, can be regarded as a final order, or, having regard to its general terms, an order deciding the rights of the parties so as to amount to a *res judicata*—unless appealed against. Amendments to pleadings should be allowed freely. It is true some interlocutory orders are regarded as final, but the Court has a free hand in matters of procedure: *e.g.*, *Prestney* v. *Colchester Corpn.* (1883), 24 Ch.D. 376.

Galliher, J.A.

GALLIHER, J.A.:—If the doctrine of *res judicata* applied, I should consider sub-paragraphs (*a*), (*b*), (*c*) and (*d*) of paragraph 8 of the amended statement of claim of May 5, 1914, as pleading, in an amplified form, the matter contained in paragraph 5 of the statement of claim of November 17, 1913, which was ordered struck out by Gregory, J., and which order was not appealed from, but I am of opinion that the doctrine does not apply.

By an order of this Court dated April 14, 1914 (A.B. p. 62), the plaintiff was permitted to amend her statement of claim by pleading any matters which might be properly pleaded in aggravation of damages. Paragraph 8 of the amended statement of claim of May 5, 1914, is in pursuance of this order, and it remains only for us to decide if the order of Morrison, J., dated May 16, 1914, striking out paragraph 8 is well founded.

In *Pearson* v. *LeMaitre* (1843), 12 L.J.C.P. 253, the Court laid down the following rule:—

> Either party may, with a view to damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter, but, if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it.

The evidence admitted there was two letters written subsequently to the publication of the libel complained of, and reiterating the statements contained in the libel complained of.

This has been followed in *Anderson* v. *Calvert* (1908), 24 Times L.R. 399, the Master of the Rolls stating, at p. 400:—

> Circumstances going to prove malice could not be excluded, whether those circumstances were before or after the publication of the libel, but

B. C.

C. A.

HALLREN v. HOLDEN.

Gallihier, J.A.

the jury ought not to treat these prior or subsequent circumstances as giving a separate and independent right to damages.

Applying these principles, would the plaintiff be entitled to give evidence of the acts complained of in paragraph 8?

The libel complained of is that the defendant caused to be published that a statement was made by a witness named Champion, in a previous trial, imputing unchastity to the plaintiff, whereas no such statement had been made by this witness. The course of conduct pursued by the defendant, if the allegations in sub-paragraphs (*a*), (*b*), (*c*) and (*d*) of paragraph 8 are true, while very reprehensible and tending to establish a system of persecution, is not, as I view it, admissible in evidence to shew malice in the mind of the defendant in causing to be published the libel complained of and should not be pleaded. It seems to me evidence must be relevant to the issue of libel from which damages flow.

The issue here is as to the truth or falsity of the statement which the defendant caused to be published as to the evidence given by Champion, and I fail to see how evidence of the matters alleged in these sub-paragraphs is relevant to that issue.

The allegations in sub-paragraphs (*e*) and (*f*) are, I think, properly pleaded, containing, as they do, matter relevant to the imputations complained of in the matter published. Sub-paragraph (*g*) is not a proper plea and should be struck out.

The order of Morrison, J., should be varied accordingly.

McPHILLIPS, J.A., agrees with MACDONALD, C.J.A.

McPhillips, J.A.

Order below varied.

SASK.

S. C.

REX v. KOLENCZUK.

REX v. CHUPAK.

Saskatchewan Supreme Court, Newlands, J. October 23, 1914.

1. VAGRANCY (§ I—2) — ESSENTIALS OF OFFENCE — WANDERER WITHOUT MEANS OF SUBSISTENCE.

A commitment under Cr. Code sec. 238 for vagrancy does not disclose an offence where it recites that the prisoner was a "loose, idle person found wandering abroad and not giving a good account of himself, thereby being a vagrant," unless it is also recited that he had no visible means of subsistence, and a discharge will be ordered on habeas corpus where the conviction on which the commitment was based was similarly defective.

[Compare *R.* v. *Hayes*, 6 Can. Cr. Cas. 357, 5 O.L.R. 198; *R.* v. *Young*, 5 O.R. 184(*a*); *Re Effie Brady*, 21 Can. Cr. Cas. 123, 10 D.L.R. 424.]

SASK.

S. C.

REX v. KOLENCZUK.

Statement

MOTION for a writ of habeas corpus with a view to the discharge of the accused under a summary conviction and commitment thereunder for vagrancy.

The questions involved were whether there was a sufficient description of the offence in either the warrant of commitment or in the formal conviction.

The prisoner was discharged.

MacKinnon, for the accused.

Campson, for the Attorney-General's Department.

Newlands, J.

NEWLANDS, J.:—Section 238 of the Criminal Code provides that every one is a loose, idle, or disorderly person or vagrant who

> (*a*) not having any visible means of subsistence, is found wandering abroad . . . and not giving a good account of himself, . . .

It is the not having any visible means of subsistence, is found wandering abroad and not giving a good account of himself that makes him a loose, idle or disorderly person or a vagrant. Therefore the commitment in these cases which state that the prisoner was a loose, idle person found wandering abroad and not giving a good account of himself thereby being a vagrant does not describe any offence under the above section.

The only description of the offence in this conviction is that the prisoner was found wandering abroad and did not give a good account of himself, the being a loose, idle person or vagrant is what the statute says he is when he does one of the things forbidden by sub-secs. (*a*) and (*b*) of sec. 238; and as persons are not forbidden to wander abroad unless they have no visible means of subsistence the commitment is bad as not describing any offence known to the law.

I direct an order to be drawn up for the prisoner's discharge without waiting for the return of a writ of habeas corpus. No costs.

Prisoner discharged.

COAST LUMBER CO. v. McLEOD.

SASK.

S.C.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and Elwood, JJ. July 15, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS—BASIS FOR.

A document in the form of a promissory note containing a clause whereby the maker stated to be the registered owner in fee simple of land described purports, in consideration of the debt and the extension of time for paying it, to encumber the land for the benefit of the payee for the amount of the debt, may be sufficient to base a caveat under the Land Titles Act, Sask., to enforce a lien on the land.

[*Imperial Elevator* v. *Olive*, 19 D.L.R. 248, followed.]

2. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEAT—INSTRUMENT—NOTICE.

An unregistered transfer under the Land Titles Act, Sask., creates only an equitable estate, and the prior registration of a valid caveat in respect of an informal charge made by the transferor before the making of the transfer will prevent the bettering or increasing of any interest in the land adverse to the equitable estate of the caveator, although the transferee purchased in good faith and without notice of the informal charge; but the transferee may be subrogated to the mortgagee's rights under a registered mortgage prior to both the informal charge and the sale transaction where he paid off and obtained a discharge of such mortgage as part of the purchase money.

[*McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551; and *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282, followed.]

Statement

APPEAL by the plaintiff from the judgment at the trial in defendant's favour.

The appeal was allowed, NEWLANDS, J., dissenting.

H. J. Schull, for the appellant.

C. W. Hoffman and *E. Gravel*, for the respondent.

Haultain, C.J.

HAULTAIN, C.J., concurred with ELWOOD, J.

Newlands, J.

NEWLANDS, J., dissented.

Brown, J.

BROWN, J., concurred with ELWOOD, J.

Elwood, J.

ELWOOD, J.:—The facts in this case have been stated by the parties, and are as follows:—

On March 14, 1912, the defendant McLeod, being indebted to the plaintiff in the sum of $485 for goods sold, executed in their favour a document in the form of a promissory note, but which contained the following clause:—

In consideration of the Coast Lumber Company, Limited, extending the date of payment for the above indebtedness to the date of maturity above mentioned, and in consideration of said indebtedness, I, being registered as owner of an estate in fee simple in the under-mentioned land, and desiring to render the said land available for the purposes of securing to and for the benefit of the Coast Lumber Company the amount of the above-mentioned indebtedness, do hereby encumber the said lands for their benefit with the amount of the said indebtedness, to be paid as hereinbefore

SASK

S. C.

COAST LUMBER CO. v. MCLEOD.

Elwood, J.

mentioned. The land above referred to is lot 18, block 27, plan 3, 2991, town of North Battleford.

At that time McLeod was the registered owner of the said land. On June 11, 1912, McLeod offered the lot for sale to the defendant Lafreniere. Lafreniere obtained an abstract of title for the lot from the Land Titles office, and, finding the title registered in the name of McLeod, subject only to a certain mortgage to the Home Investment Co., purchased the same for $2,143.24, paying McLeod $1,500 cash and the Home Investment Co. $643.24. Upon payment to McLeod he executed and delivered to Lafreniere a transfer of the lot. As there was a mortgage registered against the lot, the certificate of title was in the Land Titles office. When the transfer was delivered, on June 11, it was agreed between the parties that the purchaser was not to register it until he obtained a discharge of the mortgage from the Home Investment Co. A delay having occurred in reference to the mortgage, the discharge was not received until December 27, 1912, when both discharge and transfer were registered. On June 17, 1912, subsequent to the purchase by Lafreniere, the plaintiffs lodged in the Land Titles office a caveat founded upon the document given to them by McLeod, and brought this action to enforce their claim to a lien upon the lot. The defendant Lafreniere opposes the plaintiff's claim on the following grounds: (1) That the plaintiffs have no right to lodge a caveat founded on the document obtained from McLeod; and (2) even if they had, they omitted to lodge it until after he had become a purchaser for value without notice of the plaintiff's claim, and had, by obtaining the transfer, got in the legal estate which gave him the superior equity. The learned trial Judge, without definitely dealing with the first objection raised by the defendant Lafreniere, decided that the defendant was entitled to succeed on the second objection. For the reasons which I gave in my judgment in *Imperial Elevator* v. *Olive*, 19 D.L.R. 248, I am of the opinion that the plaintiffs had a right to lodge their caveat founded on the above document. The case of *McKillop & Benjafield* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, was cited in favour of the respondent's second contention, that the defendant having obtained a transfer prior to the lodging of a caveat, and having subsequently registered that transfer, but after the caveat, had the better title. At p. 583, Anglin, J., is reported as follows:—

SASK.

S. C.

COAST LUMBER CO. v. MCLEOD.

Elwood, J.

I am of the opinion that a caveat, when properly lodged, prevents the acquisition *or the bettering or increasing* of any interest in the land, legal or equitable, adverse to or in derogation of the claim of the caveator—at all events, as it exists at the time when the caveat is lodged. This, in my opinion, is a necessary result of a fair construction of secs. 73, 74, 80, 81, 135 and 139 of the Land Titles Act. I would refer to *General Finance Agency and Guarantee Co.* v. *Perpetual Executors and Trustees' Association*, 27 Vict. L.R. 739, and *Re Scanlan*, 3 Queensland L.J. 43. Moreover, as a document affecting the transfer of land, a caveat is an "instrument," and sec. 81 provides that "instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other, according to the time of registration, and not according to the date of execution." . . . As put by Lilley, C.J., in *Re Scanlan*, it is a "plain, practical precaution for a purchaser . . . to ascertain that there is no caveat in the registry before he pays his purchase-money. . . . People cannot learn too soon that dealings outside and without reference to the registry are hazardous."

The learned trial Judge seemed to be of the opinion that the defendant Lafreniere, having obtained a transfer of the lot, thereby got in the legal estate. I am of the opinion, however, that that is not the effect of the Land Titles Act, because, by sec. 64 of that Act, no instrument until registered under the Act shall be effectual to pass any estate or interest, with the exceptions therein mentioned; and in *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282, it was held that an unregistered transfer created an equitable estate. The plaintiff also at that time had an equitable estate, and this was prior in time, and the plaintiff, by registering the caveat, to use the language of Anglin, J., above, "prevented the bettering or increasing of any interest in the land, legal or equitable, adverse to or in derogation of the plaintiff's claim." And also, again referring to Anglin, J., above, the caveat, being an instrument, became, by sec. 81, or, as it now is, by sec. 70, by registration entitled to priority over the transfer. I have been furnished with a copy, from the Queensland Law Journal, vol. 3, p. 43, of the judgment of Lilley, C.J., in the case of *Re Scanlan*, referred to by Mr. Justice Anglin above. In that case one Donahue, on June 25, 1886, bargained and sold a piece of land to one Heaslop. On June 30, Donahue tried to withdraw from the bargain, and Heaslop's solicitors, by his instructions, entered a caveat against the land. The caveat was lodged in the registry on July 1, but it was not entered upon the register until the 15th. On June 26, Donahue had sold the same land to Scanlan, and on July 14, Scanlan paid the purchase money and received the memorandum of transfer with the certificate of title from Donahue. He did

SASK.

S.C.

COAST LUMBER CO. v. MCLEOD.

Elwood, J.

not, however, lodge these in the registry until August 13. It will be perceived that the facts in that case are almost identical with the case at bar. Lilley, C.J., in his judgment, dealt with the action as if the caveat had been registered as of the 15th July. In the course of his judgment he says:—

> Neither of them had title completed by actual entry on the register—that is, a legal title as distinguished from an equitable one—but, either of them being a purchaser for value, could obtain priority of the other by getting in the legal title, or, in other words, *securing priority of registration*. As between the two on their equitable titles, Heaslop was first in time, and, therefore, stronger in right. On the following morning, the 15th of July, Heaslop's position was further strengthened; he had lodged his caveat, which was on that day entered on the register by the registrar, and had obtained a statutory protection of his prior equitable right. The effect of a caveat was expressly decided by me in the case, *In re Wildash*. In that case I find, at p. 53, I said: "A caveat prohibits any subsequent dealing under the Act, and, with greater force, outside the Act in derogation of the claim it protects, if it is well founded." As between the unregistered transactions of Scanlan and Heaslop, the caveat protected the prior good equitable title of Heaslop against any effort of Scanlan to secure a paramount title by registration. Scanlan's title, if registered, could only take effect from the 13th of August, when he delivered the transfer and certificate to the registrar; consequently, he must fail, as Heaslop's prior title was protected certainly from the 15th July. Heaslop was, in fact, first on the register on that day.

I am therefore of the opinion that the second contention of the respondent must fail, and that the plaintiff is entitled to priority. In my opinion, therefore, the appeal should be allowed, and the questions submitted for the opinion of the learned trial Judge answered as follows:—

(1) The documents mentioned in paragraph 2 of the stated case create a valid and enforceable charge upon the land in question in favour of the plaintiff against the defendant Lafreniere; (2) that such a charge can be the subject matter of a claim by way of caveat, or rather, can be protected by way of caveat, and that there should be judgment in favour of the plaintiff as prayed for in the stated case.

The plaintiff should have its costs of the action and of this appeal against the defendant Lafreniere.

Since writing the foregoing my attention has been called to the judgment of my brother NEWLANDS. The stated case did not request any opinion with respect to the right of the defendant Lafreniere to have the land in question sold subject to the mortgage which he paid off. I, however, agree with my brother NEW-

LANDS, that the land, when sold under the plaintiff's instrument, should be sold subject to the mortgage of the Home Investment Co. which the defendant Lafreniere paid off, and that, as against the plaintiffs, the defendant Lafreniere should be subrogated to the rights of the mortgagees under that mortgage.

Appeal allowed.

SASK.

S. C.

COAST LUMBER CO. v. MCLEOD.

CHINIQUY v. BEGIN.

QUE.

C. R.

Quebec Court of Review, Sir Charles P. Davidson, C.J., Archibald and Saint Pierre, JJ. June 12, 1914.

1. PARTIES (§ I A—1)—PLAINTIFF — WIFE SUING AS — HUSBAND'S AUTHORIZATION, WHEN ESSENTIAL — QUEBEC C.C. — LIBEL — "SIMPLE ADMINISTRATION," SCOPE OF.

An action for libel is not a matter of "simple administration" within the exception of Article 176, C.C. Que., and consequently a married woman separate as to property cannot maintain the action without the authorization of her husband.

[*Chiniquy* v. *Bégin*, 7 D.L.R. 65, reversed; *Lamontagne* v. *Lamontagne*, M.L.R. 7 S.C. 162, and *Valiquette* v. *Stevens*, 31 Que. S.C. 183, referred to.

APPEAL by way of review from the judgment in *Chiniquy* v. *Bégin*, 7 D.L.R. 65, 42 Que. S.C. 261. Statement

The appeal was allowed.

Desaulniers & Vallée, for the plaintiff.

Lamothe, Saint-Jacques & Lamothe, for the defendant.

The judgment in review was delivered by

SIR CHAS. P. DAVIDSON, C.J.:—This case is before us for a reversal, or at the least, a modification of a judgment whereby the defendant was condemned in the sum of $3,000 by way of damages, for an asserted libellous article which appeared on November 18, 1911, in the defendant's newspaper "La Croix." Davidson, C.J.

In the forefront of the defendant's factum and of initial importance and urgency in the argument made before us, of his counsel, is the pretension that the plaintiff, a married woman, separate as to property from her husband, did not secure his authorization as regards the institution and prosecution of this action. Her description in the writ is as follows:—"Rébecca Chiniquy épouse séparée de beins de Joseph-L. Morin, professeur, de la cité et du district de Montréal, dûment autorisée par son époux aux fins des présentes." It will be noticed that, while authorization is asserted, the husband does not become a party to authorize this declaration. There ought to have been added, in the manner accustomed, "et ledit Joseph-L. Morin, tant personnellement, que pour autoriser sa dite épouse." This addition

QUE.

C. R

CHINIQUY v. BEGIN.

Davidson, C.J.

would have created a definite presumption that the authorization existed. The defendant pleaded to the merits, in part by way of avoidance, and in part by way of justification. The last paragraph of his plea, reads as follows: "La demanderesse, poursuivant seule, n'a pas le droit de se plaindre dudit article;—elle n'a pas le droit de réclamer les dommages qu'elle réclame; sa demande est non-seulement mal fondée, mais elle est aussi irrégulière et illégale, et doit être rejetée pour cette raison."

At the trial a casual remark was made by the defendant's counsel to the effect that the plaintiff was not authorized. It did not attract the attention of the trial Judge,—who makes no mention of the point in his judgment,—nor of the plaintiff's counsel. The papers of record, inclusive of those of the defendant, with one or two exceptions, are intituled "Dame R. Chiniquy *et vir.*" The husband was called as a witness on behalf of his wife. His opening statement was:—"Je suis l'un des demandeurs." These incidents do not constitute the express authorization so positively called for by the law. Observations are called for, as well on the general principles which relate to marital authorization, as on their application to the special incidents which this case discloses. The immediately appertaining articles of the code, are the following:—

176. A wife cannot appear in judicial proceedings without her husband or his authorization, even if she be a public trader or not common as to property; nor can she, when separate as to property, except in matters of simple administration.

177. A wife, even when not common as to property, cannot give nor accept, alienate nor dispose of property *inter vivos*, nor otherwise enter into contracts or obligations, unless her husband becomes a party to the deed, or gives his consent in writing; saving the provisions contained in the Act 25 Vict., ch. 66. If, however, she be separate as to property, she may do and make alone all acts and contracts connected with the administration of her property.

210. The separation renders the wife capable of suing and being sued, and of contracting alone for all that relates to the administration of her property; but for all acts and suits tending to alienate her immovable property, she requires the authorization of her husband, or, upon his refusal, that of a judge.

1318. The wife, when separated either from bed and board or as to property only, regains the uncontrolled administration of her property. She may dispose of and alienate her movable property. She can not alienate her immovables, without the consent of her husband, or, upon his refusal, without being judicially authorized.

183. The want of authorization by the husband, where it is necessary,

constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so.

The extension of the wife's authority to do, alone, acts of administration as found in 176, 177, is not found, at least in express words, in the corresponding articles of the Code Napoleon—which are 215-217. But the codifiers say (codifiers' report, p. 189).

This last provision is without doubt the old law (c. de p. 234), as well as the new, allowing to the wife, not in community, all acts relating to the administration of her property.

Does this come within the domain of "Administration" or even of "simple administration," subtle though the distinction.

Exactly in point is *Lamontagne* v. *Lamontagne*, M.L.R. 7 S.C. 162, Johnson, Jetté, Mathieu, JJ. Johnson, J., said (at p. 165):—

To engage her estate by bringing actions right and left, not to get in rents and income and debts already belonging to her; but in order to realize distant expectations and things she has not got, is to my mind contrary to the rule of the law.

Jetté, J., said (at p. 169):

that simple administration consisted in preserving for herself what the wife had and not in seeking to obtain what she has not.

Langelier, Droit Civil, vol. 1, no. 176 p. 313, says:

The wife may sue for rents or accounts, but if she has contracted for the construction of a house on her land, she could not alone either sue or be sued for while the contract itself is one of administration, the suit would not be one in respect of a *simple administration*. The author adds that as her right to sue alone is the exception, any doubt must be resolved against her.

In *Valiquette* v. *Stevens*, 31 S.C. 183 (Pelletier, Sir A. P., 1907), it was held that an *opposition afin de distraire* an immovable was not an act of administration. Demolombe (vol. 4, no. 37) goes so far as to assert that a judicial process of any kind was not an act of administration. Our consistent jurisprudence is to the contrary. With us the test is applied to the subject of the action.

We cannot believe that an action to recover a large sum of money by way of unliquidated damages, whether actual, or as in this case, punitive, is an act of administration.

Is it too late to give aid in the way of affording an opportunity of rectifying the omission? There is authority for the statement that an objection in regard to want of authorization should,

QUE.
C. R.
CHINIQUY v. BEGIN.
Davidson, C.J.

strictly, be taken, *in limine*, by *exception à la forme*, *Thomas* v. *Charbonneau*, M.L.R. 1 S.C. 253, cited later and *Fournier* v. *Gauthier*, R. de J., N.S. 386 (1905), are examples. In this latter case, as well as in *Lamontagne* v. *Lamontagne*, and *Prevost* v. *Corp-d'Ahuntsic*, 5 Q.B. 131 (1902), it was moreover considered that the nullity might be observed at any stage of the proceedings. Punishment of the party who fails to take advantage of the omission in due season and by proper means takes the form of loss of costs. Distinction is made and exists between the authorization precedent, required for a contract and that which has to do with the authorization needed for a judicial proceeding.

In the latter case the contract is only completed by the judgment and, so long as this is not rendered, relief may be given. Supporting these principles are found: *Thomas* v. *Charbonneau* above cited. *Comte* v. *Lagacé*, 3 D.C.A. 319 (Q.B. 1883.) (It would appear from the report that the husband was declared to authorize his wife, but was not made a party. The judgment authorized him to become one or to intervene. *Demers* v. *Dufresne*, 4 P.R. 130 (Andrews, J., 1901), *Bourassa* v. *Bernier*, 11 R. de J. 200 (Routhier, J., 1905). *O'Brien* v. *Clavel*, 7 P.R. 217 (Fortin, J., 1908). *Jaslow* v. *Rosenbloom*, 10 P.R. (de-Lorimier, J., 1909). The authorization might be in the judgment itself. 2 Tissier C. de P.C. p. 1020, art. 863, no. 3.

In view of the circumstances of this case, of the failure of the defendant to bring the point before the Court *a quo*, by a regular form of pleading and a presentation of the point in a manner which would excite the attention as well of his learned adversary; there would result a grave injustice were we not to make a remedy possible. The plaintiff is seriously enough punished by losing her judgment. A precedent for the quashing of a judgment, under like general circumstances is found in *Comte* v. *Lagacé* cited above. We are of opinion that the judgment "*a quo*" must be quashed, and the case be remitted to the end that such proceedings may be had, as to law and justice may appertain. As to costs we follow what was done in several of the cases cited. There will be none allowed in this Court. Those of the trial Court, are left to the determination of that Court, which will be the fitter to deal with the question.

WAH KIE v. CUDDY.

ALTA.
S.C.

Alberta Supreme Court, Scott, Beck, Stuart and Simmons, JJ. December 18, 1914.

1. SEARCH AND SEIZURE (§ I—10)—SEARCH WARRANT ON GAMING-HOUSE CHARGE—PRODUCING WARRANT.

In the execution of a search warrant on a gaming-house charge under Cr. Code, sec. 641, where the place is not a dwelling house or part of a dwelling house, the police officer executing it must have the search warrant with him in order to exhibit it for inspection if asked for, but it is not obligatory where it is not a dwelling house that the officer should first demand an entrance or signify the cause of his coming before breaking in.

[*Wah Kie* v. *City of Calgary and Cuddy*, 19 D.L.R. 378, 23 Can. Cr. Cas. 325, affirmed; *Hodder* v. *Williams*, [1895] 2 Q.B. 663, referred to.]

2. SEARCH AND SEIZURE (§ I—10)—FORCE IN EXECUTING SEARCH WARRANT.

An officer executing a search warrant is protected only in so far as he uses no more force than under the circumstances is reasonably necessary.

Statement

APPEAL from the decision of Harvey, C.J., at the trial without a jury dismissing the action with costs: *Wah Kie* v. *City of Calgary and Cuddy*, 19 D.L.R. 378, 23 Can. Cr. Cas. 325.

A. A. McGillivray, for plaintiffs, appellants.

C. J. Ford, for defendant Cuddy, the respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—The action is one of trespass against the Chief Constable of the City of Calgary.

The facts briefly are as follows:—

The plaintiffs are the owners, as trustees for a lodge of Chinese Masons, of premises in Calgary described as 107 Second Avenue West. The building was a two-storey building. There were two street doors, a few feet apart, one as an entrance to the ground floor and the other to the upper floor. There was no internal stairway. The upstairs consisted of a large hall or assembly room with a small room adjoining; it was here that the regular meetings of the lodge were held. The lower storey consisted of an ante-room in front and a large hall in the rear. This was used for open meetings of the lodge and as a general recreation room for reading and playing cards, etc. To the large room there was a door in the rear opening upon a lane.

On the 17th of October, 1913, the defendant Cuddy made a report in writing to the police magistrate that there were good grounds for believing and that he did believe that the premises,

ALTA.
S. C.
WAH KIE
v.
CUDDY.
Beck, J.

107 Second Avenue East, Calgary, were being kept and used as a common gaming house as defined by sec. 226 of the Criminal Code. Upon this report the police magistrate made an order addressed to the defendant in the following terms: "I hereby authorize you, the Chief Constable, or Inspector or Sergeant of the Calgary Police Force, to enter the premises of 107 Second Avenue East with such constables as are deemed requisite by you or him, and if necessary to use such force for the purpose of affecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein and to seize all tables and instruments of gaming and all money and security for money found on such premises and to bring the same before me or such other justice as may be presiding in my stead, to be by me or him dealt with according to law." The authority for such an order as well as the duty of the person authorized by the order is outlined in sec. 641 of the Criminal Code: "If the Chief Constable . . . reports in writing to . . . the police . . . magistrate . . . that there are good grounds for believing and that he does believe that any house room or place . . . is kept or used as a common gaming . . house as defined in sec. 226 . . . such . . . police . . . magistrate . . . may by order in writing order the Chief Constable . . . to enter any such house, room or place with such constables as are deemed requisite by him, and if necessary to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein, and to sieze, etc.

"2. The Chief Constable . . . making such entry in obedience to any such order may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered where he suspects that tables or instruments of gaming . . . are concealed, and all persons whom he finds in such house or premises and seize all tables and instruments of gaming . . . which he so finds."

It is, I think, important to note also the severity of the consequences following upon the execution of such an order for search.

Section 642 authorizes the examination under oath of any person found on the premises and apprehended in pursuance of the order.

Section 986 provides that in any prosecution under sec. 228 for keeping a common gaming house or under sec. 229 for playing or looking on while any other person is playing in a common gaming house it shall be *primâ facie* evidence that a house, room or place is used as a common gaming house and that the persons found therein are unlawfully playing herein—

(*a*) If any constable or officer authorized to enter such a house, room or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof; or

(*b*) If any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming or with any means or contrivance for concealing, removing or destroying any instrument of gaming.

In executing the search order in this case, the defendant Cuddy went with a number of constables to the premises in question. Cuddy and one or two of the constables remained at the front street door, and he sent some of the other constables around the building to the back door.

The evidence as to what was done is briefly as follows: The front door was tried; it was found to be locked; the handle was turned several times; they knocked; they waited a few moments; then with an axe a corner of the upper portion of the door, which was of glass, was broken, and through the hole then made, the key which was in the lock inside, was turned and thus entry obtained.

One of the constables who went to the back of the building and said that he had been to the place once or twice before, and that the windows were then let down from the top, and by standing on the ledge one could see what was going on in the room; that on this occasion they were closed, and, being "frosted," he could not see in; and that he therefore broke a pane in order to see what was going on. He said he did this because one of the other constables had tried the back door and found it locked—"So I ran up the stairs and broke the glass so that I could see in, because if you don't get in in time everything will be cleaned off the tables." One of the constables tried to break open the back door—first trying to open it by the handle, and then hammering it so that a panel was cracked; he was stopped by a constable who had entered by the front door.

The question in the case is, was force to this extent justified

ALTA.

S. C.

WAH KIE v. CUDDY.

Beck, J.

under the circumstances by the order for search. The Criminal Code (sec. 629 *et seq.*) provides for the issue of search warrants in a variety of cases.

The common law authorized the issue of a search warrant only in the case of larceney or suspected larceney: 9 Halsbury Laws of England, tit. Criminal Law and Procedure, p. 625; 22 Ib. tit. Police, p. 4986e; Encyclopædia of the Laws of England, 2nd ed., vol. 13, tit. "Search Warrants," p. 199, and cases there cited.

We were referred to the third resolution in *Semayne's Case*, 5 Coke 91, 1 Sm. L. Cases, 11th ed., p. 105:—

"In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house either to arrest him or to do other execution of the King's process if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming and to make requests to open the doors.*" And it is urged that in execution of a search warrant the police officer was bound as a thing preceding the search to signify the cause of his coming and to make request to open the doors before being entitled to make the search.

This resolution, however, referes to process, *e.g.*, a warrant which does not expressly give the right to enter, as does a search warrant. Again it refers to a house—a dwelling house. What is in question here is a room for occasional or habitual assembly only.

In *Codd* v. *Cabe* (1876), 1 Ex.D. 352, it was held that when a warrant has been issued to apprehend a person for an offence for which he cannot be arrested without a warrant, the police officer must have the warrant in his possession at the time of the arrest ready to be produced if inspection of it is asked.

I think a similar rule applies to a search warrant.

The first preliminary, therefore, to the execution of a search warrant is, I think, that the police officer should have the warrant in his possession at the time of the search.

Launock v. *Brown* (1819), 2 B. & Ald. 593, 106 E.R. 482, was a case of a search warrant under a statute (22-23 Car. II., ch. 25, sec. 2) which empowered game keepers and other persons, authorized by warrant under the hand and seal of any justice of the peace for the county in the day time to search the houses, outhouses or other places of certain persons for guns, bows, grey-

hounds, etc., and to seize, detain and keep the same, etc. The Court *en banc* of four Judges, affirming the decision of the trial Judge, held that a search warrant under the statute was unlawfully executed inasmuch as no demand of admittance had been made before breaking open the outer door of the dwelling house of the plaintiff's house.

I think this rule is applicable to all search warrants or orders for search unless it is clear from the statute authorizing the search warrant that a demand to open is not necessary. The second preliminary, therefore, I think, to the execution of a search warrant, is, generally speaking, *when the place is to be searched is a dwelling house*, is a demand to open.

In *Hodder* v. *Williams*, [1895] 2 Q.B. 663, the statement made in Smith's Leading Cases in the notes to *Semayne's Case* is approved: "The maxim that 'a man's house is his castle' only extends to his dwelling house; therefore a barn or outhouse, not connected with the dwelling house, may be broken open in order to levy an execution (*Ponton* v. *Brown*, 1 Sid. 181, 186), but not to make a distress for rent: *Brown* v. *Glenn*, 16 Q.B. 254."

In that case the plaintiff, who was a coach builder, for the purposes of his business occupied buildings as a workshop and for storage of goods, no one living there. Counsel for the plaintiff argued that the reasons given for the doctrine of *Semayne's Case* apply to a building like a shop or warehouse in which the owner or his servants would be likely to be when it is forcibly entered as much as to a dwelling house. The Court declined to accede to this argument. Lord Esher, M.R., said: "None of the authorities on the subject draw any such distinction as was suggested in argument between a building such as a shop or warehouse and a barn or outhouse The only distinction drawn is between a dwelling house and a building which is not a dwelling house."

The last rule, therefore, which I have set down does not, I think, apply except in the case of a building, room or place used as a dwelling in the ordinary acceptance of the word.

So I conclude that in the execution of a search warrant or order for search, where the place is not a dwelling house, or a room or other place—"parcel of a house" (*Denton* v. *Brown*, 1 Keb. 698,1 Sid. 186)—the police officer executing it must have the search warrant with him, in order to exhibit it for inspection

ALTA.
S. C.
WAH KIE
v.
CUDDY.
Beck, J.

if it is asked and in that case produce it and permit inspection of it, but he need not under all circumstances first demand an entrance or signify the cause of his coming.

Nevertheless, every officer acting under warrant or other lawful authority is protected only in so far as he uses no more force than under the circumstances is reasonably necessary, and is liable in trespass for any excess: 23 Halsbury's Laws of England, p. 812, and cases there cited. The statute under which the order for search was made expressly authorizes the person to whom the order is directed "if necessary to use force for the purpose of effecting such entry." When it is necessary to use force to effect an entry must depend upon the circumstances of each particular case. If it is the case of a dwelling house, much more circumspection would be called for than in the case of another class of building. A different case of conduct might reasonably be looked for in a case where the building is occupied and where it is not.

I think one should not be curious or astute to find an excess where the officer appears to have acted *bonâ fide*. I cannot find *mala fides*, and I am not inclined to find that under all the circumstances appearing in the present case there was an excess of force.

I think, therefore, the judgment of the learned Chief Justice dismissing the action with costs should be affirmed with costs.

Appeal dismissed.

CAN.
S. C.

FRITH v. ALLIANCE INVESTMENT CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. January 21, 1914.

1. SPECIFIC PERFORMANCE (§ I B—15)—ORAL AGREEMENT OF VENDOR TO REPURCHASE—STATUTE OF FRAUDS AS A DEFENCE—ACTION BY VENDEE FOR SPECIFIC PERFORMANCE.

An agreement whereby the original purchaser was to re-sell the lands to the original vendor may be set up by the latter as a defence to such purchaser's action for specific performance although the re-sale agreement was upon terms which did not effect a rescission of the original contract and would not be enforceable in a separate action because not sufficiently evidenced in writing to comply with sec. 4 of the Statute of Frauds.

[*Frith* v. *Alliance Investment Co.*, 10 D.L.R. 765, affirmed.]

Statement

APPEAL from the judgment of the Supreme Court of Alberta, *Frith* v. *Alliance Investment Company*, 10 D.L.R. 765, affirming the judgment of Harvey, C.J., at the trial, 5 D.L.R. 491,

by which the plaintiff's action was dismissed with costs and the counterclaim of the defendants was disallowed without costs.

The action was brought by the appellant for specific performance of an agreement by the company to sell certain lots in Calgary, Alta., to him. Being dissatisfied with the situation of the property the plaintiff had listed it for sale with the company which, being unable to secure a purchaser, offered to buy the property back and, owing to what took place between them, the defence of the company was that the appellant had resold the property to them and they relied upon this also by counterclaiming for specific performance of the alleged agreement by the appellant to re-sell the property to them. At the trial Chief Justice Harvey dismissed the plaintiff's action with costs, and, on account of the agreement for re-sale being ambiguous and not available as a memorandum in writing within the Statute of Frauds, the counterclaim was disallowed without costs. It was also contended, on the appeal, that the defendants were in a fiduciary relationship towards the appellant; that they had information as to increased value of the property which they did not communicate to the appellant, and that, on the whole evidence, there should have been a decree for specific performance of the agreement to sell to him.

The appeal was dismissed.

W. R. McLaurin, for the appellant.

W. T. D. Lathwell, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I have had an opportunity of reading the notes of Mr. Justice Anglin and I agree that this appeal should be dismissed for the reasons stated by him.

Davies, J.

DAVIES, J.:—I concur in dismissing this appeal for the reasons stated by Mr. Justice Idington.

Idington, J.

IDINGTON, J.:—The appellant bought from the respondent, for $641.25, some property, of speculative value, paid part of the price, complained of its being unprofitable, listed it with respondent to re-sell at $900, and, respondent's officials, concluding it was good value at that, decided on behalf of respondent to offer the appellant this price on the terms in his listing, but varied the terms so as to please him, and, so varied, he

CAN.

S. C.

FRITH v. ALLIANCE INVESTMENT CO.

Idington, J.

accepted the offer. The first transaction is in writing, and so is the last also, but ambiguously so, by reason of the cancellation of some words in the receipt rendering it doubtful if it fulfils the requirements of the Statute of Frauds. This defect arose from the effort of the respondent to so vary it as to meet appellant's views.

He seeks specific performance of his contract to purchase, whilst, repudiating his contract to re-sell to his vendor; after having for a month $50 of respondent's money in his pocket and having enjoyed its forbearance during that month and many previous months in regard to his overdue payments under the contract he sues on.

The parties, instead of simplifying matters by striking a balance between them and making one transaction of these two, let each contract take care of itself, and thus left it open for appellant, by way of experimental litigation, to claim that he was entitled to specific performance of his contract, in April, when the last payment should fall due thereunder, and that respondent could not set up this contract of re-sale to his vendors either as rescission of the first or an answer to the claim for specific performance.

I think it is quite possible to hold that, in light of all that transpired between the parties, rescission is, in truth, what they intended, subject merely to this, that the ultimate result of the financial adjustment (balancing accounts as the respondent's payments fell due and were made) should be left to work itself out in the few months that they had to run. Such conditional rescission might well be treated as a complete answer to the claim for specific performance.

For purposes, not involving the bringing of an action, a contract falling within the fourth section of the Statute of Frauds is valid if otherwise binding and not illegal. Such a contract may and has often been held a complete answer by way of defence to an action for specific performance, and the cases so maintaining were cited in argument before us and relied upon herein and in the Courts below.

It is urged, however, with some force, that, however that may be, when the new contract involves rescission, it cannot be

so in a case where the parties contemplated the continued existence of the contract. It is always desirable to look at the substance of what the parties in litigation had in view in their transactions out of which the litigation has arisen, and to discard, if possible, the mere form of expression, if clearly but a mere form of expression.

It is upon this or something like this principle that the legal rights of these parties must be decided.

It is laid down in Fry on Specific Performance (4th ed.), sec. 1031, thus:—

> Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in Roman law.

He then reviews a number of authorities and in conclusion, in sec. 1039, says, as follows:—

> But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The Statute of Frauds does not make the parol contract void, but only prevents an action upon it; and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been matter of decision. But, in point of principle, it seems to stand on the same footing as a simple agreement to rescind.

I think his conclusion fits this case and puts the principle on which it must be decided in its true light.

Again, let us assume the receipt in question herein constitutes a compliance with the Statute of Frauds, and the appellant's action was resisted upon no other ground than thus furnished: Does any one believe that a Court proceeding upon the fundamental principles upon which the right to specific performance rests, would listen to such a claim for a moment—as to enforce a conveyance in April when clearly there must be a re-conveyance in August following? Such a thing, I imagine, would be treated by a Court so appealed to as most palpably trifling.

Then, if the written contract of re-sale is a bar, so must the oral one, or partly written partly oral, be a complete defence upon the authority of the cases cited. And, as to the question springing from the relation of principal and agent, I do not think on the evidence before us there is anything open to the

CAN.
S. C.
FRITH
v.
ALLIANCE
INVESTMENT
CO.
Idington, J.

appellant herein. There was no concealment by respondent, no failure on respondent's part to disclose anything known to it, but unknown to appellant. Each used his own judgment. The respondent's may have been better than that of the appellant, but that is always liable to happen.

The law has not pushed the principles governing the relation of principal and agent so far as to preclude that sort of thing, or it would render it impossible for an agent ever to buy from his principal. The dealing must be fair, but is not impossible. And the evidence of the opinion of others next day in regard to values in a highly speculative market can be of no value, standing alone, as a test of what is fair.

The appellant was a speculator himself and his opinion is just as good. See *Kelly* v. *Enderton*, [1913] A.C. 191, 9 D.L.R. 472.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I have come to the conclusion that, in the absence of any defence based upon the 4th section of the Statute of Frauds, the respondents would be entitled to enforce against the appellant the agreement of February 18. The real question is whether (there being no memorandum sufficient under that enactment) that agreement was an answer to the appellant's action. At the date of the trial, February, 7, 1912, the respondents would have been entitled under the terms of the agreement of February, 1911 (assuming that agreement enforceable) to demand an assignment of the appellant's interest in the lands on payment of the purchase price; and, in these circumstances, I think the Chief Justice of Alberta was right in refusing specific performance of the earlier agreement.

I shall assume that, under the law of Alberta, the appellant, by virtue of the agreement of April, 1910, acquired before the second agreement was entered into an interest in the lands in question that would be an "interest in lands" within the meaning of the Statute of Frauds (sec. 4). The law of England is clear enough that a purchaser under an agreement for the sale of lands still *in fieri*, the circumstances being such that on the performance of his obligations he would be entitled to a decree for specific performance of it, has such an interest in the land;

but the interest is an equitable interest and it rests upon the fact that there is an agreement of sale in respect of which a Court of equity would decree specific performance. The existence of an agreement enforceable by action at law only would not vest in him an interest in the land. Primarily the equitable rights were rights *in personam*, but the peculiar nature and efficacy of the remedies available in the Court of Chancery for the enforcement of such rights together with the effect of the equitable doctrine of notice, in enormously widening the field over which rights *in personam* would otherwise have been enforceable, eventually led in certain cases to such rights being regarded as *jura in re* and protected as rights of ownership. But every merely equitable right of ownership or interest in the property owes its vitality to the jurisdiction of the Court of Chancery.

The question to be determined here is whether, notwithstanding the agreement of February, 1911, the appellant is entitled to demand the exercise of that jurisdiction by way of decreeing specific execution of the contract of April, 1910. I concur with Harvey, C.J., in thinking that the existence of the subsequent agreement is a proper ground for refusing the equitable remedy.

All the other points resolve themselves in questions of costs in regard to which this Court ought not to intervene.

Anglin, J.

ANGLIN, J.:—There is much in the circumstances under which the defendants procured from the plaintiff the contract for the re-sale of the property in question that is calculated to arouse a suspicion that they failed to make to him that full disclosure of material facts which is incumbent on agents for sale when they themselves become purchasers. But the trial Judge has said that it was

> established to my entire satisfaction that the plaintiff knew he was dealing with the defendants as purchasers, and that no advantage whatever had been taken of him.

Although, in appeal, Mr. Justice Walsh expressed his dislike of

> at least one incident in connection with the dealings between the parties on this re-sale,

he accepted, as did Mr. Justice Scott and Mr. Justice Simmons, "the findings of fact adverse to the plaintiff." While not

CAN.
S. C.
FRITH
v.
ALLIANCE
INVESTMENT
CO.
Anglin, J.

satisfied that, if I had been presiding at the trial of this action, I should, upon my present appreciation of the evidence, have reached the conclusion that the defendants had fully discharged their duty to the plaintiff as his agents, I am not prepared to reverse the concurrent finding of two Courts upon that point, which must to a considerable extent, in the case of the learned trial Judge, have rested upon the view taken by him of the credibility and weight of the testimony of the several witnesses.

On the other branch of the case, while, in my opinion, the contract of re-sale did not effect and was not intended to effect a rescission of the original contract—the terms of the re-sale contract, the conduct of the parties in regard to the payments and the retention by the defendants of the purchase money paid on the original contract make that very clear—I do not think the plaintiff is entitled to invoke the exercise of the equitable jurisdiction of the Court to decree specific performance. He made a contract of re-sale which is unenforceable by action only because an ambiguity in the receipt which he gave for the first instalment of the purchase money renders it insufficient as a memorandum to satisfy the requirements of the fourth section of the Statute of Frauds. Under that contract, if enforceable, the defendants would be entitled on their counterclaim to a decree for specific performance of it and a re-conveyance to them of the property in question concurrrently with the decree which the plaintiff claims requiring the defendants to convey the same property to him. Under such circumstances the Court should not, I think, decree specific performance in favour of the plaintiff. While not available to support an action, the contract of re-sale may be used as a defence. To that the Statute of Frauds offers no obstacle. Given as a defence the effect which it would have had in an action upon it, if properly evidenced, the contract of re-sale affords a sufficient answer to the plaintiff's claim to a decree for specific performance.

Whatever may be thought of the conduct of the defendants, the plaintiff's own course of dealing in this matter was not such as to entitle him to any special consideration from a Court of equity.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

AUGER v. McDONNELL.

QUE.
C.R.

Quebec Court of Review, Tellier, Delorimier, and Greenshields, JJ. February 27, 1914.

1. BILLS AND NOTES (§ I D—30)—PROMISSORY NOTE — WRITTEN CONDITION NOT APPEARING ON NOTE — NEGOTIABILITY OF — HOLDER IN DUE COURSE FOR VALUE — NOTICE.

A promissory note given to a company upon the express written condition not appearing on the face of the note but in the accompanying correspondence, that the note was for the purchase of certain bonds of the company and was to become null and void in case other parties did not purchase a like amount, is not thereby rendered negotiable and may be recovered in the hands of a holder in due course for value without notice of the condition when he took the note although no bonds were issued.

The judgment inscribed for review, which is confirmed, was rendered by the Superior Court, HUTCHINSON, J., on April 9, 1912.

The appeal was dismissed.

F. P. Tremblay, for the plaintiff.

Brown, Montgomery & McMichael, for the defendants.

GREENSHIELDS, J.:—The plaintiff seeks the recovery of the amount of $2,003, being the face value of a promissory note and $3, costs of protest. The note is signed by the defendant James McDonnell, to the order of the Montreal Suburban & Realty Co., and by them endorsed and delivered for value to the plaintiff. Greenshields, J.

The defendant, McDonnell, pleaded that the note was given by him to the company upon the express written condition, that it was for the purchase of $2,000 worth of bonds of the company, and was to become null and void in case three of the directors, Hart, Mann and Crowdy, did not purchase a like amount. He alleges, that this rendered the note non-negotiable, and the condition was known to the plaintiff; he alleges that the condition was never fulfilled, and that he never received any consideration for the note, and that the plaintiff never gave any consideration for it, and never was a legal holder and owner of the same.

The judgment condemned the defendants jointly and severally for the full amount. The defendant McDonnell alone inscribes in review.

The facts are, as well as they can be gathered from the proof.

QUE.
C. R.
AUGER
v.
MCDONNELL.
Greenshields, J.

that sometime in 1910, the company, known as The Montreal Suburban & Realty Co., was incorporated by letters patent. At some time previous to the giving of the note in question, the defendants, McDonnell, Mann, Crowdy and Hart, were elected directors. One Rollit was the general manager, and would seem to have been the promoter of the company. The plaintiff, Auger, owned certain farm properties near Montreal;—they bore the nos. 420 and 491 in the municipality of St. Leonard, and 134, 135, 136 and 137 in the municipality of Rivière-des-Prairies. In July, 1911 (the date is not clear), Auger either owned, or had options on these farms, and also, it would appear, on the farm bearing the no. 423. He addressed a letter to Rollit, by which he gave him an option on the first mentioned farms for the sum of $200,000, the option to expire, in the case of farm 491, on August 25, and the remaining options to expire thirty days from date, presumably thirty days from July 11. There is no doubt that these options were given to Rollit really for the company. On October 4, when some of the options had expired and others were about to expire (again the proof is not clear), the company desired an extension, and Rollit being then the manager, agreed, in consideration of the sum of $3,000, to extend the option. Rollit agreed to get this money for him, the plaintiff. Independent entirely of what may have passed between Mr. Mann, Mr. Hart, Mr. Crowdy or McDonnell, there is one thing certain, that Auger demanded the sum of $2,000 for this extension, and Rollit agreed to give it. There is no doubt also, that Auger, in order to preserve the options, which he had, had to pay at least $6,000 to other parties, and did pay that amount. Now, the agreement having been made between the manager and Rollit—Rollit acting for the company, and the agreement was never repudiated by the company—Auger addressed a letter to the company, and stated—"In consideration of the sum of $6,000 to be paid before twelve o'clock on the 5th," and he agreed to extend the option, as stated in his letter, which was received and accepted by the company, and thereby the options were extended.

On October 5, before noon, Rollit went to the plaintiff with $4,000 in cash, and the defendant, McDonnell's promissory note,

QUE.

C. R.

AUGER v. McDONNELL.

Greenshields, J.

for $2,000, viz: the note sued upon, payable as stated to the order of the company, and by it endorsed. Auger raised some objection that he had been promised cash, and not notes, but was assured by Rollit that McDonnell was perfectly solvent, and thereupon he accepted the note—Rollit even showing him McDonnell's rating at Bradstreets. Now, I am satisfied, from a careful perusal of the evidence, that the plaintiff did not know at the time he accepted this note, of the existence of any condition attached to it, no condition appears on the note. Sometime subsequently, after the plaintiff had granted the extension, and after he had accepted the note, he became aware of the existence of McDonnell's letter addressed to the company, at the time the note was given to it. I do not hesitate to say, that, at the date the plaintiff did see a copy of McDonnell's letter, he had accepted the note and was the owner of the note, and had given valid consideration therefore. Later on, Mr. Mann, who had paid $2,000, and Mr. Hart, who had paid $2,000 at the same time as McDonnell gave the note, Crowdy having paid $2,000 before the two former, pretended that the $2,000 they had paid was not for bonds of the company, but was to be applied on the purchase price of one farm, viz: farm No. 423. I do not consider it of great importance, in view of the conclusion that I have arrived at, that the plaintiff knew nothing at all about this arrangement. I do not consider it of importance what the arrangement between Mr. Mann and the company was. At a later date, Rollit told the plaintiff to transfer the farm 423 to Mr. Mann personally, to be transferred to the company; and the plaintiff did this. Mr. Mann thought that the company was ultimately to become the owner of this property; he says so in a letter to that effect. Mr. McDonnell says he never got the bonds. That I believe is true. No bonds were ever regularly and legally issued; he did get a certificate or interim receipt for stock of the company, for $2,000; he even says that he got shares to the amount of $12,000, which he would be glad to sell.

We have arrived at the same conclusion as the learned trial Judge, the plaintiff became the holder in due course, for value, of that note; knew of no condition to invalidate it, and we confirm the judgment.

ONT.

S. C.

MACDONELL v. WOODS.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Hodgins, J.A., Clute and Riddell, JJ. November 30, 1914.

1. INNKEEPERS (§ III A—10)—RIGHTS OF AND LIABILITY TO GUESTS—WAYFARER.

An innkeeper is liable *quâ* innkeeper only when he keeps a common inn and the guest is a wayfaring traveller using the inn as a wayfarer. [*Holder* v. *Soulby*, 8 C.B.N.S. 254; *Lamond* v. *Richard*, [1897] 1 Q.B. 541, referred to.]

2. INNKEEPERS (§ III B—15)—LIABILITY OF — LOSS OF PROPERTY — R.S.O. 1914, CH. 173.

The onus is upon an innkeeper claiming the benefit of the Innkeepers Act, R.S.O. 1914 ch. 173, sec. 4, limiting his liability for loss of a guest's goods in certain cases to $40, to prove his compliance with the statute by posting up the statutory notice to that effect throughout the hotel.

3. INNKEEPERS (§ III B—15)—BOARDING HOUSES — LOSS OF PROPERTY — LIABILITY.

Where a contract is made by the hotelkeeper to take a person in as a guest for a long time paying at a weekly or monthly rate, the relationship is that of boarding house keeper or lodging house keeper and not of innkeeper, and while not liable as an insurer because of that distinction, the hotelkeeper must take reasonable care for the safety of the property brought by the guests to the hotel.

[*Newcombe* v. *Anderson*, 11 Ont. R. 665; *Dansey* v. *Richardson*, 3 E. & B. 144; *Scarborough* v. *Cosgrove*, [1905] 2 K.B. 805, referred to.]

Statement

APPEAL by the defendants from the judgment of LENNOX, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $800 and costs, in an action brought for the value of a trunk and contents, left at the Arlington Hotel, Toronto, of which the defendants were the proprietors.

C. M. Garvey, for the appellants.

K. F. Lennox, for the plaintiff, the respondent.

Clute, J.

CLUTE, J.:—The plaintiff alleges that in December, 1913, she engaged a room in the Arlington, and had her trunk taken there, in accordance with an arrangement previously made; that after the trunk was delivered at the hotel it was lost or stolen as the result of the negligence of the defendants, their servants or agents. The defendants deny that the trunk ever arrived at the hotel, and also deny negligence.

It was proven by the plaintiff that she engaged the room, number 68, a week before she delivered the trunk, and it was arranged that she should take it on the 22nd. On that day, she called up the hotel by telephone and asked for the clerk with whom she had made the arrangement. He came. She told him

she was going to send her trunk that day at two o'clock, and he said, "All right, Mrs. Macdonell, I have kept room 68 for you." This evidence is not contradicted—the clerk with whom she made the arrangement was not called by the defendants. The arrangement was that she was to pay $7.50 a week or $30 a month for the room; the midday dinner and other meals were to be charged extra. On the 22nd, she sent the trunk by Hearn, cartage agent. He says that he called at Mrs. Macdonell's at two o'clock and received her trunk from her. He helped her to close the lid, the trunk being so full with clothes. The plaintiff instructed him to take the trunk to the Arlington Hotel, with a slip shewing the number of her room. He went to the hotel, and was told by the clerk to leave it inside the door, which he did.

On the following day, the plaintiff went to the hotel, and found the trunk was not there. The trunk has not since been seen or heard of.

In the charge the learned trial Judge told the jury that from the evidence there seemed to be no doubt at all that the trunk came to the hotel and was stolen. "That being so, I must instruct you as a matter of law, that the hotel company is liable."

No objection was taken to this charge. At the trial no question seems to have been raised or distinction drawn between the liability of an hotelkeeper where the person seeking damages for a lost article is a transient traveller, that is, the ordinary guest of an inn, and the liability where the person is a permanent boarder.

On the argument counsel for the defendants objected to the charge, and for the first time further urged that the defendants were not responsible as innkeepers, and that their damages are limited under the Innkeepers Act to $40; and further contended that it was a question of negligence and should have been submitted to the jury, and that the defendants were entitled to a new trial. In the view I take, the question of limited damages does not arise; but, if it did, the defendants could not avail themselves of it, as it did not appear that notice as required by sec. 6 of the Innkeepers' Act, R.S.O. 1914, ch. 173, was duly posted up; and, if it were, they fall within the exception in sec. 4 owing to their default.

ONT.

S. C.

MACDONELL v. WOODS.

Clute, J.

There is a distinction between the law as it relates to the duties of an innkeeper and the law as it relates to those of a boarding-house keeper, and a further distinction as to the liability even of an innkeeper where the inmate is a guest or a boarder, as to the measure of responsibility for his goods.

[The learned Judge here referred to the cases of *Dansey* v. *Richardson* (1854), 3 E. & B. 144; *Holder* v. *Soulby*, 29 L.J.N.S. C.P. 246; *Hollingsworth* v. *Nicholson and Co.* (1904), in the addendum to Jelf & Hurst's Law of Innkeepers; *Scarborough* v. *Cosgrove*, [1905] 2 K.B. 805; *Newcombe* v. *Anderson* (1886), 11 O.R. 665.]

An innkeeper is responsible to his guests for goods lost or stolen within the inn—in short, he is insurer except where such liability is limited by statute. But this liability is confined to innkeepers properly so called, and does not extend to a lodging-house keeper or boarding-house keeper.

In the present case, I think it clear from the evidence that the capacity in which the plaintiff entered the Arlington was not that of an ordinary traveller or transient guest, but as a boarder under a contract for board by the week, with the intention of staying a considerable time. I take the law to be as laid down by Coleridge, J., and Campbell, C.J., in *Dansey* v. *Richardson*, and followed in *Scarborough* v. *Cosgrove*, and that there was a duty on the part of the boarding-house keeper to take reasonable care for the safety of the property brought by the guest to the hotel; and, further, that in this case there was evidence of an express agreement by the defendants, through their clerk and servant, to take charge of the plaintiff's trunk and place the same in her room, and that it was a question of fact as to whether or not the defendants were guilty of neglect and want of reasonable care in this regard.

The jury were not charged on the question of negligence, but were told that if they found that the trunk came to the premises of the defendants, the defendants were liable. I do not think this charge can be sustained, and under the former practice the case should, in my opinion, go back for a new trial. But, under the Judicature Act, R.S.O. 1914, ch. 56, sec. 27, this is unnecessary. The principal facts are not contradicted. There can

ONT.
S. C.
MACDONELL v. WOODS.
Clute, J.

be no doubt whatever upon the evidence that an arrangement was made by the plaintiff with the defendants' clerk that the trunk should be sent to the hotel, and that on the day when it was sent the clerk was notified and promised to receive it and send it to her room. This reasonable duty so undertaken was entirely disregarded: the trunk was left in the passageway unprotected, and was taken away or stolen and lost through the neglect and default of the defendants.

I think that this is a case where the Court has the right, under sec. 27 of the Judicature Act, to find, and should find as a fact, that the defendants did not take reasonable care of the trunk, and that this neglect amounted to negligence upon their part and rendered them liable to the plaintiff for the loss of her trunk and contents.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex.:—I agree. Mulock, C.J.Ex.

RIDDELL, J., was also of opinion for reasons stated in writing that the appeal should be dismissed with costs. Riddell, J.

HODGINS, J.A., agreed that the appeal should be dismissed with costs, for the reasons stated by RIDDELL, J. Hodgins, J.A.

Appeal dismissed with costs.

LONG v. TORONTO R. CO.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. June 19, 1914.

1 NEGLIGENCE (§ II F—120)—CONTRIBUTORY — INJURY AVOIDABLE NOTWITHSTANDING—LAST CLEAR CHANCE—ULTIMATE NEGLIGENCE.

Where the general effect of the verdict when read with the evidence and the charge of the trial judge is that notwithstanding the negligence of the deceased who had been struck by a street car while attempting to cross the track, the motorman might have avoided the accident by the exercise of reasonable prudence, the verdict should not be set aside.

[*Long* v. *Toronto Ry.*, 10 D.L.R. 300, 15 Can. Ry. Cas. 35, reversed; *Tuff* v. *Warman*, 5 C.B.N.S. 573; *Radley* v. *London & N.W.*, 1 A.C. 754; *Walton* v. *London B. & S.C.*, H. & R. 424; *The Bernina*, 12 P.D. 58; *Calgary* v. *Harnovis*, 15 D.L.R. 411, 48 Can. S.C.R. 494; *C.P.R.* v. *Hinrich*, 15 D.L.R. 472, 48 Can. S.C.R. 557, referred to.]

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario setting aside the verdict for the plaintiff at the trial and dismissing his action. Statement

The appeal was allowed, Davies, J., dissenting.

CAN.

S. C.

LONG v. TORONTO R. CO.

Statement

Raney, K.C., for the appellant. The jury could and did find that though the plaintiff was negligent the motorman could, by exercising reasonable care, have prevented the accident. This being so the plaintiff is entitled to the verdict. Pollock on Torts (9th ed.), 471 *et seq.* *Radley* v. *London & North Western Railway Co.*, 1 App. Cas. 754, at p. 759; *The Bernina*, 13 App. Cas. 1.

Dewart, K.C., for the respondents. On the evidence given the case should not have gone to the jury. See *Davey* v. *London & South Western R. Co.*, 12 Q.B.D. 70; *Dublin, Wicklow & Wexford R. Co.* v. *Slattery*, 3 App. Cas. 1155; *G.T.R. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838, 50 C.L.J. 27.

We also rely on *Jones* v. *Toronto & York Radial R. Co.*, 23 O.L.R. 331; 25 O.L.R. 158; *Brenner* v. *Toronto R. Co.*, 40 Can. S.C.R. 540, at p. 556.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—In view of the admitted negligence of the deceased, the question to be decided is: Could the motorman have prevented the accident by the exercise of ordinary prudence?

The jury found in answer to questions 4, 5, and 6 that the plaintiff's husband was negligent in not looking for the car, but that notwithstanding such negligence, the accident might have been prevented if the car had been under proper control and the brakes had been put on. Those answers would have been more helpful if the jury had fixed the period of time at which this precaution with respect to the brakes should have been taken. But to appreciate their full significance, the answers must be considered in the light of the evidence. For instance, the motorman says that he had the deceased in view from the time the latter left the sidewalk up to the very moment of the accident, and that

> he kept, straight on crossing the street with his head down in the direction of the car absolutely absorbed, not thinking of what he was doing,

and this, notwithstanding the insistent ringing of the gong. The motorman also admits that he realized almost immediately when he first saw the deceased that there might be trouble, and notwithstanding, at a distance of thirty yards from the point of the accident, the car was moving at the rate of ten miles an hour. The motorman adds that,

he realized the deceased was not going to stop in his attempt to cross the track when he was only ten feet from him,

and he then reversed his power and applied the brakes. In these circumstances, the unfortunate man is run down and the jury find that the car was not under proper control at the time of the accident and that the brakes should have been applied sooner.

It would be difficult to reach any other conclusion unless the jury were prepared to say that the motorman who admits he was fully aware of the possibility of trouble at a time when, by the exercise of reasonable care, he might have avoided the accident, was entitled to run the pedestrian down because the latter was negligently unconscious of the coming of the car.

The general effect of the answers to the first six questions is: Assuming that the negligence of the deceased began apparently when he left the sidewalk and continued until the moment of the accident; the motorman who says he anticipated danger from the moment he first saw the deceased coming towards the tracks was under a duty to be on the alert, and he should, in the circumstances have expected that the deceased would attempt to cross the track—which was indeed the only danger to be anticipated—and have been prepared for that emergency. The jury find that he failed in that duty. His negligence was, therefore, the immediate cause of the accident.

The answer to question seven, which was put by the Judge of his own motion, has a tendency to create some confusion. That question and the answer thereto are as follows:—

7. Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care—in other words, was the negligence of deceased a contributing act up to the very moment of the accident?

Answer.—10 say "No," and 2 say "Yes."

In his charge to the jury, the effect of that question is thus explained by the trial Judge:—

Now, the seventh question is a very peculiar one. Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care—in other words, was the negligence of the deceased a contributory act up to the very moment of the accident? I do not think I can make it any clearer than I have made it there. Did the unfortunate deceased's act contribute up to the moment of the accident? Well, in a sense, it did, physically, because he

CAN.

S. C.

LONG v. TORONTO R. Co.

Sir Charles Fitzpatrick, C.J.

went right on, but that is not what is meant by this question. The question is: Did he become aware that the car was approaching and was he able to avoid the danger? That is the sense in which that question is put. We do not know anything about his condition of mind at all. Apparently there is a question of whether he was under the influence of liquor or not. The policeman says he was a short time before. The man who was with him says he was not. I do not think it makes a great deal of difference in any event, it is just what his state of mind was, which you are the judges of, from the best information that can be placed before you.

Although not completely satisfactory, I am disposed to think that the effect of the answer is that, at the moment of impact, the deceased was unconscious of the near approach of the car, and that the motorman who had the last opportunity to avoid the accident, failed in his duty.

The general effect of the verdict when read with the evidence and the charge of the trial Judge is, therefore, that, notwithstanding the negligence of the deceased the motorman might have avoided the accident by the exercise of ordinary prudence and, in that view, the appeal should be allowed with costs here and below. *Tuff* v. *Warman*, 5 C.B.N.S. 573; *Radley* v. *London and Northwestern R. Co.*, 1 App. Cas. 754.

Davies, J.

DAVIES, J., dissented.

Idington, J.

IDINGTON, J.:—I accept the law as being correctly laid down in Pollock on Torts, 9th ed., 473, as follows:—

> If the defendant could finally have avoided the mischief by ordinary diligence, it matters not how careless the plaintiff may have been at the last or any preceding stage.

The deceased according to evidence the jury were entitled to accept was crossing from the southerly to the northerly side of Queen street, in an oblique line tending westerly when respondent's car, running from the east to the west, struck and killed him. The line thus taken by deceased tended to prevent him, when evidently from some cause or other in an unobservant mood, from as readily seeing the coming car as he otherwise might have done.

The motorman says he saw him from the time he stepped off the sidewalk to pursue the path he took, and kept him in his eye till he was struck. The story is a striking one and, to comprehend clearly and accurately the issue now presented for our solution, better be given in the language of the man

who ought to know the facts. The same man had been examined before the coroner, who had held an inquest. The stenographer's report of his examination at the inquest was referred to at the trial hereof and material parts of it read to him and his assent, or dissent, as the case might be, got. This is to be borne in mind in estimating both the value of the witness's evidence and his integrity. [Extracts from the stenographic record at the trial were here given.].

Queen street is unusually wide and from the south curb to the track the car ran on is shewn to be twenty-eight feet six inches.

The issue presented to us is whether or not the man seeing another he thus described as so dead to his surroundings as to fail to respond to such desperate efforts as were made to arouse him had duly and properly run him down. If we can say so then the judgment appealed from is quite right. And it seems to me we must be able to say so before we can uphold it. It seems according to past instances from *Davies* v. *Mann*, 10 M. & W. 546, down to the recent case of *O'Leary* v. *The Ottawa Electric R. Co.*, 12 O.W.R. 469, (appeal from which judgment was dismissed by an equal division in this Court) in a great variety of cases to have been held that it was for the jury to say whether or not, in a case where the defendant had apprehended, or ought to have apprehended, danger of injury to another who had been negligent of his person or his property, he (the defendant) had exercised ordinary care to avert such injury. Hence the law has hitherto been taken to be as laid down in the passage above quoted from Pollock.

The jury has said deceased was negligent but by answering another question, No. 5, seems clearly to intend that ultimately the respondent had not taken proper care to avert the accident —in other words—had not used that ordinary care the law required.

Question No. 7, though, I submit with great respect, unhappily framed, yet evoked a reply confirmatory of the same view and minimized the negligence of deceased as viewed by the jury. Such read in light of the charge seems clearly to be the result of these findings. And so read there can be no

CAN.
S. C.
LONG
v.
TORONTO
R. CO.
Idington, J.

judgment dismissing the action unless the Court comes to the conclusion it should never have been submitted to a jury but dismissed. I cannot think that a man who realized, as the motorman professes, for such a length of time and space the danger he was in of injuring the deceased, whose movements and conduct he had kept steadily in his eye, was justified in running him down. However, that may be I can still less think that there was no case to submit to the jury.

I can conceive of men taking, as in fact the members of this very jury did, opposite views in such a case. And it seems to me that the learned Chief Justice who tried the case realized all the difficulties, used his long and wide experience of such cases, and ruled according to the law as it has been administered by him and others for a quarter of a century. The Court of Appeal has gone a long way in the direction of establishing (what railway companies have struggled so long to establish) the hard and fast rule of "stop, look and listen" as an impassable barrier in the way of future recovery by any person, or their representatives, in cases where the so-called rule has not been observed.

It has never hitherto formed part of English or Canadian law. Each case with its attendant circumstances has been dealt with independently of such rule, though elements in it may have formed part of the basis acted on in many cases. There may be in the motorman's story a good deal of fiction. He may not in fact have been so very apprehensive and realized so well the danger as he says. Indeed, it would seem charitable to doubt it in looking at the results. It does not, however, lie in the mouth of respondent to say we should do so.

Nor does his own intimation that he did not think the man would attempt to cross, conclude the matter, for the Judge and jury were entitled to consider his acts of throwing off the power and continually ringing his gong as conclusive evidence that he thought there was danger of his crossing and being run down. And yet he failed to use that ordinary diligence motormen feeling such danger should have used. If he had continued at the high rate of speed he was going, before realizing the danger, he would have passed the man without hurting him. Appre-

bending what his conduct says he did, ordinary common sense dictated his doing more than he did.

There is in the evidence another and entirely different story which if correct might have been well accepted by the jury to justify a verdict for the defendant. I am not concerned at all with that for it lay within the province of the jury to determine which story was right. I am only concerned with the law and for the maintenance of the law and long established means of applying it by leaving to the jury the facts unless so clear beyond peradventure that there is nothing to try.

It has been suggested this motorman exercised his judgment. Again it was for the jury to say whether such judgment could be held to be in conformity with what men of common sense exact, under the name of ordinary care or diligence. The motorman's amending version that the deceased travelled north-easterly in his crossing, is in conflict with the evidence and surrounding circumstances. But if correct, then the deceased was facing the light of the coming car and a greater object of the motorman's pitying care than if going obliquely to the north-west. Is a man seeing another in such state entitled to shout at him and knock him down if he won't get out of the way?

I think the appeal should be allowed with costs and the judgment of the learned trial Judge restored.

I wrote the foregoing opinion shortly after the first argument herein a year ago, and though a longer line of authorities has been cited on the second argument than on the first, I have heard nothing to shew that there has been any change in the operation of the clear legal principles so long established which I have referred to in the foregoing.

Duff, J.

DUFF, J.:—Broadly, the rule as regards the effect of a plaintiff's negligence is that his want of care, assuming it to be of such a character as to constitute what is understood in law to be negligence, is a complete answer to a claim founded on the defendant's negligence, if it was in whole or in part the "proximate" or "direct cause" of the plaintiff's misfortune. In *Walton* v. *London, Brighton & South Coast R. Co.*, 1 H. & R. 424, at 429 and 430, Mr. Justice Willes in the course of a discus-

CAN.
S. C.
LONG
v.
TORONTO
R. CO.
Duff, J.

sion of the judgment of the Exchequer Chamber in *Tuff* v. *Warman*, 5 C.B.N.S. 573, says:—

If there is no evidence of negligence on the part of the plaintiff, then the only question is whether there has been negligence on the part of the defendant. But in cases where there has been negligence on the part of the plaintiff, the question is whether that was the direct cause of the accident or proximately contributed to it.

* * * * * *

If there was evidence of negligence on the part of the plaintiff, the further question arises whether that negligence was the proximate or direct cause of the accident .

In his judgment in *The Bernina*, 12 P.D. 58, at 61, Lord Esher states the rule in these words:—

(5) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant. (6) if the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one.

And at pp. 88 and 89 Lord Justice Lindley discusses the subject in the following passage:—

If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock, C.B., pointed out in *Greenland* v. *Chaplin*, 5 Ex. 243, the jury cannot take the consequences and divide them in proportion according to the negligence of the one or other party. But if the plaintiff can shew that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as is shewn not only by *Tuff* v. *Warman*, 5 C.B.N.S. 573, and *Radley* v. *London and North Western Railway Co.*, 1 App. Cas. 754, but also by the well-known case of *Davies* v. *Mann*, 10 M. & W. 546, and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes as follows:—

1. A. without fault of his own is injured by the negligence of B., then B. is liable to A. 2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A. 3. A. is injured by B. by the fault more or less of both combined, then the following further distinctions have to be made: (*a*) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.: *Butterfield* v. *Forrester*, 11 East 60; *Bridge* v. *Grand Junction Railway Co.*, 3 M. & W. 244; *Dowell* v. *General Steam Navigation Co.*, 5 E. & B. 195; (*b*) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B.: *Tuff* v. *Warman*, 5 C.B.N.S. 573; *Radley* v. *London*

CAN.
S. C.
LONG
v.
TORONTO
R. Co.
Duff, J.

and North Western Railway Co., 1 App. Cas. 754; *Davies* v. *Mann*, 10 M. & W. 546; (*c*) if there has been as much want of reasonable care on A.'s part as on B.'s or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law.

I think the jury was entitled to find in this case the following facts: That the motorman became aware some time before the collision that if the deceased, Frank Long, continued in the direction in which he was going there was risk of collision between him and the car. He also became aware that the deceased was absorbed and quite inattentive to his surroundings. They were further entitled to take the view that if the motorman was a person competent to take charge of an electric car running on such a thoroughfare as Queen street, he ought to have realized (early enough to have enabled him to stop his car or to bring it under such control as would enable him to stop it without risk of injury to the pedestrian) that in the circumstances it was his duty not to assume the risk of proceeding without taking such measures. They were also entitled to find that Long in fact did not become aware of the proximity of the car until the moment he was struck or immediately before. As to the question, these facts being established, as between Long's heedlessness and the motorman's failure to do his duty in the circumstances, Long's heedlessness was a direct or proximate cause of the accident, the broad common sense of the matter seems to dictate the answer that the negligence of the motorman (who saw Long's failure to realize the peril of pursuing his course and his state of abstraction, and who ought himself to have realized the peril) was, to use the language of Lord Justice Lindley, quoted above, "the real and proximate cause of the accident."

On the law the respondent's contention is that, assuming the facts to be as just stated, the case is within the specific rule (*a*) enunciated in the passage quoted above from Lord Justice Lindley's judgment as applicable to the third class of cases mentioned by him, viz., where A. is injured by B. through the fault more or less of both combined, then if notwithstand-

CAN.
S. C.
LONG
v.
TORONTO
R. CO.
Duff, J.

ing B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.; and that it is not within the rule enunciated by the Lord Justice as Rule (*b*). It cannot be doubted that if we take the moment when Long stepped across the south rail, or the latest moment, whenever it was, at which by hurrying across the track he could have escaped the car, as being the crucial moment, and confine our attention to the physical possibilities of the situation at the moment so taken, the case appears to be literally within the language of the rule (*a*). Considered with reference exclusively to an external standard, Long's conduct at either of these moments unmistakably exhibits a want of ordinary care, and at either of these moments by the observance of such ordinary care the avoidance of the accident would have been physically possible. I should mention in passing that I am excluding the hypothesis of drunkenness. I think that after what occurred at the trial and before this Court on the first argument the appellant's right to recover cannot properly be rested upon any such hypothesis.

Furthermore, treating Long's failure to observe ordinary precautions at these critical moments as negligence, within the meaning of rule (*b*), it seems to be literally true that from the first of those moments on, the motorman did everything that could be done to avoid the mishap, and that at that stage of the business he must be acquitted of negligence.

But I think the fallacy in this line of argument lies in the tacit assumption that the rules referred to as rules (*a*), and (*b*), constitute an exhaustive code of rules applicable to the third class of cases mentioned by the Lord Justice. It will be observed that Lord Justice Lindley is careful, as are Mr. Justice Willes and Lord Esher in the passages I have quoted from them respectively, to insist upon the broad general principle that the victim's negligence to be an answer must be a direct or proximate cause of the accident. Rules (*a*) and (*b*) are particular examples of the application of the general principle; rule (*c*) is in effect a restatement of the general principle. But —assuming that rule (*b*) is not applicable to the circumstances of this case, there are elements present here, the motorman's knowledge of facts from which he ought to have foreseen the

peril in time to have avoided the injury, the victim's ignorance of the peril and the motorman's knowledge of that ignorance, which cannot, I think, be left out of account in determining whose conduct was the proximate cause for the purpose of assigning responsibility which are not to be found in the cases in which the specific rule (*a*) has heretofore been enunciated and applied. I do not think there is any decision requiring one to hold that in a case in which such elements are present these specific rules (*a*) and (*b*) literally interpreted must be regarded as furnishing an exhaustive or exclusive interpretation of the general principle; on the other hand, there are decisions of this Court, *Calgary* v. *Harnovis*, 15 D.L.R. 411, 48 Can. S.C.R. 494, and *Canadian Pacific R. Co.* v. *Hinrich*, 15 D.L.R. 472, 48 Can. S.C.R. 557, supporting the view that in such cases such elements of knowledge and ignorance must be taken into account and that the victim's conduct must be viewed in its relation to the conduct of the defendant in determining whether it was a *causa proxima*. That view is supported by the decision of *Municipal Tramways Trust* v. *Buckley*, 14 Aust. C.L.R. 731, in the High Court of Australia. It receives some support also from the case of *Springett* v. *Ball*, 4 F. & F. 472, and in *Mitchell* v. *Caledonia R. Co.*, 46 Scot. L.R. 517, at 519, Lord Dunedin and Lord Kinnear seem to give the weight of their authority in favour of this way of looking at such cases. Perhaps the same may also be said of the judgments of Lord Cairns and Lord Penzance in *Dublin, Wicklow and Wexford R. Co.* v. *Slattery*, 3 App. Cas. 1155, at 1166, 1167, and 1174. The subject has also been fully discussed in Ontario in *Sim* v. *City of Port Arthur*, 2 O.W.N. 864; *Rice* v. *Toronto Railway Co.*, 22 O.L.R. 446, and *Herron* v. *Toronto Railway Co.*, 6 D.L.R. 215, 11 D.L.R. 697, 28 O.L.R. 59. I ought also, I suppose, to refer to my own judgment in the case of *Brenner* v. *Toronto Railway Co.*, 40 Can. S.C.R. 540, upon which Mr. Dewart strongly relied. I was there, of course, dealing only with the phase of the law of negligence which came into play in that case. Having re-examined the whole matter for the purposes of this appeal, I do not think I can honestly charge myself with inaccuracy, but it should be observed that the point of the observa-

CAN.
S. C.
LONG
v.
TORONTO
R. CO.
Duff. J.

tion quoted by Mr. Dewart (in its application to the present case) is that negligence of the victim, in order to be an answer, must be a "direct and effective contributing cause." In that case, I had no manner of doubt that the negligence of the unfortunate victim, who attempted to pass across the track in front of a car which she knew to be approaching, without looking at the last moment to see whether she could do so in safety and without giving any sign of intention to cross until it was too late for the motorman to stop his car, was a direct contributing cause. In this case, considering the conduct of the victim, in relation to the conduct of the motorman, and the elements of knowledge on the one hand, and ignorance on the other, abovementioned, I think the proper view is that the *causa proxima* or direct cause, or if you like, the *cause*, in the legal sense, was the failure of duty on the part of the motorman, and that Long's want of care ought rather to be considered one of the conditions or circumstances on which the motorman's failure of duty took effect.

As to the facts: with great respect, I am unable to agree with the view of the facts taken by the Court of Appeal. I have read the evidence more than once with care and I will only say that I think the evidence of the motorman and of the superintendent support the verdict. One consideration appears to me to have been overlooked. There is no doubt that the motorman was placed in a difficult situation, and full allowance should be made for that. It is very important also in such cases to avoid confusing excusable error of judgment, the error being proved by the event, with want of competence or diligence; but on the other hand, a reasonable measure of competent judgment may be required from the respondent's employees in such emergencies. This is sufficient to dispose of the contentions advanced on behalf of the appellant. As to the matter of a new trial, I have only to say, that, agreeing as I do with the opinion of the learned Chief Justice who tried the case as to the law applicable, I think the charge was admirably calculated to instruct the jury fully and effectively as to their duties. No doubt the 7th question on its face is open to criticism. But I do not think the explanation given by the learned Chief Justice

CAN.
S. C.
LONG
v.
TORONTO
R. Co.
Duff. J.

of the point he desired them to consider under that head could have been misapprehended. Even if I had felt some difficulty as to the construction of the answers—which I do not—I should have hesitated long about directing another trial of the action in view of the attitude of the very able counsel who appeared for the respondent who at no stage of the proceedings has suggested the propriety of a new trial, or taken any exception to the charge of the learned trial Judge except to impugn the principles of law upon which he proceeded, an exception which if successful must have led to the dismissal of the action.

Anglin, J.

ANGLIN, J., dissented.

Appeal allowed with costs.

Solicitors for the appellant: *Mills, Raney, Lucas & Hales.*

Solicitors for the respondents: *McCarthy, Osler, Hoskin & Harcourt.*

[Leave to appeal to the Privy Council was refused, August 4, 1914.]

ONT.
S. C.

HUNT v. EMERSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. December 21, 1914.

1. BROKERS (§ II B—12)—REAL ESTATE BROKERS—SUFFICIENCY OF BROKER'S SERVICES—PROCURING CAUSE—COMPENSATION.

When a proprietor with the view of selling his estate goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given.

[*Toulmin* v. *Millar*, 58 L.T.R. 96; *Burchell* v. *Gowrie*, [1910] A.C. 614; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395; *McBrayne* v. *Imperial*, 13 D.L.R. 448; *Stewart* v. *Henderson*, 19 D.L.R. 387, applied.]

Statement

APPEAL from the judgment of FALCONBRIDGE, C.J.K.B., dismissing an action for damages.

G. Lynch-Staunton, K.C., for the appellant.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the defendant, the respondent.

Hodgins, J.A.

December 21. HODGINS, J.A.:—The written agreement between the parties in this case, coupled with the admitted verbal arrangement to pay commission, resembles that considered in

ONT.
S. C.
HUNT
v.
EMERSON.
Hodgins, J.A.

Kelly v. *Enderton*, 9 D.L.R. 472. The Privy Council found that such a contract amounted to this: an option to buy, coupled with an agreement to allow a commission for finding a purchaser who was able to pay the price, whether the person acquiring the option became the purchaser or gave the benefit of the option to another.

If the option in this case were the only agreement between the parties, I should be inclined to think that the appellant could not claim an agency to sell except upon the terms mentioned in the option. But both parties admit that there was mention of some variation in price, and it must be determined whether or not that mention, and the actions of the parties throughout, introduced into the bargain a more general agency.

The arrangement effected with the Bank of Hamilton by the respondent was within the time limited in the option, and of course rendered it impossible for the appellant to negotiate further with the bank, which was known to both parties as the appellant's prospective purchaser. The reservation in the option of the 12th September, 1913, given to the bank's agent, is of course of no consequence in this connection.

It may be taken that the respondent was anxious to sell his property. The option was prepared by him, and in his evidence he states that he did not assume that the appellant was going to buy the property. The evidence as to the price and time is as follows:—

The appellant alleges that, after he got exhibit 1, he told the defendant that "it was going to be a long deal. Q. You told him that? A. And thirty days was not long enough, probably not long enough, and he said, 'Hunt, if you get a real deal on, I will give you all the time necessary to wind it up.'" The appellant then perused the document—"and I told Mr. Emerson, I said, 'Those odd figures will never stick in this deal,' and Mr. Emerson said, 'Do the best you can, I am no cincher.'"

In cross-examination he says that the respondent gave him "to understand that he would take less than $107,350, and told him distinctly to do the best, to see what he could do, and that if he got the right deal he would extend it; he said he would take care of him, and that that meant he would take less than $107,350. These further questions were put:—

"Q. You had no authority to sell without his consent for less than $107,350? A. He was the seller.

"Q. You had no authority to sell for less than $107,350? A. No; I could not sell it unless he accepted it."

The respondent says that, after negotiations were opened with the Bank of Hamilton, the appellant said: "Is this your rock-bottom price? I said, 'That option is approximately $107,000, roughly 5 per cent. commission, that would leave something over $101,000.' I said, 'I might take a little less rather than lose the sale of the property,' but I said, 'I won't consent to it now.' "

On cross-examination he says: "Q. Did you not tell him you would take a little less if that would cause a sale? A. I said I might. Q. If that is going to put the sale through I (you) might be inclined to take a little less? A. Yes. . . . Q. So therefore you had not made up your mind, so far as you expressed it, what your price was? A. No."

The fair result of this, I think, is that, while the option named a price and time for sale, it was understood that, if the appellant could effect a sale at a less price, the respondent might accept it, and if more time were needed he would give it.

In *Toulmin* v. *Millar*, 58 L.T.R. 96, Lord Watson, in discussing the effect on general authority to sell, of the fixing of a price, thus states the results: "When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations. On the other hand, suppose a proprietor goes to an agent for the purpose of letting and instructs him to let. The agent then says, 'I think I can find you a purchaser; will you not sell?' To which he replies, 'I will sell

ONT.
S. C.
HUNT
v.
EMERSON.
Hodgins, J.A.

for £10,000, not a sixpence less; if you can get that sum, sell; if not, let the property.' I am not prepared to hold that an arrangement expressed in these or in equivalent terms would confer a general employment to sell upon the agent. In my opinion it would merely give him a limited mandate to sell for the price specified, instead of letting; and his agency would come to an end when he failed to obtain that price, and carried out the alternative scheme of letting the estate to a tenant."

It seems to me that the appellant's position is more properly described by the first part of what I have quoted, and that he had a general authority. Does what happened during the negotiations affect the right of the appellant to get a commission on the sale afterwards made?

The facts in relation thereto are very simple. The option as drawn was given to the agent of the bank, and by him transmitted to the head office. The appellant visited Hamilton and discussed the matter, and the following telegrams passed:—

"Sept. 8th, 1913.

"To J. T. Emerson, Port Arthur, Ont.

"Board met to-day and will send man Port Arthur immediately provided price made one hundred thousand flat. Say will not pay another dollar. Answer quick.

"E. S. HUNT."

"Port Arthur, Ont., Sept. 8th, 1913, 5.53 p.m.

"E. T. Hun (*sic*) Ham.

"Your message received. Will not take less than one hundred thousand net to me. If you do not make deal will you release option. Have another customer.

"J. T. EMERSON."

This telegram is explained by the respondent to refer to a possible customer mentioned by Rankin before the appellant's option was given, whom he had never seen, and with whom there were no negotiations after the appellant went to Hamilton.

"Sept. 9th, 1913.

"To J. T. Emerson, Port Arthur, Ont.

"What commission will you pay on one hundred thousand basis? Board refuse commission. Think you should stretch point. Waiting answer. "E. S. HUNT."

It was urged in argument that this telegram must be taken as an acknowledgment that the appellant knew that he had no right to a commission, and as a request for a new arrangement. I do not so read it. If the respondent had intimated that he might take less than $107,350, then it was reasonable that the appellant, who was to be paid either $5,000 flat or 5 per cent. on a sale at the stated figure, should express a willingness to negotiate regarding the commission which the respondent would pay under the changed conditions. "Net to me" meant, of course, clear of any commission, and a business man desiring to put the deal through would naturally inquire if the respondent would modify his stand to enable the sale to be closed. It might have been better expressed; and, indeed, the reference to the refusal of the bank to pay commission was not strictly justified, as they had not been asked, and therefore had not refused. But it indicated their attitude so far as it affected the appellant and respondent, and the telegram is just what would be expected if the evidence of the respondent is borne in mind, that he might take a little less if that would cause a sale.

This telegram indicated that the sale to the bank would not go through if the respondent insisted on refusing any commission, or if he did not stretch a point sufficiently to induce the appellant to meet him. Neither party receded, and the appellant wrote to the respondent reproaching him. That letter is lost, but it is set forth on pp. 12, 48, and 65 of the notes of evidence. As detailed by the various parties, it does not, to my mind, indicate the throwing up of the agency, but is confined to a recognition of the fact that the immediate deal with the bank had fallen through, owing to the refusal of any commission.

The view was urged that the telegram of the 9th October, even if not conclusive in itself, throws light on the original agreement, indicating that the appellant realised that a new arrangement was necessary to entitle him to a commission on a less sum than $107,350. But this leaves out of sight the significance of the evidence I have quoted, which treats the stated price as not being the final basis. Besides this, the respondent's previous telegram shews that he then regarded the appellant as master of the situation till the expiry of the option, and it does

ONT.
S. C.
HUNT
v.
EMERSON.
Hodgins, J.A.

not withdraw then and there whatever rights the appellant had arising out of the employment, if, in truth, that was a general one, in the sense I have pointed out.

In the case of *Nightingale* v. *Parsons*, [1914] 2 K.B. 621, the conclusion of Lord Watson in his second proposition in *Toulmin* v. *Millar* (*ante*) is in fact adopted in dealing with a case in which the alternative of letting had been actually taken. But in that case, the test applied by Collins, M.R., in *Millar* v. *Radford* (1903), 19 Times L.R. 575, was approved, i.e., "whether the introduction was an efficient cause in bringing about the letting or sale."

The respondent made the sale himself to the Bank of Hamilton for $100,000 on the 12th September, 1913. This was to the purchaser introduced by the appellant; and, applying the cases of *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, *Stratton* v. *Vachon* (1911) 44 S.C.R. 395, *McBrayne* v. *Imperial Loan Co.*, 13 D.L.R. 448, and *Stewart* v. *Henderson* (1914), 19 D.L.R. 387, I think the appeal should succeed.

In the *Burchell* case it was held that, as the agent had brought the vendors into relation with the actual purchaser, he was entitled to recover, although the vendors had sold behind his back, on terms which he had advised them not to accept.

The evidence as to the amount of the commission was, that it was originally arranged to be 5 per cent., but that the respondent got the appellant to agree to $5,000. In this case it makes little difference which basis is taken, for 5 per cent. on $100,000 comes to $5,000. It seems to follow that, if the original bargain included a general employment, the agent would be entitled either to the agreed commission or to damages, the measure of which might well be the stated percentage applied to the reduced amount: *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. at p. 626. The sum of $5,000 was fixed with regard to the contemplated price of $107,350, according to the evidence I have quoted; and, as it was not obtained, the appellant is justified in claiming, on the price actually got, commission at the rate of 5 per cent.

Counsel for the respondent contended that, even if the appellant were otherwise entitled to a commission, he had forfeited his

right to it by his arrangement to divide his commission with the local agent of the bank. He urged that, if a sale had been made, the bank, on discovering this fact, could repudiate the transaction; and that an agent who so acted as to produce a contract which might, at the option of the purchaser, be voided, could not recover commission. In this contention I would be disposed to agree if the sale had been actually made as a result of the agent's negotiation, of which that arrangement was a part. But recovery here depends on a different cause, i.e., the introduction, brought about by the agent, before any other act had been done, of the purchaser with whom the principal, disregarding the agent and intervening himself, made the contract.

It is true that Lord Alverstone in *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, uses the expression: "A principal is entitled to have an honest agent, and it is only an honest agent who is entitled to any commission;" but I think that decision is correctly interpreted in *Hippisley* v. *Knee Brothers*, [1905] 1 K.B. 1, and in *Nitedals Taendstikfabrik* v. *Bruster*, [1906] 2 Ch. 671. In the first case the agent received a secret profit from the purchaser, and the Court held, that his interest was therefore adverse to that of his principal, and that in such a case he could not say that he had faithfully performed his duty. It was pointed out that, even if the agent had been impartial, that was not what the principal was entitled to, and that it was impossible to say what might have been the result if the agent had acted honestly. In the *Nitesdals* case there were transactions which were conducted honourably, and some that were not; and Neville, J., decided that these were separable. In the *Hippisley* case the same principle was applied, though under different circumstances. This case is, of course, not one exactly of the kind there dealt with, for the right to commission, so far as the appellant is concerned, depends upon his introduction of the purchaser to whom the property was afterwards sold. But I think the distinction may reasonably be made that the intervention of the respondent eliminated from the transaction the negotiation in which the impropriety occurred, and that it is separable from and does not interfere with the right of the appellant depending only upon the introduction prior to the bargain with the agent.

ONT.
S. C.
HUNT
v.
EMERSON.
Hodgins, J.A.

The latter disclaims any right, arising from the improper offer, as attaching to the sale actually made, and the respondent insists that his sale had no connection with the appellant. It would be a misapplication of the principle to hold that an act, evidence of which is in no way essentially connected with nor part of the proof upon which his success depends, should disentitle an agent to receive his commission.

Having regard to the reason of the rule which prevents an agent from succeeding unless his action is free from the taint of dishonesty—which reason I take to be that he cannot give true service unless he is free from an actual or possible contrary interest—I think the appellant is, under the circumstances in evidence here, entitled to be paid.

The appeal should be allowed, and judgment entered for the appellant, with costs throughout, for the sum of $5,000.

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

MACLAREN and MAGEE, JJ.A., concurred.

Meredith, C.J.O.

MEREDITH, C.J.O., dissented.

Appeal allowed; MEREDITH, C.J.O., *dissenting.*

QUE.
C. R.

LEGAULT v. MONTREAL TERRA COTTA CO.

Quebec Court of Review, Archibald, Saint-Pierre and Greenshields, JJ. May 9, 1914.

1. DAMAGES (§ V—371)—JOINT TORT-FEASORS—DIVISION OF DAMAGES — NEGLIGENCE.

The obligation of tort-feasors in respect of negligence is joint and several as between them and the person injured but as between themselves the damage is apportionable under Quebec law so where three parties were equally in fault but only one is sued by the injured person that one on bringing in the others to answer as defendants in warranty is entitled to indemnity for two-thirds of the amount, one-third against each of the other tort-feasors.

2. RAILWAYS (§ II C—25)—FENCES — RAILWAY ACT — TWO CONTIGUOUS PARALLEL LINES — PRIVATE LANDS — RESPONSIBILITY — APPORTIONMENT OF — JOINT TORT-FEASORS.

The provisions of sec. 254 of the Railway Act, Can., as to fencing the right-of-way apply so as to require a fence between two contiguous parallel lines of different railway companies, and default in maintaining same may involve both in responsibility for the killing of cattle straying upon the track because of a defect in the railway fencing adjacent to private lands.

Statement

JUDGMENT inscribed for review, which is modified as to the condemnation in warranty, reported in 43 Que. S.C. 15.

Judgment below varied.

Emard & Emard, for the plaintiff.

Laramée & Desjardins, for the defendant and plaintiff in warranty.

A. E. Beckett, K.C., for the Grand Trunk Ry. Co.

Meredith, Macpherson, Hague & Holden, for the C.P. Ry. Co.

GREENSHIELDS, J., dissented.

ARCHIBALD, J.:—This case comes in review of a judgment maintaining the plaintiff's action against the principal defendant, for the sum of $225, and maintaining the action in warranty of the plaintiff in warranty (principal defendant), against the two railway companies, defendants in warranty.

The ground of action was the killing of three cows which belonged to the plaintiff and had got upon the railway line and were killed on the line of the G.T.R.—The action was brought against the principal defendant because the plaintiff had his pasture adjoining the land of the Montreal Terra Cotta Co., and the latter was obliged to maintain in good order a portion of the fence between the plaintiff's land and its land, and the plaintiff alleges that that portion of the fence which belonged to the defendant had been, for a considerable period, in bad repair and the plaintiff had protested to the defendant upon the subject, but the defendant had done nothing; that, in September, 1911, on a Sunday morning, three of plaintiff's cows got through the fence of the Montreal Terra Cotta Co., where it was in bad repair, and then escaped on to the right of way of the C.P.R. and, crossing that, on the right of way of the G.T.R. where they were killed. The plaintiff's farm is situated at Pointe Claire and is to the north side of the C.P.Ry. as also is the land of the Montreal Terra Cotta Co., so that the plaintiff's cows getting first upon the land of the Montreal Terra Cotta Co. and, from there, on to the railway lines, were obliged to go first upon the right of way of the C.P.R., before they reached that of the G.T.R. The defendant being sued, called in the two railway companies, alleging that the C.P.R. was in fault, in not keeping a fence between the land of the Montreal Terra Cotta Co. and its land, whereby the cows obtained an entrance upon the right of way of the railways. The railway companies pleaded against the action in war-

QUE.

C. R.

LEGAULT v. MONTREAL TERRA COTTA CO.

Archibald, J.

ranty that there is no *lien de droit* between them and the plaintiff in warranty and ask for the dismissal of the action.

The judgment has maintained the position of the plaintiff in warranty and while condemning him as principal defendant, to pay the plaintiff the amount of $225, for the value of his cows killed by the railway, in consequence of the principal defendant's fault in not having his fences in good condition, it nevertheless condemned the railway company to indemnify the plaintiff in warranty against the judgment pronounced against it. The defendants appeal from this judgment and claim that there was no *lien de droit* between them and the plaintiff in warranty, and that the action in warranty ought to have been dismissed.

I think the Judge appears to have based himself upon sec. 294 of the Railway Act of Canada (ch. 37). Sub-sec. 4 of this is as follows:

> When any horses, sheep, swine or other cattle at large, whether upon the high-way or not, get upon the property of the company and are killed or injured, the owner of any such animals so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company, in any Court of competent jurisdiction, unless the company establish that such animals got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animals or his agent.

Sub-sec. 5:

> The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company and not at the point of intersection with a high-way deprive the owner of his right to recover.

Then, sec. 295 provides exceptions to the rule that the company is responsible by the mere fact of the animals having been killed on its track, all of which refer to cases where the proprietor of the animals has been in fault in not taking care of them, or in not keeping the gates of farm-crossings properly closed or at fault himself, in taking down or interfering with the railway fences. But sub-sec. 3 of sec. 294 provides that if animals are at large upon any highway without being in charge of any person, at the point of intersection of a highway, and, in consequence of that fact, they get upon the track of the railway and are killed, no action exists against the company. It is seen that this section provides a rule contrary to the common law rule

that responsibility results always from fault, and that fault must necessarily be proved before any judgment in damages can be given. The section throws upon the railway company the obligation of proving that the other party was in fault. In cases of this kind, the rules of interpretation are strict, and where an obligation is imposed in excess of that existing at common law, the case must be brought within the four corners of the exception to the common law rule.

In this case, it is said that where animals are killed on the railway track, the owner shall be entitled to recover the amount of the loss or injury and that without proving any fault on the part of the railway company. Here, the owner does not direct his action against the railway company at all; he directs his action against his neighbor that was in fault and that has been determined by the judgment to have been in fault, and has been condemned to pay in consequence of its fault, and this latter now directs its action against the railway companies to indemnify it from the effect of the judgment pronounced. The action of the plaintiff in warranty does not come within the scope of sub-sec. 4 of sec. 294 of the Railway Act, and it was necessary for the plaintiff in warranty to found itself upon the common law rule that fault is an essential of responsibility for damages caused by any act. The defendant, in my judgment, was not precluded from founding his action upon fault, although the action of the owner might have been taken against the railway company without any allegation of fault. In this instance, it appears that the Canadian Pacific Ry. Co. was constructing a siding on the property of the Terra Cotta Co. for the mutual convenience of the railway company and the Terra Cotta Co.;—that, for the purpose of constructing this siding, the fence had been removed, or a portion of it removed, and that although the siding was completed, the fence, or at any rate the gate had not been replaced. The accident happened on a Sunday morning when there were no persons present, and, the animals, getting through defendant's fence, had nothing to prevent them from going upon the railway tracks.

That was, of course, sufficient to establish fault on the part of the Canadian Pacific Ry. Co. As I said, both railway com-

QUE.

C. R.

LEGAULT v. MONTREAL TERRA COTTA CO.

Archibald, J.

panies run parallel to each other, at this point, and their properties were contiguous to each other. There was no fence between the two railway companies, so that when the animals got upon the Canadian Pacific Railway, there was nothing to prevent them crossing over on to the line of the Grand Trunk. There never has been any fence between the two railways, yet there is nothing in the Railway Act which applies any special rule regarding fencing to the case where two railways are parallel to each other, without any land belonging to private individuals between them. Sec. 254 provides:

> The company shall erect and maintain, upon the railway: (*a*) fences of a minimum height of 4 ft. 6 in. on each side of the railway.

As I said, there is nothing in the Railway Act which limits the operation of that provision.

In the factums and arguments of the defendants in warranty before the Court, they seem to consider their cause common. There is no effort on the part of the G.T.R. to cast any special blame on the C.P.R., or to avoid liability, because the fence, which did not exist, was a fence which was under the control and on the property of the C.P.R. It may be assumed, I think, as it was practically admitted at the argument, that the railway companies are under contract with each other, with regard to this matter of fencing, by which the C.P.R. makes the fence to the north of its track, and the G.T.R. makes the fence to the south of its track. But in the absence of any provision of that kind, sanctioned by the Board of Railway commissioners, there would remain upon the G.T.R. the obligation of having a fence on both sides of its track, as provided by the section above cited; so that I come to the conclusion that the G.T.R. is in the same position as the C.P.R., because, if there existed any contract between the two railways by which the fence dividing their two properties is dispensed with, then the two companies would be mutual agents of each other for the construction of the fence on one side of the track of each, because the fence on the south side of the G.T.R., would operate in place of the fence on the south side of the C.P.R., and *vice versa*, so that, in any case, both railways are responsible for one. As I have before said, there was manifest fault on the part of the C.P.R. in leaving their right of way un-

QUE.

C. R.

LEGAULT v. MONTREAL TERRA COTTA CO.

Archibald, J.

fenced, and this accident happened in consequence of that fact. It is true that it also happened in consequence of the escape of the cows from the plaintiff's property by the fault of the plaintiff in warranty. It is true that the obligation of tort-feasors is joint and several, as between them and the person injured;—but it is not so between the tort-feasors themselves. Each is responsible for a portion of the damage.

We are of opinion, therefore, that in this instance, the fault of each party was practically equal; it consisted in the same sort of an act, the leaving of the fence in a condition insufficient to prevent the passage of animals;—and, that, therefore, the judgment of the Court, instead of maintaining the plaintiff's action in warranty, should have maintained it only for one-third of the damage, should have condemned the defendants in warranty to indemnify the plaintiff in warranty to the extent of one-third against each of the defendants in warranty.

We will, therefore, modify the judgment and condemn the defendants in warranty to pay to the plaintiff in warranty, one-third of the condemnation against the plaintiff in warranty in the principal action, including principal, interest and costs, with also the costs of the action in warranty upon an action for that amount.

DUHAIME v. CORPORATION OF YAMASKA.

QUE.

C. R.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ.
January 30, 1914.

1. INTOXICATING LIQUORS (§ I C—34)—LOCAL OPTION BY-LAW—COMING INTO FORCE OF—CONTEMPORANEOUS RESOLUTION—SURPLUSAGE—USELESS.

A local option by-law passed in December under a statute which provides that as regards the prohibition to sell liquors it shall come into force on the following May 1st, when existing licenses would expire, is not invalidated by a contemporaneous resolution that the by-law should come into force fifteen days after public notice thereof; the resolution was mere surplusage and was useless.

2. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION BY-LAW—ELECTION—COMPULSORY—DEMAND FOR—THIRTY ELECTORS — EACH MUNICIPALITY—R.S.Q. 1909, SEC. 1319.

A local option by-law passed by a county council may be compulsorily submitted to public vote on demand of thirty or more electors in each municipality in the county under sec. 1319 R.S.Q. 1909; it is not enough that the number lacking to such petition in one municipality is exceeded by the signers in another municipality.

Statement

APPEAL from the judgment of the Superior Court, Bruneau, J.

Appeal dismissed.

QUE.

C. R.

DUHAIME v. CORPORATION OF YAMASKA.

Greenshields, J.

Cardin & Allard, for the plaintiffs.

J. B. Brouseau, K.C., for the defendants.

GREENSHIELDS, J.:—The plaintiffs, at the time of the institution of the present action, were licensed hotelkeepers, carrying on their business as such within the territorial limits of the county of Yamaska, in the province of Quebec. The defendant is the corporation of the county of Yamaska. The *mis-en-cause* are Pierre Tellier, notary, and Joseph I. Pontbriand, M.D., in their quality of joint collectors of provincial revenue for the district of Richelieu; and the other *mis-en-cause* are eighteen in number, being the local municipalities forming the county of Yamaska. By their action, the plaintiffs pray, that by the judgment to be rendered, a certain by-law passed on December 11, 1912, prohibiting, within the limits of the county of Yamaska, the sale of intoxicating liquors and the issuing of licenses to that effect, should be annulled and declared irregular, illegal and *ultra vires*, and that the *mis-en-cause* should be summoned to hear the said by-law declared illegal, irregular, and null, and that the said *mis-en-cause*, Pierre Tellier and Dr. Joseph I. Pontbriand, in their quality of joint collectors of the provincial revenue for the district of Richelieu, and the other *mis-en-cause*, as well as the defendant, be ordered to suspend all action relating to the by-law, the whole with costs against the corporation defendant in any event, and against the *mis-en-cause* in case they contest. The plaintiffs set forth in their declaration a large number of grounds for attacking the by-law in question; but the case, as adjudged by the learned trial Judge, and as submitted for the consideration of this Court, involves the decision, apart from the question of costs of two questions only: (1) Does the by-law in question contain a clause contrary to law, therefore rendering it null and void and illegal, because after its adoption, it was declared by resolution of the council that the by-law should come into force fifteen days after public notice thereof had been given by the secretary-treasurer of the corporation defendant? (2) Did the corporation defendant exceed its powers in adopting the by-law without having previously submitted the same for the ap-

probation of the municipal electors of the county of Yamaska, seeing the request made to that effect by 84 electors, by a petition lodged with the secretary-treasurer of the county. The plaintiffs insist that both these grounds involve the nullity of the by-law. The plaintiffs obtained an order for an interlocutory injunction, restraining the corporation defendant, from proceeding with the enforcement of the by-law.

Subsequently, on April 27, Joseph Elie, a municipal elector and ratepayer of the county of Yamaska, made a petition for leave to contest the plaintiff's action. This petition in intervention was received and filed, and, in general terms, defended the legality of the by-law and all proceedings had therein. The plaintiffs inscribed in law against the intervention alleging that the facts disclosed and alleged by the intervenant do not justify the conclusions thereof, and contested the intervention, in effect, denying the material allegations thereof and alleging the illegality of the by-law.

By judgment rendered on May 13, 1913, the inscription in law was maintained and the intervention was dismissed. Thereupon, on May 23, 1913, the *mis-en-cause*, the corporation of the village of St. Michel, filed a plea to the plaintiff's action, denying the essential allegations of the declaration, and affirming the legality of the by-law.

The *mis-en-cause*, the corporation of St. Michel alone contested; the defendant, the corporation of the county of Yamaska, submitted to justice, and the issue as submitted to the Court of the first instance was between the plaintiffs and the *mis-en-cause*, the corporation of St. Michel.

Now as before stated, the two questions submitted for decision are: (1) whether the by-law was null, because by resolution the council sought to put it in force fifteen days from its date; and (2) whether upon the demand of eighty-four electors of two of the municipalities forming the county of Yamaska, the council improperly refused to submit the by-law to a popular vote, as provided by statute.

On December 11, 1912, at 2 p.m., following an adjournment from 10 a.m., a meeting of the county council of the county of Yamaska was held at St. François du Lac, at which were

QUE.

C. R.

DUHAIME v. CORPORATION OF YAMASKA.

Greenshields, J.

present a quorum of the council, and at which it was moved by one of the councillors and seconded by another, that there should be prepared, read and taken into consideration a by-law with a view of prohibiting the sale of intoxicating liquors, and the issuing of licenses to that effect, within the limits of Yamaska county, in conformity with the license law and the Revised Statutes of Quebec, 1909. It was proposed by another councillor, and seconded by another, in amendment, that no such by-law should be prepared, read and adopted or considered. Although called an amendment, this in reality was not an amendment. However, the amendment was voted upon, and upon being submitted, was lost. Thereupon the principal motion was submitted, and was adopted upon the same division, nine in favour, and eight against; and the following by-law was passed:—

It is ordered and enacted by by-law of the said council as follows:—The sale of intoxicating liquor and the issue of licenses to that effect, are by the present by-law prohibited within the limits of the municipality of the county of Yamaska.

The by-law was signed by the presiding officer, and also by the secretary-treasurer. After the division on the by-law, it was moved by one of the councillors and seconded by another, that the by-law which had just been read and considered be adopted and enacted as a by-law for all purposes, and that the by-law should come into force fifteen days after the publication of a public notice of its adoption, to be given by the secretary-treasurer of the council.

Now, the first attack upon the by-law, which is declared to be *ultra vires*, is the attempt to put it in force within fifteen days. It may be remarked at the outstart, that the by-law is clearly not *ultra vires*. Art. 1317 of R.S.Q., clearly confers the power of enacting such a by-law on a municipal council. It says:—

The municipal council of every county . . . may under the authority and for the enforcement of this section and subject to its provisions and limitations at any time pass a by-law prohibiting the sale of intoxicating liquors and the issue of licenses therefor within such municipality.

Now, sec. 1324 enacts, as regards the prohibition of licenses:—

Every such by-law shall come into force from the day of the communication thereof to the collector of provincial revenue. And, as regards the prohibition to sell—Every such by-law . . . shall come into force on the first day of May after that day.

Now, the enactment is clear, and its purpose is equally clear. In my opinion, if a county council passes such a by-law, then, in order to prevent any local municipality forming part of the county, from issuing further licenses, the by-law comes into force upon the communication of it to the collector of inland revenue. The purpose of this undoubtedly is, that persons may not be exposed to acquire a license and lose it shortly afterwards.

The other provision of the law is manifestly to protect acquired rights. A person who has bought and paid for a license up to May 1, of any year, is entitled to have and hold and use that license during that time, and, for that reason no by-law could affect him until the expiration of the then current license year. Now, that is the law in clear terms.

By resolution, the county council attempted to put this by-law in force fifteen days after its adoption. It is argued by the plaintiffs that this resolution affected the whole tenor of the by-law; and, say the plaintiffs,—it is clearly against the law. If the resolution does cover the whole tenor of the by-law, affecting as well the issue of new licenses as the prohibition to sell, it is clearly contrary to the provisions of the law, and it is a resolution which could not, so far as the sale of intoxicating liquor is concerned, be enforced. But does such a resolution render the by-law itself null and void? I cannot answer the question in the affirmative. The plaintiffs, hotelkeepers, have never been attacked; no proceedings have been taken against them to enforce the by-law, or had not, at least, up to the time of the institution of the present action. It can be easily imagined that if one of the plaintiffs had been summoned for selling liquor in contravention of the by-law, at some time previous to May 1, 1913, he might successfully have defended himself, and alleged that the by-law could not and did not come into force before May 1, 1913, and any resolution attempting to put it in force before that date, was blank paper. But, unattacked, I should say that the plaintiffs were without right

QUE.

C. R.

DUHAIME v. CORPORATION OF YAMASKA.

Greenshields, J.

to seek to set aside the by-law itself by reason of a resolution which I consider nothing more nor less than surplusage, useless, and in no way affecting the validity or legality of the by-law. I am entirely against the plaintiffs upon this ground.

Now, as to the second ground. By sec. 1319 of the Revised Statutes it is provided:—

> Any municipal council when passing such by-law, may order that the same be submitted for approval to the municipal electors of the municipality, and in that case the same shall not take effect unless approved.

This paragraph gives to the council the right, of its own motion, to submit the by-law it proposes to pass, to the electors. If the council chooses to submit the by-law, then, if not approved of by the electors called upon to vote as provided, the by-law cannot be passed by the municipal council. But under this paragraph, there is no prohibition against the council passing the by-law without the approval of the electors. In other words, the municipal council has the power, without submitting to the electors, to pass the by-law.

But says par. 2 of sec. 1319,

> Any thirty or more municipal electors in each municipality in the county, if the by-law applies to a county, may, at any time, by a requisition in the form "A," or to the like effect, signed by them and delivered on their behalf, to the clerk or secretary-treasurer of the municipality, require that any by-law which the municipal council thereof may pass under the authority and for the enforcement of this section, at any time within one year from the date of such requisition, to prohibit the sale of intoxicating liquors, and the granting of licenses, be submitted for a like approval, and in that case such by-law shall not take effect unless approved.

By this paragraph, I should say there is a provision made that if a council passes a by-law, there is machinery provided by which that by-law may be submitted for approval to the electors. In other words, the county council may be forced, if proper procedure is had, to submit the by-law for approval, and if not approved, then their by-law is of no effect. In the present case, there are 18 municipalities composing the county of Yamaska. Sixty electors from one municipality of the county, and twenty-four from another signed a requisition and lodged it with the secretary-treasurer, asking for a popular vote upon the by-law. This demand the council refused. They refused

it upon the ground that eighty-four electors chosen from two municipalities out of eighteen was not a compliance with the law. It is urged that this was an illegality which involved the nullity of the by-law itself.

Now, the learned trial Judge found against the plaintiff upon this pretension, and I agree with him. The section says, thirty or more municipal electors in each municipality in the county. It does not say, in any municipality of the county nor in any number of municipalities, but in each, which, if the words mean anything, mean, from all the municipalities. I cannot interpret the words otherwise. But, says the learned counsel for the plaintiffs, supposing in a particular municipality there were not thirty electors, what could be done? It may be that there is something lacking in the provision of the law; but, even if there is, the clear wording should not be changed. I should say that if in a particular municipality there were not thirty qualified electors, those wishing to attack the by-law would have to get the signature of all there were. In any event, I am of opinion that the obtaining of 84 electors out of two municipalities from eighteen, is not a compliance with the law, and that the county council were justified in refusing the demand, and the by-law must stand.

On the question of costs, I am not disposed to disturb the finding of the learned trial Judge, and I should confirm the judgment as rendered.

LITTLE v. SMITH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, and Hodgins, JJ.A., and Clute, J. December 21, 1914.

1. ICE (§ I—6)—FROZEN BAY—PUBLIC DOMAIN—RIGHT TO CUT—NEGLIGENCE IN REMOVING—INSUFFICIENT GUARD.

When a bay forming part of the public domain is frozen over, the public right to cut ice thereon is subordinate to the public right of travel over the entire bay, and the person who insufficiently guards the place where he has been cutting ice is liable in damages for the loss of a horse which ran away while being driven by its owner and without any negligence on his part, and leaving the regularly travelled ice track, fell through on the newly formed thin ice at the place which defendant had left without the protection required either by the Criminal Code, 1906, sec. 287, or by the common law.

[*Pennock* v. *Mitchell*, 17 O.L.R. 286; *Sherwood* v. *Hamilton*, 37 U.C.R. 410; *Bell Telephone* v. *Chatham*, 31 Can. S.C.R. 61, referred to.]

Statement

APPEAL by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings in favour

ONT.
S. C.
LITTLE
v.
SMITH.

of the plaintiff, upon the findings of a jury, at the trial of an action in that Court, brought to recover damages for the loss of the plaintiff's horse.

W. B. Northrup, K.C., for the appellants.

E. G. Porter, K.C., for the plaintiff, respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—The female appellant conducts an ice business, which is managed by her son, the other appellant, and for the purpose of the business cut ice in the Bay of Quinté.

There is a conflict of testimony as to the area of the opening made in the process of cutting, but it was at least 150 feet long and 8 or 9 feet wide, and the appellants failed to provide the protection around it required by sec. 287 of the Criminal Code, R.S.C. 1906, ch. 146. A horse of the respondent, which was being driven by him, attached to a sleigh in which the respondent and a man named McConnell sat, and in which there were a number of empty milk cans, ran away, and in the course of his flight broke through the thin ice which had formed over the hole, and was drowned. The bay when frozen over is used as a means of travelling from Belleville to the county of Prince Edward, and the respondent was driving across the bay for the purpose of getting a supply of milk from farmers in that county. There was a beaten track which was used in crossing the bay, and the respondent was driving on it when his horse ran away and ultimately came to the hole in the ice, which was distant about 150 feet from the travelled way.

The respondent brings his action to recover damages for the loss of his horse, and claims to recover on two grounds: (1) that the hole in the ice, insufficiently guarded as it was, constituted a nuisance in the highway which he was lawfully using, and that the loss of the horse was due to the existence of the nuisance; (2) that the appellants were guilty of a contravention of sec. 287 in not protecting the hole as that section requires, and that the loss of the horse was due to the failure so to protect it.

The contention of the appellants is, that the hole in the ice did not constitute a nuisance, because of its distance from the travelled way; that no action lies for the failure to provide the protection which sec. 287 requires; and that the proximate cause

of the drowning of the horse was his running away and being no longer under the control of his driver, or of any one else; and the appellants also contended that the learned County Court Judge misdirected the jury as to the effect of sec. 287, and that the running away of the horse was occasioned by the negligence of the respondent, who, it was contended, was under the influence of liquor and unfit to drive the horse, in driving while in that condition a horse which had run away on the previous day.

The question of contributory negligence was fairly left to the jury, and their verdict acquits the respondent of it, and there was evidence which warrants the jury's finding.

The main question is as to the liability of the appellants for injury done to a runaway horse.

That it was the duty of the appellants, both at common law and under the provisions of the Code, to guard the hole that had been made, is, I think, undoubted, and that such a duty exists was decided by a Divisional Court in *Pennock* v. *Mitchell*, 17 O.L.R. 286.

It may be that sec. 287 imposes a greater duty as to the nature of the guard than is imposed by the common law, but it is unnecessary, in the view I take, to consider that question.

[The learned Chief Justice quoted sec. 287.]

While the purpose of this enactment was the safeguarding of human life, I have no doubt that a hole, opening, aperture or place, left unguarded in contravention of it, in a public highway, as the Bay of Quinté is, is a nuisance; and, if it be a nuisance, the respondent, having suffered damage different in kind from that which was suffered by the public at large, is entitled to maintain an action for the recovery of the damages which he has sustained.

There is more difficulty as to the liability of the appellants in the circumstances of the case, the horse having run away without, as the jury have found, any negligence on the part of the respondent, and in his flight having broken through the thin ice which had formed over the hole cut by the appellants.

The question as to liability in case of runaway horses is discussed in Elliott on Roads, 3rd ed., vol. 2, pp. 194-5, para. 793, where the result of the American cases is thus stated: "Where

ONT.
S. C.
LITTLE
v.
SMITH.
Meredith, C.J.O.

a horse takes fright at some object for which the municipality is not responsible, and get beyond the control of his driver and runs away and comes in contact with some obstacle or defect in the road or street, it is held by the highest courts of Maine, Massachusetts, Wisconsin, and perhaps one or two other States, that the municipality will not be liable. These cases are based upon the theory that the conduct of the horse is the primary cause of the accident; that there are two efficient, independent, proximate causes, the primary cause being one for which the corporation is not responsible, and as to which the traveller himself is not in fault, and the other being the defect in the highway; that such being the case, it is impossible to say that the accident would have happened without the primary cause, and the city cannot, therefore, be held liable. According to the weight of authority, however, the city is liable in such a case, where it has been negligent in not removing the obstruction or repairing the defect, provided the injury would not have been sustained but for such obstruction or defect."

The question has been under consideration in this Province in several cases, most of which were cases against municipal corporations, in which they were sought to be made liable because of defects in highways which it was their duty to keep in repair, and in such cases the question is complicated by the further question as to the extent of the duty to repair, e.g., whether in the case of an embankment it is necessary that the guard shall be strong enough to resist the coming into contact with it of a runaway horse. . . .

The cases are certainly not satisfactory, and are not easily reconcilable, but I am of opinion that the true rule is that laid down in the *Sherwood* case, and that the *Atkinson* case does not stand in the way of its being applied in a case against a municipal corporation where the highway is out of repair owing to the corporation's neglect of the statutory duty to keep it in repair; but, if the rule be otherwise, and the corporation is not liable where horses are running away, that would not, in my opinion, help the appellants. The Bay of Quinté—the whole bay—is a highway and open to the public, and upon its waters when frozen any person may travel on foot or driving his horse or other

animal. The public have the right to cut the ice, but this right is subordinate to the right of travel, as is clearly shewn by the provision of the Code to which I have referred; and I am unable to find any ground upon which the appellants can escape liability if the hole which they had made in the ice was not guarded as the Code requires, and the absence of the guard was the cause of the respondent's horse being drowned, notwithstanding that the horse had escaped from the control of his driver and was running away when he met his death, if that was not due to the negligence of the respondent.

That the hole was not guarded as the Code requires is clear upon the evidence, and the danger of the horse getting into it was increased owing to the fact that ice had formed over the hole, but not of sufficient strength to support the weight of the horse. It is possible that, if there had been open water where the ice had been cut, the bushes that had been set up would have been sufficient to have prevented the horse from proceeding beyond them; but, as it was, there was nothing to indicate to the horse that what lay beyond the bushes was not ice like that over which he had been travelling.

The charge to the jury is not, I think, open to the objection taken to it by the appellants' counsel. It was left to the jury to say whether or not the hole was reasonably guarded, but it was pointed out to the jury that it was necessary to guard only so as to keep persons from accidentally driving or falling into it; and that, even if there had been a good, solid fence, three feet high around the hole, it did not follow that it would have kept the horse from getting into the hole; and, reading the charge as a whole, I do not think that the appellants have any reason to complain that it was too favourable to the respondent.

It was argued for the appellants that the right to cut ice formed in a navigable water is paramount to the right of the public to travel upon the ice, and in support of that contention a decision of the Supreme Judicial Court of Maine, *Woodman* v. *Pitman*, 79 Maine 456, and also the opinions of American text-writers were cited. Whatever may be the view of American Courts as to the respective rights and duties of the ice-cutter and the public, the policy of our law, as indicated by the provisions

ONT.
S. C.
LITTLE
v.
SMITH.
Meredith, C.J.O.

of sec. 287 of the Code, is that the safety of human life and limb is paramount to the right of the ice-cutter; and that, if he chooses to exercise his right, he must do so in such a way as not to endanger that safety, by providing the safeguards which by the section he is required to put around the opening which he has made.

I may point out, however, that, while taking the very favourable view which was adopted by the Maine Court of the ice-cutter's rights, it is said (p. 465): "At the same time the appropriators should by suitable means reasonably guard their fields against exposing to danger persons who may be likely to innocently intrude upon them, if such likelihood may be seen to exist."

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

Maclaren, J.A. MACLAREN, J.A., agreed in the result.

Clute, J. CLUTE, J., agreed in the opinion of MEREDITH, C.J.O.

Hodgins, J.A. HODGINS, J.A., agreed that appeal should be dismissed.

Appeal dismissed with costs.

QUE.
C. R.

ATKINSON v. CINQ-MARS.

Quebec Court of Revision, Archibald, Greenshields and Beaudin, JJ. May 22, 1914.

1. CHARITIES AND CHURCHES (§ I D—35)—NATURE AND VALIDITY — DEFINITENESS; DISCRETION OF TRUSTEES—WILLS.

While article 869 of the Civil Code (Que.), gives the right and power to a person to freely dispose of his property by will (and that to charities or charitable institutions), if the will does not indicate clearly the charitable institutions or the class of charitable institutions, the charitable bequest will be nugatory for uncertainty and vagueness, and this result follows where the testator leaves it entirely to his executors or trustees to select the charities and the class of charities to be benefited.

[*Grimmond* v. *Grimmond*, 74 L.J. Ch. 35, referred to.]

Statement APPEAL from the Superior Court.

Appeal allowed.

Lamothe, St.-Jacques & Lamothe, for plaintiff.

Cinq-Mars & Cinq-Mars, for defendant.

The judgment in review was delivered by

Greenshields, J. GREENSHIELDS, J.:—The judgment under revision is based on art. 869 of the Civil Code, which is in the following terms:

The testator may name legatees, who shall be merely fiduciary or simple trustees for charitable or other lawful purposes within the limits permitted by law; he may also deliver over property for the same objects to his testamentary executors or effect such purposes by means of charges imposed upon his heirs and legatees.

The learned trial Judge interpreted the above article to mean, that a testator could appoint a testamentary executor, with instructions to give or hand over or divide and distribute among charities generally all the testator's estate, without any direction or indication what such charges should be, leaving it entirely to the discretion or choice, or even whim, of his testamentary executor.

We cannot so interpret the article, or so interpret our law. We are of opinion that while the art. 869 gives the right and power to a person to freely dispose of his property by will, and that to charities or charitable institutions, if the will does not indicate clearly the charitable institutions, or the class of charitable institutions, such a will is so tainted with uncertainty and vagueness as to be impossible of execution, and the clause must be considered as "non écrite."

In the clause under consideration, there is no indication of any class of charitable institutions; there is no limitation, and it is impossible from the will itself, to ascertain to what charities, or what class of charities the testatrix wished her property to go.

At the whim or caprice of the testamentary executor, the property might be distributed to charities thousands of miles away from the home of the testatrix, or if the testamentary executor was greatly impressed with the idea, that "charity begins at home," and ends there, no distribution might take place. Far be it from this Court to suggest that such a contingency could possibly arise from the gentleman who is named testamentary executor in the will under consideration.

A glance at the jurisprudence of France is sufficient to convince the Court, that a clause such as the one under consideration, would never be given effect to or recognized as valid. It is true the French law looks with disfavor on a too great freedom (in willing).

The law of England would never maintain such a clause. I refer to one case only, that of *Grimmond* v. *Grimmond*, Law

QUE.
C. R.
ATKINSON
v.
CINQ-MARS.
Greenshields, J.

Journal, [1905] vol. 74, p. 35. In that case the testator divided his property into three parts; as to one of the parts he disposed of it as follows:

> With regard to one of the said parts or shares, they (the trustees), shall divide up and convey the same to and among such charitable or religious institutions and societies as I may direct, and in such proportion to each or any as I may fix in writing whether holograph or tested, or under my hand, and failing thereof in whole or in part, then as regards such will or such part not disposed of by me, to and among such charitable or religious institutions and societies as my trustees, or their survivors or survivor of them, may select, in such proportion to each or any as they may fix.

Apparently, the testator did not, in his lifetime, either by holograph or tested instrument indicate any charitable or religious institutions among which that part of his estate should be distributed or divided, and much less, of course, did he indicate the proportion in which such distribution should take place. The then Lord Chancellor, Earl of Halsbury, in rendering judgment, stated:

> In my opinion the testator here has not given a class from which he allowed his trustees to select individually, but he has left his direction so vague that it is in effect, giving someone else power to make a will for him, instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case, the testator has not made any will himself, but has allowed someone else to make a will for him after his death and that the law will not allow.

If this be sound law in England, the clause of the will under consideration is clearly contrary to that law.

It is impossible, as already stated, to say to whom, or to what charities the testator intended to give his property. It is a well recognized principle, that if a testator wishes to will away from his heirs at law his property, he must state, with at least a degree of certainty that would enable a Court to ascertain his intentions, to whom he wished his property to go.

I fancy Pothier puts the matter as well as it can be put: Bugnet, vol. 1, pp. 410 *et seq.* and particularly at 410, under title "Defects which may be found in testamentary legacies, and which render them null." 1. "The uncertainty as to the person to whom the testator wishes to will," and he says: "It is impossible to carry out or execute a legacy without knowing pre-

cisely the legatee. If he is not named, he must be indicated in a manner certain."

Demolombe, vol. 18, No. 618, says:

> Since it is necessary that the legatee should be designated by the testament or will itself, the testator should not confer upon the heir or legatee, or a third person the right to designate.

Both parties in the present case sought assistance and comfort from the case of *Ross* v. *Ross*.

The determination of that case created considerable difficulties, and gave rise to much divergence of opinion. The testator in that case gave half of his estate to Public Protestant Charities in Quebec and Carluke—the Protestant Hospital Home; French Canadian Mission, and amongst poor relatives, "as he may judge best."

It was held, that the indication was clear as to the class, and as to localities, viz: Protestant Charitable Institutions, naming same in the City of Quebec and in Carluke.

Clearly the intention of the testator was to give his property to Protestant Charitable Institutions in those two cities, and he named two in one city, and if there had been no others, then clearly the duty of the testamentary executor would be, to hand over the legacy to the two named, if they existed. It was indeed held in that case, that poor relatives would be limited, and should be limited to relatives who would inherit as from an intestate succession.

We cannot find in the judgment of the *Ross* case any support for the judgment under revision, and we do not find it necessary even to consider any of the numerous judgments or opinions delivered in the Ross will, as we think the present case is clearly distinguishable from that case.

In a recent case before this Court, viz. *Latulippe* v. *Anglican Church of Megantic*, a man made a will, by which he left all his property to a protestant corporation of the town of Megantic, for the purpose of maintaining a protestant hospital there. It was a holograph will, and four protestant corporations of that place sought to prove the will. The heirs at law attacked the will as indicating with certainty no legatee, and reversing the judgment of the trial Court, this Court held, that there was no clear indication of a legatee, and therefore the will failed.

QUE.

C. R.

ATKINSON v. CINQ-MARS.

Greenshields, J.

But it is said that in the present case a legatee is indicated, viz: the testamentary executor.

The testamentary executor under this will is not the legatee. He has the seizin of the estate only for the purpose of handing it over or distributing it to some one. That some one is the legatee, and the testamentary executor would find it as difficult to discover who the legatee is to whom he should hand over as this Court has. There is no one to enforce the execution of the will: there is nobody who could come before the Court and claim as of right any part of the estate.

The judgment must be reversed.

SASK.

S. C.

MANDERS v. CITY OF MOOSE JAW.

Saskatchewan Supreme Court, Newlands, J. June 22, 1914.

1. MUNICIPAL CORPORATIONS (§ II G—195)—CONTRACTOR — EXCAVATION WORK — DELAY IN FURNISHING GRADES—ENGINEER'S CERTIFICATE—EXTRAS — DELAY IN WORK — DAMAGES.

Damages by the contractor for unreasonable delay by the city in giving the grades and levels for excavation work on the streets may constitute "extras" for which the city engineer's certificate must first be obtained as a referee under the terms of the contract; and in any case the contractor need not have delayed the whole work over the more favourable season for the operations by waiting for the city engineer to give him the grades and levels, but on the city's default, should have himself employed an engineer to do so and added the expense to the contract, when the matter was one of detail only and could have been worked out by any engineer from the plans showing the depths and from the corner stakes already put on by the city engineer.

2. MUNICIPAL CORPORATIONS (§ III—285)— OFFICERS — POWERS OF — ENGINEER—CERTIFICATE UNDER CONSTRUCTION CONTRACT—RECONSIDERATION—CLERICAL ERROR, CORRECTION OF.

The certificate of an engineer made binding upon the parties under a construction contract cannot after it is issued be changed by him as upon a reconsideration and change of opinion; but, *semble*, a clerical error might be corrected.

3. MUNICIPAL CORPORATIONS (§ II D—140) — CONTRACTS — COMPLETION — FINAL CERTIFICATE — "HOLD BACK" OF PORTION OF CONTRACT PRICE.

The certificate of the engineer made binding on the parties under a construction contract may be a "final certificate" if it certifies the completion of the work, although against the contract price certified as earned it further certifies for a "hold-back" of a portion thereof; the latter may be disregarded by the court in an action to recover the price if the certificate does not state what the "hold-back" is for (whether for damages for defective work or otherwise), and the contract contained no provision warranting the hold-back as such.

4. DAMAGES—(§ III A—42*a*)— CONTRACT — MUNICIPALITY — FAULTY PLANS — INSPECTION BY ENGINEER — FAULTY CONSTRUCTION — ONUS OF PROOF.

Where the plans furnished by the municipality for certain municipal works done under contract were faulty and the structure was built by

the contractor under them subject to an inspection of his work and materials by the municipal engineer made by the contract, a referee whose decision was binding on both parties, the onus is upon the municipality to satisfy the court that the structure fell down through the contractor's fault and not because of the faulty design shown on the plans, and should furnish the engineer's certificate to that effect on counterclaiming for damages.

ACTION brought to recover certain amounts of money which the plaintiff claimed to be due to him by the defendant by virtue of a contract between them whereby the plaintiff built a sewage disposal plant for the city.

Statement

Seaborn, Taylor, Pope & Quirk, for the plaintiff.

Willoughby, Craig, & McWilliams, for the defendant.

NEWLANDS, J.:—These claims are three in number, and will be disposed of separately:

Newlands, J.

1st. A claim for $18,953.46 for damages on account of delay caused by defendants in giving the plaintiff grades and levels whereby a large part of the work had to be done in the cold weather when the cost of doing the same was many times greater than during the summer months. 2nd. A claim for $163.14 being an amount allowed by the city engineer for extras which was afterwards disallowed by him at the request of the defendants. 3rd. A claim of $5,000 being a hold-back by the city after the completion of the contract.

As to the 1st claim: The contract was to be completed in 5½ months from the order to commence the work. They got this order on May 9, 1912, so that the day set for the completion of the contract would be October 24, 1912. Upon this the plaintiff argues that it was a summer contract and that in tendering he agreed to do the work for summer prices. That it was agreed by the defendants that they would give grades and levels, but that they failed to do so when requested, and that the work which the plaintiff had to do was therefore thrown over into the winter and was done by the plaintiff at a cost much greater than he could have done the same if defendant had furnished him with grades and levels as requested. In addition to denying the facts alleged by the plaintiff, the defendant counterclaims for the penalty and special damages under a provision in the contract. On the facts of the case I am of the opinion that the defendant did not furnish the grades and levels with the promptness that was necessary for the completion of a large job of this kind, and this was particularly the case before the

SASK.

S. C.

MANDERS v. CITY OF MOOSE JAW.

Newlands, J.

defendant had a resident engineer on the job; after which I do not find that the plaintiff had any serious cause of complaint although even then he was delayed somewhat in getting the levels and grades which he required in order to do the work.

The contract provided that these grades and levels were to be given by the city engineer. That these were not given with that promptness which was required is in my opinion no reason why the plaintiff could not have gone on with his work. All he had to do was to employ an engineer himself to give him the grades and levels the defendant neglected to give him and he would have then been able to charge this expense up to defendant. As he could have done this he should not have delayed the whole work waiting on the defendant's engineer. At the commencement of the contract the work was largely excavating and an engineer employed by himself could have given him these grades just as easily as the city engineer as they had the plans showing the depths to be excavated and the corner stakes had been put in by the city engineer. It is true that this work would not have been passed until the city engineer was satisfied that it was correct, but as any competent engineer could have given these levels correctly there was nothing to prevent the plaintiff from going ahead and doing the work which he says he was prevented from doing by waiting on the city engineer. For this reason the plaintiff is not entitled to the damages he has claimed. He is also disentitled to them for another reason and that is that it is provided by the contract that the plaintiff must obtain a certificate from the city engineer before he can recover for any extras, and he claims these damages under the heading of extras. The plaintiff has not got this certificate. For the same reason the defendant cannot recover on its counterclaim for it too must have the city engineer's certificate for the amounts it claims against the plaintiff under this heading. I may also add that the city solicitor stated that the city had no desire to enforce the penalty clause. The plaintiff's claim for $18,953.46 is therefore dismissed with costs, and defendant's counterclaim is dismissed with costs also.

2nd. As to the plaintiff's claim for $163.14 extras I am of the opinion that he is entitled to this less $45 which the plaintiff

admits he has received. The city engineer on March 3, 1913, allowed the plaintiff $3,565.33 for extras and on March 20, 1913, he changed this giving the plaintiff a new certificate for $3,402.19. I think the change made was not to correct a mistake but a change of judgment, brought about by the city commissioners pointing out to him that he had not construed the contract correctly. This the city engineer cannot do; all parties are bound by his first certificate and he cannot change same. The plaintiff will recover on this claim $163.14, less $45 already paid, with interest at 5 per cent. from March 3, 1913, and costs.

3rd. As to the claim for the $5,000 hold back. The certificate upon which this hold back is mentioned is in my opinion the final certificate without which the plaintiff could not have recovered. In it the city engineer certifies that the plaintiff has earned the whole contract price which is equivalent to a certificate that the whole work is completed. After stating the contract price the words "hold back $5,000" are written. It is not stated what this hold back is for, nor for how long it is to be. As there is no provision in the contract for any hold back other than that of 15 per cent., which had been held back until this last payment, then the engineer was not entitled to make it under the contract, and if he intended to allow the defendant this amount for damage then he should have said so and stated what the damages are for. For these reasons I think the defendant had no right to hold back this sum of $5,000 and the plaintiff is entitled to recover this amount with interest at 5 per cent. from December 14, 1912, and costs. In opposition to this claim the defendant claims that the stand-by tanks were not properly erected by plaintiff and the material and workmanship were not in accordance with the contract, and that this building fell down in consequence thereof and that defendant is entitled to $5,000 damages therefore from plaintiff. This building fell down in the spring of 1913, a number of expert witnesses were called by both sides and it was proved that the design of the building was such that the side walls were not strong enough to stand the thrust of the arch without the support of the earth. The plaintiff's witnesses were of the opinion that the building fell down because these walls were not strong enough, but the

SASK.

S. C.

MASTERS v. CITY OF MOOSE JAW.

Newlands, J.

defendant's witnesses would not state what in their opinion was the cause of the building falling. The evidence shewed that all the work and material supplied by plaintiff on this building were inspected and passed by defendants' engineers and inspectors. This being the case and it being admitted that the design is faulty, I think the burden is on the defendants not only to shew that the plaintiff's work was the cause of the building falling but to provide a certificate from their engineer to that effect. This claim of the defendants for damages is therefore dismissed with costs.

KOLARI v. MOND NICKEL CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 7, 1914.

1. MASTER AND SERVANT (§ II A—60)—DUTY OF MASTER—SAFETY AS TO PLACE AND APPLIANCES—BROKEN CABLE—NEGLIGENCE.

The inference may be drawn from the happening of the accident by the breaking of a cable at defendant's works, in the absence of explanation by the defendant, that it arose from want of care on the part of defendant or his servants, but not necessarily want of care for which the master is responsible to his workman; the master's duty is to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, but not to guarantee that the place and machinery shall be absolutely safe.

[*Scott* v. *London and St. Katharine Docks Co.*, 3 H. & C. 596, applied; *Patton* v. *Texas and Pacific R. Co.*, 179 U.S. 658, referred to; *Haywood* v. *Hamilton Bridge Works Co.*, 7 O.W.N. 231, distinguished.]

Statement

APPEAL by the plaintiff from the judgment of the Judge of the District Court of the District of Sudbury, after trial without a jury, dismissing the action, which was brought to recover damages for personal injuries sustained by the plaintiff, while working for the defendant company in one of its mines, by being struck by a bucket and cross-head, which fell by reason of the breaking of a cable.

J. S. McKessock, for the appellant.

J. M. Clark, K.C., for the defendant company, respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The action is brought to recover damages for personal injuries sustained by the appellant while employed by the respondent as a labourer in one of its mines.

The appellant, when he met with his injuries, was working as a "mucker" at the bottom of a shaft several hundred feet

deep, in a mine of the respondent, and his duties were to "muck" and to give the signal for raising the laden buckets, which were moved by electrical power operated upon the surface. The shaft was divided into four compartments, two for the buckets, one for a cage, and the fourth for a ladderway. The compartment in which the appellant was working was not timbered to the bottom of the shaft. The bucket was lifted by means of a steel cable, and there was a cross-head weighing, according to the testimony of the appellant, about a ton, but, according to the testimony of the witness Stovel, about 400 pounds; and there was a clip attached to the cable, the purpose of which was to keep the cross-head, as was stated on the argument, 10 feet away from the bucket; and there were, at the distance of 100 feet from the bottom of the shaft, stop-blocks intended to prevent the cross-head from descending below that point. While the bucket, which had been filled, was being raised to the surface, the cable broke "right at the bucket," and the bucket and the cross-head fell to the bottom of the shaft, striking the appellant, who had "got out of the way in a corner;" and it is in respect of the injuries thus sustained that the action is brought. . . .

The learned Judge determined the case on the application of the principle that "where the thing is shewn to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care," and his conclusion upon the evidence was, that the respondent had met this onus, and had shewn that it had exercised proper care; and he, therefore, gave judgment dismissing the action.

I am, with respect, of the opinion that this conclusion was not well-founded. The evidence of Stovel was most unsatisfactory. Although the accident had resulted in the death of one workman, as well as in causing the appellant's injuries, Stovel, though he was the superintendent in charge, appears not to have taken the trouble to ascertain definitely whether there was more than one break in the cable.

There was, besides, no explanation offered as to the cause

ONT.
S. C.
KOLARI
v.
MOND NICKEL CO.
Meredith, C.J.O.

of the cross-head falling to the bottom of the shaft. It is a proper conclusion from what happened that, if the stop-blocks were there, as probably they were, they were insufficient, and that the respondent was negligent in not having stop-blocks of sufficient strength to withstand the impact of the falling cross-head.

These considerations and the fact that no attempt was made to shew that the cable or the safety devices were ever inspected after April, 1912, lead me to the conclusion that the respondent failed to displace the inference which, if the principle that the learned Judge held to be applicable were applicable, was to be drawn from the happening of the accident.

It was, however, argued by counsel for the respondent that the principle which the learned Judge applied was not applicable; that the maxim, or, as I prefer to call it, the rule of evidence, *res ipsa loquitur*, does not apply to a case between master and servant, and he cited in support of his contention Beven on Negligence, 3rd ed., p. 130.

The cases referred to by Mr. Beven in support of this statement do not, in my opinion, justify as broad a statement as he makes.

If all that is meant be that in cases between master and servant the application of the principle enunciated by the Exchequer Chamber in *Scott* v. *London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631, that "there must be reasonable evidence of negligence, but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care," will not, without more, make a case to go to the jury, I agree with his statement of the law.

In support of his statement of the law, Mr. Beven quotes the following passage from the judgment of Willes, J., in *Lovegrove* v. *London Brighton and South Coast R.W. Co.* (1864), 16 C.B. N.S. 669, 692: "It is not enough for the plaintiff to shew that he has sustained an injury under circumstances which may lead

to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation."

This is but a statement of the well-established rule that "where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent for the Judge to leave the matter to the jury:" *per* Williams, J., in *Hammack* v. *White* (1862), 11 C.B.N.S. 588, 596.

This is not a rule applicable only to cases between master and servant, but is a rule applicable to all actions founded on negligence.

Willes, J., cannot have meant that, where the evidence warrants the inference of the negligence charged, the plaintiff "must go on and give evidence. . . ." What is meant is, I think, that, although it may be a fair inference, it is not the only one that may be drawn from the evidence; just as, in such a case as this, while it might be a fair inference that the falling of the bucket and cross-head was due to negligence for which the defendant was answerable, it would be an equally fair inference that it was due to causes for which he was not answerable.

After making the statement quoted from the judgment of Willes, J., the learned Judge went on to say that "that is well explained by Erle, C.J., in *Cotton* v. *Wood* (1860), 8 C.B.N.S. 568, 571-2."

In that case Erle, C.J., quoted the following passage from the judgment of Williams, J., in *Toomey* v. *London Brighton and South Coast R.W. Co.* (1857), 3 C.B.N.S. 146, 150: "It is not enough to say that there was *some* evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant, clearly would not justify the Judge in leaving the case to the jury. There must be evidence upon which they might reasonably and properly conclude that there was negligence." And the Chief Justice expressed his own views in these words: "Where it is a perfectly even balance upon the evidence

ONT.
S.C.
KOLARI
v.
MOND
NICKEL CO.
Meredith, C.J.O.

whether the injury complained of has resulted from the want of proper care on the one side or the other, the party who founds his claim upon the imputation of negligence fails to establish his case" (p. 571). Williams, J., agreed with the Chief Justice, and said that "there is another rule of the law of evidence, which is of the first importance, and is fully established in all the Courts, viz., that, where the evidence is equally consistent with either view,—with the existence or non-existence of negligence,—it is not competent to the Judge to leave the case to the jury. The party who affirms negligence has altogether failed to establish it" (p. 573).

In the *Toomey* case Willes, J., said: "In order to establish a case of negligence against the defendant, it was incubment on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it."

The only other case referred to by Mr. Beven in support of his statement is *Patton* v. *Texas and Pacific R.W. Co.* (1901), 179 U.S. 658. In that case, in delivering the judgment of the Court, Brewer, J., said (p. 663): "That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *primâ facie* a breach of his contract to carry safely . . . a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . In the latter case it is not sufficient for the employé to shew that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shews that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

The inference may be drawn from the happening of the accident, in the absence of explanation by the defendant, that it arose from want of care upon the part of the defendant or his servants, but not necessarily want of care for which the master is responsible to his workman; the master's duty being to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, but not to guarantee that place and machinery shall be absolutely safe.

It may be pointed out, also, that of the cases to which I have referred the only one between master and servant is *Patton* v. *Texas and Pacific R.W. Co.*

[The learned Judge referred at length to *Haywood* v. *Hamilton Bridge Works Co. Limited* (1914), 7 O.W.N. 231.]

The case at bar is, I think, distinguishable from these two cases. Here the defect in the cable, if it was defective, was not a latent one; and, although the general superintendent and the superintendent in charge of the work upon which the appellant was engaged were called as witnesses for the defence, it was not pretended by either of them that there had been any inspection of the hoisting apparatus or its appurtenances.

The proper conclusion, in my opinion, upon the evidence, is, that the falling of the bucket and cross-head was not due to any negligence on the part of the appellant or any of his fellow-servants, but was due to three causes: (1) a defect in the cable; (2) the insufficiency of the clip; and (3) the insufficiency of the stop-blocks; that the defect in the cable might and ought to have been discovered if the cable had been properly inspected; that either there was no inspection provided for or the person charged with the duty of inspecting was negligent in the performance of it; that the insufficiency of the clip and the stop-blocks was due to the negligence of the respondent or of the person who was entrusted by it with the duty of seeing that these safeguards were properly provided.

I am not of opinion that, if it did not appear from which of the three causes I have mentioned the accident happened, but it did appear that it must have happened from one or more of them, even assuming the law to be as stated by Mr. Beven, the

ONT.
S. C.
KOLARI
v.
MOND NICKEL CO.
Meredith, C.J.O.

appellant fails to make out his case. In other words, I am of opinion that, if the conclusion is warranted that the accident happened from one or more of these three causes or from the combined effect of all three of them, the appellant made a case enabling him to recover.

Upon the whole, I am of opinion that the appeal should be allowed with costs, and that there should be substituted for the judgment which has been directed to be entered, judgment for the appellant for $450 with costs.

The damages were not assessed by the learned Judge, but the evidence amply warrants their being assessed at at least the sum I have named.

Appeal allowed.

B. C.
S. C.

WILSON v. B.C. REFINING CO.

British Columbia Supreme Court, Murphy, J. September 14, 1914.

1. CORPORATIONS AND COMPANIES (§ V F—250) — LIABILITY OF SHAREHOLDERS — EFFECT OF TRANSFER IN TRUST—COMPANY'S RIGHT OF SET-OFF.

In respect of shares in a company subject to the B.C. Companies Act (R.S.B.C. 1897, ch. 44, sec. 53, R.S.B.C. 1911, ch. 39, sec. 40), the person pledging same to a bank as collateral security is to be considered as still holding the same and remains liable as a shareholder, although a transfer has been registered in favor of the bank manager "in trust," and where the articles of association of the company (R.S.B.C. 1897, ch. 44 Table A, sec. 75), enable the directors to deduct "from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls *or otherwise*," a deduction of the pledging shareholder's debt to the company (not being for calls), may still be made from dividends on the share subsequent to and notwithstanding the assent to the transfer, and such assent is not a representation by the company that the pledging shareholder owed them nothing (except possibly as to calls on the particular shares), and no estoppel arose against it.

[*Page* v. *Austin*, 10 Can. S.C.R. 132, referred to.]

Statement

ACTION for a dividend on shares and for a declaration of plaintiff's rights.

Judgment accordingly.

Sir C. H. Tupper, K.C., for plaintiff.

Ritchie, K.C., for defendant.

Murphy, J.

MURPHY, J.:—It is not controverted that plaintiff holds the shares merely as a trustee for the Royal Bank of Canada, of which he is manager in Vancouver. Again, it is not disputed that the Royal Bank holds them as collateral security to Male-

kov's account. Malekov is the true owner and has pledged the shares. He owed money to the company at the time the dividend claimed herein was declared and the company contend that under their articles they are entitled to retain so much of the dividend money as is necessary to liquidate this debt. It was not shewn that this debt represents unpaid calls on the shares the dividends on which are in question herein. In fact, I think all evidence given as to what this debt was for must be rejected as hearsay, Mr. Cunningham having no knowledge of its origin except information gleaned from the books or given by others connected with the company. Its existence as alleged is, however, proven. The questions are—Can the true facts be proven, Wilson being the registered holder "in trust" and having in his possession certificates issued to him "in trust"? If they can be, is the company's action justified by the Companies Act and their articles? In the first place it is to be observed that the entry of these shares on the share register in trust contravenes sec. 41 of ch. 44 R.S.B.C. (1897), and sec. 35 of ch. 39 R.S.B.C. (1911), one or other of which Acts applies to the company. The transfer sent in by plaintiff was executed to him "in trust." His covering letter requested that the new certificate be issued to him "in trust," and it was in fact so issued. Sec. 53 of ch. 44 R.S.B.C. (1897), and sec. 40 of ch. 39 R.S.B.C. (1911), are identical and are as follows:—

> No person holding shares, stock or other interest as collateral security shall be personally subject to liability as a shareholder; but the person pledging such shares, stock, or other interest as such collateral security *shall be considered as holding the same* and shall be liable as a shareholder in respect thereof.

Sec. 75 of Table A of the 1897 Act, which is included in the articles of the company reads: —

> The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls *or otherwise*.

It is worth noting that this provision has been excised in Table A of the Act of 1911.

"Member" in Table A of 1897 clearly, I think, means "shareholder" as that term is used in the Act. If then the true facts can be shewn, it appears to me the company's contention is correct. The section above quoted not only exempts the

B. C.
S. C.
WILSON
v.
B.C.
REFINING
CO.
Murphy, J.

pledgee from liability but goes on to expressly declare that the pledgor "shall be considered as holding the same and shall be liable as a shareholder in respect thereof."

Table A of 1897, which insofar as the points involved herein are concerned applies to this company, fixes on the shareholder liabilities, or, at any rate, confers on the company rights against the shareholder, in addition to the matter of calls. By sec. 10 thereof the company may decline to register any transfer of shares made by a member who is indebted to them. By sec. 75, above quoted, they may retain out of the dividends payable to him any amount due for calls or otherwise. The language of both the Act and the articles is clear and effect must, I think, be given to its obvious meaning. But it is said the true facts cannot be shewn. *In limine*, it is to be observed that everyone dealing with a company is supposed to be conversant with its memorandum and articles. Hamilton & Parker, 3rd ed., p. 107, and authorities there cited. Mr. Wilson and the Royal Bank must therefore be taken to have been aware, if my view of the meaning of the Act and articles is correct, that if the true facts were known the company had a right to retain any dividend declared to the extent necessary to cover any indebtedness to it by Malekov. Mr. Wilson, by the form of transfers sent in and by his covering letter requesting the issue of the shares to himself "in trust," expressly calls the company's attention to the fact that the transaction is not an ordinary transfer of shares to him in his own right. Strong and Henry, JJ., in *Page* v. *Austin*, 10 Can. S.C.R. 132, held the true facts could be shown even when the transfer registration and share certificate were absolute in form. Gwynne, J., in the same case refused to go so far but said they might be in the case of mortgagees or trustees appearing upon the books so to be. Whilst the full transaction is not set out on the books, and it is difficult to see how it could be in view of the prohibition against recognition of trusts in the Act, the register does shew it in part. As stated above, however, plaintiff must be taken to have had knowledge of the company's rights in the premises. How can it be said then that the company is estopped? True, if the claim was for calls on these particular shares, then, probably they would be by virtue of the

statement and receipt on the share certificate that they are fully paid up. But how can registration to Wilson a "in trust" be held to be any statement of representation that Malekov owed them nothing? The essentials of an estoppel *in pais* are clearly stated by Strong, J., in *Page* v. *Austin*, *supra*, at p. 164, and, if I may be permitted to adopt his language in this case, the very foundation upon which such a mode of concluding the rights of parties rests is wanting. I think then the company is entitled to succeed on this issue.

There remains the question of costs. The circumstances accompanying the payment of the dividend to plaintiff on the small lot of shares held by him is, I think, an admission of liability by the defendant. Under all the circumstances I think I should certify that there was sufficient reason for bringing the action even as to this amount in this Court. The order will therefore be that the plaintiff recover the general costs of the action up to the date of the payment of this amount to the bank, and that the defendant recover the costs of the issue on which they succeed up to that date. Subsequent to that date the defendant to have the costs. Set off *pro tanto* to be allowed.

Judgment accordingly.

GROAT v. KINNAIRD.

Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.
October 23, 1914.

1. EVIDENCE (§ II A—95)—EXECUTORS — PRIMA FACIE CASE — DEBTOR OF DECEASED — BURDEN OF PROOF.

It is only when the executors representing the estate have made out a prima facie case against a person who is alleged to have borrowed money from the deceased, that the burden of proof is shifted and such person bound to furnish other material evidence in corroboration of his story, under the Evidence Act, Alta., 1910 (2nd. sess.), ch. 3, sec. 12.

[*Thompson* v. *Coulter*, 34 Can. S.C.R. 261, and *Scott* v. *Allen*, 5 D.L.R. 767, considered.]

2. EVIDENCE (§ II A—95)—EXECUTORS — GIFT BY DECEASED TO SON — LOAN — BURDEN OF PROOF.

The delivery of money by a father to his son is presumed to be a gift and the burden of proof lies upon the father's executors or other persons interested who contend that it was a loan.

[*Cox* v. *Bennett*, 18 W.R. 519 referred to; see 29 Cyc. 1660.]

3. EVIDENCE (§ XI E—781)—TESTATOR — CHEQUE TO SON — GIFT OR LOAN — ADMISSIBILITY OF EVIDENCE — INTENT.

Evidence is admissible, on a dispute as to whether a cheque given to the son by the father was by way of gift or loan, to shew similar

ALTA.

S. C.

GROAT v. KINNAIRD.

gifts of the parent to other children or of the general plan of the parent to lend and not to give property to his children under similar circumstances. (*Per* Beck, J.)

[*Sidmouth* v. *Sidmouth*, 2 Beav 477; *Forbes* v. *Pascoe*, L.R. 10 Ch. 343, referred to; 29 Cyc. 1662 approved.]

Statement

APPEAL from judgment of Walsh, J., at trial.

Appeal allowed.

C. C. McCaul, K.C., for plaintiff, appellant.

S. E. Bolton, for defendants, respondents.

Scott, J.

SCOTT, J., concurred in the result.

Stuart, J.

STUART, J.:—I agree with my brother Beck and for the reasons he gives that owing to the existence of the relationship of father and son the burden of proof that there had been a mere loan of the money was upon the defendants, the executors, who were plaintiffs by counterclaim. That being so, however, I think it becomes unnecessary to consider whether there was evidence corroborative of the son's story. According to the interpretation of sec. 12 of the Evidence Act which was adopted in *Thompson* v. *Coulter*, 34 Can. S.C.R. 261, at 263, where the similar wording of the Ontario Act was under consideration, it is only when the executors representing the estate have made out a *primâ facie* case against a person so that the burden of proof can properly be said to be shifted, that the statute operates in their favor and makes it necessary that that person should, in order to succeed, furnish other material evidence in corroboration of his story. At least, that, I think, is as far as *Thompson* v. *Coulter*, *supra*, can be said to go. *Scott* v. *Allen*, 5 D.L.R. 767, also goes as far as that, but no further.

I think this is the only possible interpretation of the statute which would not lead to grave injustice but if the statute is so applied I do not see that it is fairly open to criticism.

Applying the rule in the present case there can be no doubt that the burden of proof rested and continued to the end to rest on the executors and that they did not make out such a case as would shift the burden of proof to the plaintiff. That being so I cannot see that the statute applies at all against the plaintiff so that there is no necessity to consider whether there was corroborative evidence or not. It may be as my brother Beck holds that the very fact which shifts the burden of proof to the execu-

tors, *i.e.*, the existence of the relationship of father and son would be corroborative evidence sufficient to satisfy the statute in case the burden were not upon the executors but rested upon the son. But inasmuch as that fact places the burden upon the executors and inasmuch as they have not made out a *primâ facie* case in the sense of actually shifting the burden of proof I think it is enough to say that the statute does not operate in their favor.

Perhaps a word might usefully be added in regard to the extreme difficulty which would evidently arise in adopting any wider interpretation of the statute than that which I suggest. Suppose there had been a jury at the trial of this case, the Judge would have been bound to tell the jury that the burden of proving that there had been merely a loan lay upon the executors. Now all that the executors advanced as evidence to shew that there had been a loan was a rather uncertain admission alleged to have been made by the plaintiff to the executor Kinnaird, who referred to it as "leaving an impression" upon his mind and a statement by the plaintiff's brother that the plaintiff had offered to pay it back. Now if the jury disbelieved these statements or found them insufficient to justify an inference of a loan the defendants must have failed. But this evidence was perhaps enough to demand a submission of it to the jury and therefore to necessitate evidence for the defence. Then would come the plaintiff's denials. Now, if there should be a wider interpretation of the statute than the one I suggest, how would the Judge instruct the jury in regard to it? It seems to me it would be a difficult task to give a proper instruction. Could they be told that, although, after hearing the evidence for the defendants and for the plaintiff to which I have referred, they might believe the plaintiff and not find enough in the defendant's evidence to justify the inference of a loan, still, inasmuch as in order to get a verdict the plaintiff's evidence must under the statute be corroborated they must therefore find a verdict for the defendants for $2,000? Surely they could not be told that, when they might not find sufficient in the defendant's evidence to justify a verdict in any case. I do not think the words of the statute necessitates any such absurd result.

Of course, they might be told that if they disbelieved the

ALTA.
S. C.
GROAT
v.
KINNAIRD.
Stuart, J.

defendant's evidence or thought it insufficient to justify the inference the counterclaim should be dismissed while if they believed it and thought it sufficient then they must disregard the plaintiff's evidence because uncorroborated, but I think that also would be unfair and unjust, and that it is not necessary to so interpret the statute. The words and spirit of the statute are sufficiently complied with by saying that when the executors by *means of facts not denied* as in *Thompson* v. *Coulter, ubi supra*, shift the burden of proof upon the opposite party in the sense that they are entitled under the law to a verdict if no further evidence is given then that opposite party cannot get a verdict unless his evidence is corroborated. In other words, I think in the present case the plaintiff's evidence was entitled to be considered even without corroboration, as long as the burden of proof rested upon the defendants. I agree also with my brother Beck that there was clearly not enough in the evidence to justify the inference of a mere loan when the burden of proving that such was the fact lay upon the executors and the presumption was the other way. I think, therefore, the appeal should be allowed with costs and that the costs below go as proposed by my brother Beck. The question of a satisfaction *pro tanto* of the legacy will, of course, still remain open and may be decided in a proper proceeding taken for that purpose.

Beck, J.

BECK, J.:—This is an appeal from the decision of my brother Walsh at the trial without a jury directing judgment to be entered on the counterclaim for $2,108 less $227.40, the amount found due to the plaintiff on his claim. The counterclaim is for repayment of a loan of $2,000 alleged to have been made by the testator, of whom the defendants are the executors, to the plaintiff. The plaintiff is a son of the testator. The testator died on May 17, 1912. The $2,000 was given by the testator to the plaintiff by means of a cheque two or three days before the testator's death. The question for decision was whether the $2,000 was or was not a loan.

As presented to the trial Judge the question was solely—loan or gift. On the argument of the appeal counsel for the plaintiff contended that if it was not held to be a simple gift it should be held to be a gift by way of advancement or ademption or satis-

faction *pro tanto* of a legacy to the plaintiff contained in his father's will. This aspect of the question does not seem to have occurred to any one at the trial. It is true that this does not in the slightest degree alter the question in issue—loan or gift—it merely raises the further question of the consequences, if the advance is found to be a gift. Nevertheless an adverting to principles and authorities applicable to the question of ademption or satisfaction would undoubtedly have thrown much light upon the question of loan or gift.

The testator left an estate valued at something over $200,000. There were six sons, including the plaintiff, and two daughters. By his will the testator left a life estate to his widow and then the whole estate equally to his children. This is to be gathered from oral evidence of the contents of the will which was not put in as evidence so that it appears that the plaintiff will be entitled to about $25,000 on the death of his mother who is quite old.

The learned trial Judge in his oral reasons for judgment says as follows:

> There is no doubt about the advance having been made—that is admitted by the plaintiff. *Primâ facie* that was an advance [clearly the learned Judge means by way of loan]; it was not a gift. I think the onus is on the plaintiff to prove that it was a gift. I am unable to say that he has satisfied me that this money was intended as a gift from his father to him.

He then discusses the evidence and proceeds:—

> I have to find therefore as a fact on the evidence that this sum of $2,000 was advanced by way of loan by his father and not as a gift. Even if I did not have that opinion, I do not see how the plaintiff could possibly succeed with respect to the claim that he makes that this was a gift. The onus of proof that it was a gift was upon him; and this claim, under sec. 12 of the Alberta Evidence Act, ch. 3, 1910, 2nd sess., should be corroborated by some other material evidence. We have no evidence but his own to characterize this as a gift and it seems to me this evidence that it is a gift would require corroboration under that Act before it could be considered effective. I find, therefore, that the plaintiff is liable to the defendants as executors for this money.

The words of sec. 12 of the Alberta Evidence Act are as follows:

> In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

ALTA.
S. C.
GROAT
v.
KINNAIRD.
Beck, J.

This section is in practically the same words as sec. 10 of R.S.O. 1897, ch. 73, construed in the case of *Thompson* v. *Coulter*, 34 Can. S.C.R. 261, where the previous decision in *McDonald* v. *McDonald*, 33 Can. S.C.R. 145, is referred to with approval as holding that the direct testimony of a second witness is unnecessary, the corroboration may be afforded by circumstances. I cannot refrain from saying that in my opinion it is much to be regretted that such a provision appears in our Evidence Act. I think it is calculated to produce gross injustice in many cases while the former well recognized rule of practice that credence should not be given to the unsupported testimony of a person claiming a gift debt or release against the estate of a deceased person, unless his evidence brings the clearest conviction to the tribunal which has to try the question, afforded a sufficient protection to the estates of deceased persons.

That the learned Judge was under the impression independently of the Evidence Act that the onus was on the plaintiff to shew that the $2,000 received by him was a gift seems to me quite plain from the extracts I have given from his reasons for judgment. That his impression was wrong is quite settled. It is no doubt a rebuttable inference of fact that an advance from a father to a son, if nothing more appears, is not a loan but a gift—whether the gift effects an ademption or satisfaction of a legacy or debt or other obligation is another and a further question.

In *Cox* v. *Bennett* (1870), 18 W.R. 519, James, V.C., held that the delivery of money by a person to another to whom the former has placed himself *in loco parentis* is presumed to be a gift and the burden of proof lies upon any party who contends that it is a loan. In giving judgment he said:

> In this case I am of opinion that the 5,000 pounds was a gift. At all events the executors have not made out that it was a loan the burden of proof being upon them. The testator had put himself completely *in loco parentis* towards his son-in-law.

See also Roscoe N.P., Evidence, 18th ed. 598; 29 Cyc. tit. "Parent and child" pp. 1660 *et seq.* Hal's Laws of England, vol. 15 tit: "Gifts" pp. 414 *et seq;* and vol. 17 tit: "Infants & Children," pp. 116 *et seq.*

In the present case the presumption being that the $2,000

was a gift and the onus of proving it to be a loan not upon the plaintiff but upon the defendants, the executors, the requirements of the provision of the Evidence Act already referred to are fulfilled. The plaintiff says the $2,000 was a loan. The presumption—the inference or rather the fact of the testator being the father of the plaintiff from which the inference arises—is the evidence corroborative of the plaintiff's evidence.

The learned trial Judge having based his decision on the facts upon a wrong view with respect to the onus of proof and the effect of the statute his reasons for deciding against the plaintiff's claim cannot be accepted and in the result we are left to decide the question upon our own independent view of the evidence.

Were we investigating the question whether, assuming the $2,000 was a gift it was a partial ademption or satisfaction of the legacy to the plaintiff that question would have to be answered by ascertaining the intention of the testator with the aid of certain well defined *primâ facie* rebuttable presumptions.

In *Sidmouth* v. *Sidmouth*, 2 Beav., 447 at 455, Lord Langdale, M.R. says that: "Contemporaneous *acts* and even contemporaneous *declarations* of the parent may amount to such evidence" (i.e. of the father's intention that a *gift* was not intended but a *trust* in his favor) "has often been decided. Subsequent acts and declarations of the *parent* are not evidence to *support the trust*, although subsequent acts and declarations of the *child* may be so" (i.e. evidence to support the trust). It seems equally clear that *subsequent* acts or declarations of the parent *against a trust* in his favour would be admissible.

In 29 Cyc. tit. Parent & Child, pp. 1662-3, it is said: "Evidence is also admissible of *similar gifts* of the parent to *other children* or of the general plan of the parent to *lend* and *not to give* property to his children *under similar circumstances.*" It seems to me that this is sound. The principle was acted upon in *Fowkes* v. *Pascoe* (1875), L.R. 10 ch. 343, where in holding that a transfer of stock to the joint names of the owner of the stock and a third party was intended not as a trust for the transferor but as a gift—(no doubt as a gift in the sense that the survivor would take the whole; see *Sidmouth* v. *Sidmouth*, *supra* p. 457)

ALTA.

S. C.

GROAT v. KINNAIRD.

Beck, J.

—the Court took into consideration another similar transaction of the transferor. It seems to me therefore that evidence of the way in which the testator in the present case dealt with regard to other moneys turned over by him as well to his other children as to the plaintiff would be admissible in evidence on the question whether a gift being proved or admitted it was a partial ademption or satisfaction and if this is so that it was relevant also on the previous question—which is equally a question of the intention of the testator—whether the payment was by way of loan or gift. Evidence on this line was, it appears, proposed to be given on the part of the plaintiff but was not given in deference apparently to the learned Judge's expression of opinion that it was not material.

In this view there is probably more evidence available one way or the other with which to assist in the solution of the question in dispute—loan or gift; and if I thought that the evidence before us was not clear enough I should be ready to afford opportunity to produce further evidence. This was suggested even when the case had gone so far as the Supreme Court of Canada in *Thompson* v. *Coulter*, *supra*.

My opinion, however, is that the evidence when looked at with a correct appreciation of the presumptions arising from the circumstances and of the effect of the Evidence Act establishes not a loan but a gift to the plaintiff. The question whether that gift is to be taken as a partial ademption or satisfaction of the legacy to the plaintiff is a further question to be determined in another appropriate proceeding.

I would therefore reverse the judgment of the learned trial Judge and direct that the defendants' counterclaim be dismissed and that the plaintiff have the general costs both of the claim and counterclaim, subsequent to the date of the delivery of the defence and counterclaim and with no costs to the defendants.

Simmons, J.

SIMMONS, J., concurred in the result.

HAMILTON v. PENNER.

SASK.

S. C.

Saskatchewan Supreme Court, Lamont, J. September 15, 1914.

1. COVENANTS AND CONDITIONS (§ II A—5)—CONSTRUCTION; VALIDITY; EFFECT —CONFLICTING "PROVISO," HOW INTERPRETED.

A proviso wholly inconsistent with a covenant is void and may be rejected where such interpretation will give effect to all the clauses of the contract.

[*Furnivall* v. *Coombes*, 5 M. & G. 736; *Watling* v. *Lewis*, [1911] 1 Ch. 414, referred to.]

ACTION on an agreement of sale. Statement

The action was dismissed, as prematurely brought.

J. F. Frame, K.C., and *D. Stewart*, for plaintiff.

A. Frame and *J. D. Brown*, for defendants.

LAMONT, J.:—By an agreement in writing dated May 1, 1913, Lamont, J. the plaintiff agreed to sell to the defendant Penner, who agreed to buy, lot 21 in block 35, plan C.E., Saskatoon, for $40,000. The provisions contained in the agreement for the payment of this sum read as follows:—

$20,000 cash, receipt whereof is hereby acknowledged, a further sum by the purchaser assuming a loan of $5,000; the balance, $15,000, is payable in three equal annual payments, the first of such payments to be made on May 1, 1914. Provided, however, that $1,500 is to be paid on the first $5,000 payment on October 1 next, provided the rent of the premises amounts to that sum. If the rent of the premises amounts to a less sum than $1,500, then such lesser sum is to be paid on October 1, with interest thereon at the rate of 8 per cent. per annum. . . . The first of such payments of interest to be made on May 1, 1914.

It was further provided that

In the event of default being made in payment of principal, interest, taxes or premiums of insurance or any part thereof, the whole purchase-money shall become due and payable.

The defendant covenanted to make these payments. The $20,000 payment was made, and the defendant Penner entered into possession. On July 29, 1913, he re-sold to the defendants Cooper and Halliday. Immediately after October 1 the plaintiff demanded from the defendant Penner the rents which had been collected up to October 1. The plaintiff says Penner told her he had received $400. Penner did not give evidence at the trial. Not receiving any money, the plaintiff, on October 27, 1913, brought this action, in which she sues for the whole of the $15,000 unpaid under Penner's contract. Two defences are set up: the first, that the action is brought prematurely; and secondly, that the plaintiff cannot shew either a legal or equitable title to the land, and is therefore not entitled to succeed.

SASK.

S. C.

HAMILTON v. PENNER.

Lamont, J.

The first question is, was there a payment due when the action was brought? The agreement specifically makes the first of the deferred payments due on May 1, 1914. Then there is the proviso by which it is stipulated that on October 1, 1913, the defendant Penner will pay to the plaintiff the rents collected up to that date to the extent of $1,500. What is the effect of this proviso? Does it make a portion of the first payment (an amount equal to the rents collected) due on October 1, and the balance of the payment due on May 1, 1914? If so, a portion of the purchase money was due when the action was brought. If the proviso is to be interpreted as making a portion of the first of the deferred payments payable on October 1, it is inconsistent with the clause which expressly sets out that the first of the defendant's payments was to be made on May 1, 1914, and, if wholly inconsistent, effect cannot be given to it. In 7 Hals., at 517 and 518, the learned author says: "A proviso wholly inconsistent with a covenant is void and may be rejected," and he cites as authority *Furnivall* v. *Coombes*, 5 Man. & G. 736. See also *Watling* v. *Lewis*, [1911] 1 Ch. 414. In the present case the balance of purchase money was to be paid in three equal annual payments. To hold that a portion of the first payment became due on October 1, thereby dividing the first payment, would be inconsistent with this as well as wholly inconsistent with the express stipulation that the first payment was to be made on May 1, 1914. The proviso, therefore, is inoperative to make the first payment or any part thereof due before May 1. Furthermore, it is the duty of the Court to place such an interpretation upon a contract as will give effect to all its clauses if the same can reasonably be done. This, in my opinion, can be done by interpreting the proviso as an agreement on the part of the defendant to advance to the plaintiff, on account of the first payment due May 1, 1914, whatever rents he had collected up to October 1 not exceeding $1,500. This gives effect to the express agreement that the first payment was to be made on May 1, and carries out what seems to have been the intention of the parties. Penner's failure to pay over on October 1 the rents collected, whatever other rights, if any, it may give the plaintiff, cannot be effective to mature the first payment before May 1, 1914. This action was therefore prematurely brought, and will be dismissed.

Action dismissed.

DOMINION TRANSPORT CO. v. GENERAL SUPPLY CO.

ONT.

S. C.

Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. September 21, 1914.

1. ESTOPPEL (§ III E—70)—CORRESPONDENCE—DEFENDANT, LIABILITY OF—PLAINTIFF EMPLOYED BY ANOTHER COMPANY—RELIANCE ON DEFENDANT'S CONDUCT.

Estoppel is not raised by correspondence shewing that defendant company entertained the belief that it was liable for work done by the plaintiff where the plaintiff was in fact employed by another company not assuming to act for or on behalf of defendant company, unless it is also shewn that plaintiff changed his position to his prejudice in reliance upon defendant company's conduct and letters.

Statement

APPEAL by the defendant company from the judgment of the Senior Judge of the County Court of the County of Carleton in favour of the plaintiff company in an action in that Court, tried without a jury.

G. G. S. Lindsey, K.C., for the appellant company.

Shirley Denison, K.C., for the respondent company.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The action is brought to recover the respondent's charges for transporting machinery from the Ottawa station of the Canadian Pacific Railway to the West End Construction Company, which I shall afterwards refer to as the construction company, in that city.

The machinery had been purchased by the construction company from the appellant, and was shipped from Prescott to Ottawa by the Canadian Pacific Railway, consigned to the appellant. By the terms of the contract of purchase, the property in the machinery remained in the appellant until the price of it was paid, and the purchaser was entitled to possession of it until default in payment.

On the arrival of the machinery at Ottawa, the advice-note was handed to the respondent, a cartage company which delivers goods which arrive at Ottawa by the Canadian Pacific Railway to the persons to whom they are consigned, and a duplicate copy of the advice-note was sent to the appellant.

Upon the advice-note the words "no cartage" were stamped, which means, as the evidence establishes, that the shippers do not undertake responsibility for the cartage charges.

The construction company was desirous of obtaining quick delivery of the machinery, and its representatives, Claffy and

ONT.

S. C.

DOMINION TRANSPORT CO. v. GENERAL SUPPLY CO.

Meredith, C.J.O.

Grey, saw the agent of the respondent, Mr. Manners, and told him of this. Mr. Manners at once communicated with the appellant asking for its consent to the respondent's letting the construction company have or delivering to that company the machinery, and the appellant's consent was given to that being done. Arrangements were then made between the representatives of the construction company and Manners for the cartage of the machinery to the works of that company at or near Fairmount avenue. A discussion took place as to the charges, and it was finally arranged that the work should be charged for by the day. According to the testimony of Manners, Grey said that the charges would be paid by the appellant, but this was denied by Grey. Assuming that Manners' evidence on this point is accepted, there is nothing to indicate that Grey acted or assumed to act, in the transaction or in making that statement, for the appellant; but it is clear that he was acting, as all the parties knew, for his own company.

The machinery was delivered in pursuance of this arrangement, and its delivery occupied several days.

On the 3rd July, 1911, the respondent sent to the appellant a bill of its charges, and on the 19th of the same month the following letter was written by the sales-manager of the appellant:—

"Ottawa, Can., July 19/11.

"The Dominion Transportation Co., Ottawa, Ont.

"Gentlemen:— *Attention of Mr. D. H. Manners.*

"We are in receipt of your statement dated July 3rd for cartage on car of machinery to Fairmount ave. We note that you charge us at the rate of $7.50 per day for five teams, which we think is a trifle stiff, in view of the fact that these teams were practically on the same waggon.

"We would thank you to look into this matter, and we think that you will agree with us that this charge is a little steep.

"Yours truly,

"The General Supply Co. of Canada Ltd.

On the following day, Manners replied to this letter, explaining the reason for the charges, and concluded his letter by saying that he "would be pleased to see you personally and talk the matter over."

According to the testimony of Greene, an officer of the appellant company, Manners, in accordance with the suggestion in his letter of the 20th July, had an interview with Greene at which he repudiated all liability of the appellant for the respondent's charges. Manners does not in terms deny this, but says that, according to his recollection, there were no repudiations of liability by the appellant until the following October.

On the 25th July, 1911, the following letter was written by the appellant to the construction company:—

"Ottawa, Can., July 25/11.

"The West End Construction Co., Ottawa, Ont.

"Gentlemen:—Beg to enclose herewith bill from the Dominion Transport Co. for the moving of large crusher, which they have charged to us, also the correspondence we have had with them in reference to this bill. We think that this price is pretty stiff, and, as you are acquainted with the facts, and as this should really have been charged to you direct, we think you had better take this matter up with them, as we think there is no need for us entering this in our books.

"In the meantime we will also voice our complaint to Mr. Manners.

"Yours truly,

"The General Supply Co. of Canada Ltd.,

In my opinion, the appellant is not liable for the respondent's charges. There was, as between the appellant and the construction company, admittedly no liability on the part of the appellant to deliver the machinery at the construction company's works; the appellant's duty was at an end when the machinery reached the Ottawa station of the Canadian Pacific Railway Company. The contract for the transport of it to the construction company's works was made between that company and the respondent, and Claffy and Grey did not act or assume to act for the appellant in making the contract. If either of these gentlemen had assumed to act for the appellant, it may be that the subsequent correspondence would amount to a ratification of their acts; but, as they did not assume to act for anybody but the construction company, there was nothing to ratify.

ONT.

S. C.

DOMINION TRANSPORT CO. v. GENERAL SUPPLY CO.

Meredith, C.J.O.

The letters of the 19th and 25th July seem to indicate that the appellant, or the writer of the letters, was under the impression that the appellant was liable for the respondent's charges, but that is clearly not enough to render the appellant liable.

It was argued for the respondent that the conduct of the appellant after the receipt of the respondent's bill of charges, and especially the letters of the 19th and 25th July, estop the appellant from denying its liability, but I am not of that opinion. At most they shew that the appellant entertained the belief that it was liable to pay the respondent's charges, but there is nothing to indicate that the respondent changed its position to its prejudice relying upon the appellant's conduct and letters; and, in the absence of evidence of that having taken place, no estoppel arose.

There is, besides, the evidence of Greene to which I have referred that, at the interview between him and Manners, he (Greene) repudiated liability on the part of his company.

The appeal should be allowed with costs and the judgment be reversed, and judgment entered dismissing the action with costs.

Appeal allowed.

MAN.

C. A.

SWANSON v. McARTHUR.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. June 29, 1914.

1. CONTRACTS (§ II D 4—185)—SUB-CONTRACT — CONSTRUCTION WORK — CHANGE OF SCHEME OF WORK—RESTRICTIONS — VARIATIONS — SCALE OF PAYMENT.

A sub-contractor for railway construction work who by reason of a change of the scheme of work by the supervising engineer demands the right to proceed with certain new work which the change necessitated as "grading" is restricted to the price stipulated for that class of work between himself and the principal contractor although the latter, because of the extra expense which such grading entailed, was paid by the railway on the higher scale pertaining to "train-filling"; nor was the sub-contractor entitled to claim upon a percentage clause in the sub-contract which applied only to "variations" in the specific work for which the sub-contract provided.

[*Swanson* v. *McArthur*, 16 D.L.R. 872, reversed.]

Statement

APPEAL from decision of Prendergast, J., *Swanson* v. *McArthur*, 16 D.L.R. 872.

Appeal allowed.

C. P. Wilson, K.C., for defendant, McArthur.

D. H. Laird, for defendants, Eastern Construction Co.

W. H. Trueman, for plaintiff.

HOWELL, C.J.M.:—The plaintiff undoubtedly moved and put in the embankment 264,010 cubic yds. of loose rock and common excavation, both of which are mentioned in schedule 2 referred to, and made a part of his contract with McArthur, and in coming to this conclusion I am not differing from the finding of the learned trial Judge. The schedule fixes the price for this work at 50c per c. yd. for the loose rock and 25 c. per c. yd. for common excavation with an allowance also fixed by the schedule for "overhaul."

In his evidence the plaintiff claimed he was entitled to do this work under his contract because it was of the above character and he undoubtedly did a very considerable portion thereof, expecting to be paid for it according to that schedule. Progress estimates were issued by the engineers from time to time during the entire work describing the work done and the overhaul, and the plaintiff from time to time received payment from prices and quantities of the loose rock and excavation and overhaul and the plaintiff from time to time received payment from the defendant company on the basis of these estimates. On the argument, Mr. Trueman for the plaintiff claimed and urged that this work was specifically described in the schedule and was therefore, he urged, work which the plaintiff had a right to perform and neither of the defendants could therefore, prevent him doing it.

The government engineer in charge of this work was called as a witness on behalf of the plaintiff, and he describes the work done by the plaintiff as "borrow," "common excavation and loose rock." This witness also gave the detailed amount for loose rock, common excavation and overhaul for this fill coming to McArthur under his contract as shewn in the estimates issued up to the completion of the works. If the matter had stopped here the plaintiff would be clearly entitled to recover the prices fixed by the schedule and not as claimed and found by the trial Judge.

The plan for the construction of the part of the railway where this work was eventually done at first contemplated a permanent bridge and so when the plaintiff's contract was executed this work was not to be done by him, as he had nothing to

MAN.

C. A.

SWANSON v. MCARTHUR.

Howell, C.J.M.

do with bridges. Subsequently it was changed to trestle work and still it did not come under the plaintiff's contract, because such work requires the filling in after the rails were laid by hauling the materials for the embankment for a considerable distance by train and dumping therefrom amongst the trestles, a work not covered by the plaintiff's contract. After the work had progressed upon the line it was discovered that, at this point on the plaintiff's part of the line, and at three other parts on the line covered by McArthur's contract but not on the plaintiff's part of the work, there were borrow pits reasonably convenient to the work from which loose rock and ordinary excavation could be taken to make these embankments; but as the distance of the haul and the height of the embankments were much greater in these four places than ordinarily, and as McArthur knew that the roadbed where these four fills are situate was originally intended to be done by himself, he thought that the plaintiff did not have a right under his contract to do this work. He therefore entered into an arrangement with the government engineers that he would put steam shovels and engines on each of these fills and rush the work, not putting in trestles, and waiting for the rails to be laid before any embankment was constructed, and it was agreed that, between him and the commissioners, this work should be considered as "train haul" and paid for at 52c. per c. yd.

After this arrangement had been made, the plaintiff claimed and insisted that this work, after the above changes, was within his contract and refused to let either of the defendants enter upon the work or put steam shovels upon it and he went on with the work from this borrow pit, moving loose rock and common excavation, claiming that it came within schedule 2 of his contract. The original contract provides that the engineer may make such changes in the construction of the roadbed as he thinks fit. He changed the plans so that the fill in question became one of grading—that is simply moving earth and loose rock from a borrow pit to the embankment.

I think the plaintiff was right in claiming, after this change had been made, that the work thereby came under his contract. Calling it train haul did not make it that, and if it had been train

haul the plaintiff would have no right to do the work. After more than half the work was done a letter of May 5 was written by the resident engineer to the chief engineer stating that this work would not be paid for as train haul and progress estimates were regularly issued during the work, as above mentioned, describing the work to be what it really was.

Much evidence was given to shew that an agreement was made between the plaintiff and the defendant company fixing the plaintiff's compensation at 40 cents per yd. If that is established the plaintiff cannot recover, for he has been paid that amount; but I need not discuss this evidence.

The learned Judge disposes of this matter as follows:

In this case, the chief engineer directed Mr. McArthur, represented by the sub-contractor, where train-filling was indicated on the profile, to do a certain other kind of work; and as that other kind of work was "grading" according to Mr. Richan, and as "grading" is provided for in clause 4 of the principal contract, Mr. McArthur was bound to comply—and, as grading is mentioned in schedule one of the sub-contract, it became also the plaintiff's duty and privilege to execute the same.

This work, however, whilst being "grading" offered special difficulties not usually found in grading, owing particularly to the depth of the depression which existed not only in the path of the line but extended far on both sides. If done with special appliances such as steam shovels, that would increase the cost; if done, as it was, without special appliances, the labor was very much greater. The engineers consequently considered it fair to allow Mr. McArthur more than for ordinary grading. They allowed him 52 cents, which is the usual price for train-fill, and returned it in a column entitled "train-fill"—which, however, did not change its true nature of "grading," and was moreover not meant to, as the certificate on the return purports to be for "grading."

The plaintiff swears that about the time the work was completed an engineer on the works told him the work would be finally passed as "train-fill," but I cannot see how this statement can vary a bargain made between the plaintiff and McArthur.

The learned trial Judge then proceeds to hold that under sec. 8 of the plaintiff's contract he is entitled to recover 90 per cent. of 52c. per c. yd. for this work.

Sec. 8 of the contract is as follows:

Should the variations made by the chief engineer of the commissioners necessitate the performance of work of a character not set out in the schedules hereto, and should the parties hereto not mutually agree upon the prices to be paid therefor, then the employer shall pay to the contractor for such work a ninety per centum of the amount he shall receive therefor from the commissioners.

I shall not repeat what I have above set forth as to the nature

MAN.

C. A.

SWANSON v. MCARTHUR.

Howell, C.J.M.

and character of this work further than to say it is exactly of the character set forth in the schedules to the plaintiff's contract. It was so sworn to by the witnesses, so claimed by the plaintiff, and his counsel asserted that because it was of the character set forth in the schedules he had a right to prevent the defendants from interfering with him. When McArthur entered into the contract with the plaintiff there was no work for the latter to do at that fill and no doubt he thought he could make what bargain he chose as to these deep fills, but as the changes came within the schedules of the plaintiff's contract the latter insisted that he was entitled to do the work under his contract, and it follows he must be paid for as provided for by these schedules.

With great deference and after reading the carefully prepared judgment of the learned trial Judge, I do not think that the plaintiff's compensation for this work is governed by or comes within clause 8 of the contract, but must be paid for according to the terms of the schedule. The amount that the commissioners allowed to McArthur for this work has nothing to do with the bargain made with the plaintiff.

The appeal must be allowed with costs and the judgment entered for the plaintiff must be set aside and entered for the defendants with costs of suit subsequent to August 4, 1913.

Richards, J.A.

RICHARDS, J.A.:—The work which the plaintiff did was grading, which is distinctly provided for in his contract with the defendant as work to be done by him; and he entered upon it and claimed the right to do it as grading, because of its being covered by the contract. But, because the defendant was paid for it as train-filling, the plaintiff claims that he is entitled to be paid for it as if it had been train-filling. When their contract was made it did not contemplate work of any kind being done by the plaintiff at the place where he afterwards did that now in question. It was then intended that the place should be permanently bridged, and that class of work is not included in the contract. But, as a result of two changes made by the chief engineer, it ultimately became grading.

The plaintiff claims that under sec. 8 of the contract he became entitled to 90 per cent. of the price paid the defendant. That section reads:

8. Should the variations made by the chief engineer of the commissioners necessitate the performance of work of a character not set out in the

schedules hereto, and should the parties hereto not mutually agree upon the prices to be paid therefor, then the employer shall pay to the contractor for such work a ninety per centum of the amount he shall receive therefor from the commissioners.

In the above "employer" refers to the defendant and "contractor" to the plaintiff.

The section depends on what is covered by "variations." To me it seems that it can only mean variations in those things which the contract contemplated that the plaintiff should perform. Now the contract did not contemplate work of any kind by him at the place in question. By the principal contract with the commissioners the defendant was to do that part of the line by bridging, which is specially excepted from the contract between him and the plaintiff. Therefore, it seems to me that sec. 8 in no way affects the case. The variation that took place was not a variation of anything that the plaintiff had agreed to do. The work came to him because of something, that he had not at all undertaken to do, being turned into a class of work that he had agreed to do. So that what happened was the exact opposite of what was contemplated by sec. 8. Instead of work that he had contracted to perform being turned into work that he had not, work that he had not contracted to do was turned into work of a class that he had undertaken to perform. His title to do it, if he was entitled, was because by those changes it became converted into the class of work he had contracted for, not that, having been within such a class, it had been changed to something not within his contract. It is only where the variations call for work of a character *not* set out in the schedules that sec. 8 applies. After it once became of the class of work the plaintiff was entitled to do, it was not varied in any way. Calling it "train-fill," in the dealings between the defendant and the commissioners, did not make it such. It remained "grading," whatever called. It being grading, and done as such it came within the plaintiff's fixed schedule of prices, and it seems to me that it was no concern of his what the defendant received for it.

With deference, I would allow the appeal with costs, set aside the judgment in the Court of King's Bench, and enter judgment there for both defendants with costs.

PERDUE, J.A., and CAMERON, J.A., concurred.

Appeal allowed.

B. C.

C. A.

KOOP v. SMITH.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. November 3, 1914.

1. FRAUDULENT CONVEYANCES (§ IV—15)—NOTICE—RIGHTS AND LIABILITIES OF PURCHASER—ONUS ON PARTY ATTACKING THE TRANSFER, WHEN.

The onus is upon the party attacking the validity of a transfer made to a creditor as an unlawful preference under the Fraudulent Preferences Act, B.C., and bringing his action more than 60 days after the transfer attacked, as to which special provision is made by sec. 3 (2*a*), to establish the *mala fides* of the transferee; hence, in the absence of proof of notice or knowledge on the part of the transferee of the transferor's financial embarrassment, the plaintiff will fail to make out a case of intent on the transferee's part.

[*Johnstone* v. *Hope*, 17 A.R. 10; *Burns* v. *Mackay*, 10 O.R. 167; *Molson's Bank* v. *Halter*, 18 Can. S.C.R. 88; *Stephens* v. *McArthur*, 19 Can. S.C.R. 446; and *Adams* v. *Bank of Montreal*, 8 B.C.R. 314, 32 Can. S.C.R. 719, referred to.]

2. EVIDENCE (§ IIE—205)—PRESUMPTIONS—FROM SILENCE—FAILURE TO TESTIFY, FROM SICKNESS—EFFECT.

Where defendant was shewn to be unable to attend the trial on account of ill-health, and her application for a postponement of the trial has been denied, as it did not appear probable that her health would improve, no unfavorable inference is to be drawn against her from her failure to give evidence where the plaintiff insists upon proceeding with the trial.

Statement

APPEAL from the judgment of Hunter, C.J.B.C., in the plaintiff's favour in an action impeaching, as a fraudulent preference, a bill of sale made to the defendant by her brother.

The appeal was allowed, IRVING and GALLIHER, JJ.A., dissenting.

M. A. Macdonald, for appellant, defendant.

Burns, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff's case is that the bill of sale in question in this action was a fraudulent preference.

Our Fraudulent Preferences Act, R.S.B.C., ch. 94, makes a clear distinction between transfers of property made with *intent* to prefer and those which have that *effect*. In this it follows the Ontario and Manitoba statutes as amended since such decisions as *Molson's Bank* v. *Halter* (1890), 18 Can. S.C.R. 88, and *Stephens* v. *McArthur* (1890), 19 Can. S.C.R. 446, so that now the only distinction between 13 Eliz. ch. 5 (2), as re-enacted by sec. 3 (1) (*a*) of our Act and clause (*b*) of the same section, which declares that transfers, "if made to or for a creditor with intent to give such creditor preference over his other creditors or over any one or more of them as against the creditor or creditors injured, delayed, prejudiced or postponed," shall be utterly void, is that

the one relates to transactions with creditors while the other voids transfers which offend against its provisions though made to persons who are not creditors of the transferor. The *mala fides* aimed at is expressed in identical language in each. The decisions, therefore, under 13 Eliz., may now be more confidently applied than before the change in the wording and arrangement of the statutes above referred to.

As I read the authorities, the better opinion even before such amendments was that in order to defeat a transfer of property to a creditor the creditor must be shewn to have concurred in the fraudulent intent. That opinion, it is manifest, was adopted by the Legislatures making such amendments, and by our own Legislature in passing the statute now under consideration.

That the burden of proof to establish the *mala fides* of the defendant rests upon the plaintiff is not open to doubt, and hence, in the absence of proof of notice or knowledge on the part of the transferee of the transferor's financial embarrassment, the plaintiff will fail to make out a case of intent on the transferee's part: *Johnstone* v. *Hope* (1890), 17 A.R. (Ont.) 10; *Burns* v. *Mackay* (1885), 10 O.R. 167.

It is also clear that if there was *bonâ fide* pressure exercised by the defendant upon her debtor the transfer should be upheld even if the inference that she knew of her debtor's financial difficulties be justified on the evidence in this case. *Adams* v. *Bank of Montreal* (1899), 8 B.C.R. 314, may be referred to as one of the most recent authorities on this point, and one in which the cases bearing upon it are collected and considered.

The facts, briefly, are that T. J. Smith was indebted to his sister, the defendant, for two years' arrears of wages, amounting to $3,000. The *bonâ fides* of this debt is not questioned: the only evidence in the case from which any inference can be drawn either favourable or unfavourable to the defendant on the question of her *bonâ fides* is that of her said brother. I will assume for the purposes of this decision that T. J. Smith was insolvent when he executed the bill of sale in question. It may be that the fair inference from the evidence is that he was then insolvent or knew that he was on the eve of insolvency. I do not find it necessary to decide that question, because, in my opinion, the bill of sale was given for valuable consideration, and no want of *bonâ fides* on the part of the defendant has been shewn.

B. C.

C. A.

KOOP v. SMITH.

Macdonald, C.J.A.

Smith's evidence is to the effect that, on the death of his wife about eight years before the trial, he induced the defendant, who was then a school teacher in one of the other provinces, to become his housekeeper at a salary of about $1,500 a year. For six years he paid her wages regularly, but for two years before the execution of the bill of sale, owing to illness and absence from business and pressure upon his financial resources in connection with his large business interests, he had allowed her wages to fall into arrears. She requested payment on several occasions, and finally Smith offered her the horses and other effects described in the bill of sale in full satisfaction of the arrears, which she accepted, and thereafter maintained the horses at her own expense. Smith emphatically affirms that the transaction was *bonâ fide*, but I do not rely upon that, as apparently the learned trial Judge did not accept that statement. Where the burden of proof is on the defendant I accept the finding against her of the learned trial Judge whether expressed or implied in his conclusion, but where the burden is on the plaintiff, I must see whether there is any evidence from which a proper inference can be drawn in support of such an issue. Now, the plaintiff offered no evidence from which it can be inferred that the defendant knew of her brother's financial embarrassment (assuming that he was embarrassed), other than what was given by Smith himself. He says that the only knowledge she could have, so far as he knew, was what she might infer from the fact that he had not been able for some time prior to the execution of the bill of sale to provide as liberally for his domestic establishment as theretofore. Now, unless it could be properly inferred from the fact of retrenchment in household expenses, and his failure to pay her wages in cash, that she knew he was so financially embarrassed as to make it a fraud on his part to offer, and on her part to accept, the mode of payment offered her, then the finding of *mala fides* against her cannot be supported.

An attempt was made by plaintiff to shew that the goods comprised in the bill of sale were worth very much more than the debt, and that the discrepancy was so great as to brand the transaction with fraud. Doubtless great inadequacy of consideration is a badge of fraud, but such has not been made out in this case. Smith had owned a large number of show horses, kept by him not for profit but for pleasure; they were a source of expense

to him—not of revenue. When he felt the need of retrenchment he desired to get rid of his stable. The best horses, harness and driving traps were sold to the Provincial Government. He had made efforts to sell some or all the others, and had failed. It was then that he gave the bill of sale in question. The evidence does not convince me that the horses and other effects so transferred were salable at a better price than that at which she took them; at all events, not at a price so much above her debt as to raise a presumption of fraud.

I have a recollection that counsel agreed in the statement that the horses had either been sold by the consent of both parties to this action for $3,500, or were to be sold if that price could be obtained, the money realized to abide the result of litigation, but whether I am mistaken in this or not, I am satisfied that the consideration was sufficient and was *bonâ fide*. Nor is there anything singular in defendant's acceptance of horses in payment of the debt, as it is conceded that she was a horse-woman and drove and rode these horses in the shows before the transfer of them to her.

The judgment appealed from, as I understand the reasons of the learned Judge, rests in no small degree upon circumstances of suspicion, and that it was incumbent upon defendant to testify in her own behalf to remove such suspicion. Without discussing the alleged obligation of a party to remove suspicions, it is enough to say that her counsel moved for a postponement of the trial on the ground that she was unable by reason of ill-health to give evidence. The application was supported by the evidence of a reputable physician, who gave it as his opinion that it would be unsafe to permit her to give evidence either at the trial or at her own home in her then condition of health, and that it was on his advice, not at her desire, that she had not been examined. The plaintiff, however, insisted upon proceeding with the trial, and the learned Judge refused the postponement. In these circumstances no unfavourable inference can in my opinion be drawn from her failure to give evidence.

In *Burns* v. *Mackay*, 10 O.R. 167, the learned Chancellor said, at p. 169:—

> The only evidence given at the trial was that of the defendant—the creditor. Although suspicion might lead me to infer that he intended a fraudulent preference of himself, yet the rule of the Court is not to act upon

B. C.
C. A.
KEOP
v.
SMITH.
Macdonald, C.J.A.

mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion.

On the whole I am of the opinion that the plaintiff has not made out a case of want of *bonâ fides* on the part of the defendant. There is, as I have already intimated, no positive evidence at all to shew a fraudulent intent, nor are the circumstances such as to enable one to say that the defendant took the bill of sale with knowledge of Smith's alleged insolvency, or if she had knowledge, that the pressure she exerted was not *bonâ fide*.

I would allow the appeal and dismiss the action.

Irving, J.A.

IRVING, J.A., dissented.

Martin, J.A.

MARTIN, J.A.:—This is an action to set aside a bill of sale of certain horses to the defendant, and it was not begun till more than 60 days thereafter, so is not within sub-sec. (2*a*) of sec. 3 of the Fraudulent Preferences Act. There is very little dispute on the facts, the real question being the inference to be drawn from them. The submission is that the learned trial Judge has not correctly applied the law relating to preference and pressure, which essentially remains as it was when decided in *Adams* v. *Bank of Montreal* (1899), 8 B.C.R. 314, affirmed by the Supreme Court of Canada, (1901) 32 Can. S.C.R. 719, and leave to appeal refused by the Privy Council. I think this submission is correct, and that there was clearly good consideration and legal pressure. In addition, I am of the opinion that the fair value of the horses was not, on the evidence, more than $3,000, which is the consideration given in the bill of sale. We were invited to assume that the defendant had no means of her own, and therefore the sale was obviously a sham one, as the keep of the horses pending a sale thereof would be only an expensive burden upon her which she could not bear, but the evidence is that the defendant had for about eight years been housekeeper for her brother at the salary of about $1,500 per annum, having left Manitoba, where she was a school teacher, to go to Vancouver for that purpose, at, at least, double the salary she had been getting as a teacher, and her board. So, if anything is to be assumed, it should be that the defendant in all that time would have saved something at least; but it is quite sure that it cannot be assumed she was penniless even though she was not paid for about two years.

I have only to add, with respect to the fact that the defendant's

evidence was not given, that she applied, supported by reputable medical testimony, for a postponement of the trial on account of her illness, which was refused, as her severe nervous disorder seemed to be of such a nature that it could not be said when she would be fit to appear in Court, and therefore the trial Judge held that "it is quite obvious that the plaintiff's rights cannot be deferred indefinitely, and therefore the case had to go on." In such circumstances no unfavourable inference could fairly be drawn against her, but apart from that the case against her fails of itself.

The appeal, therefore, should be allowed.

GALLIHER, J.A. (dissenting):—I agree with IRVING, J.A., for the reasons given. Galliher, J.A.

McPHILLIPS, J.A.:—The appeal is one from the judgment of the Honourable the Chief Justice of British Columbia (Hunter, C.J.), the action being one brought to set aside a bill of sale, of date May 15, 1912, given by Thomas T. Smith, the brother of the defendant (appellant), covering a number of horses, carriages and harness. McPhillips, J.A.

The evidence shews that the defendant, the sister of Thomas J. Smith, left other employment and went to reside with her brother, and her salary as housekeeper was to be $1,500 a year, and at the time of the making of the bill of sale had been some 8 years in this employment receiving her salary, and had been paid the salary up to May, 1910, when her brother went to England. Besides acting as housekeeper, the defendant exhibited her brother's horses at various horse shows in different places, riding and driving them, being a skilled person in such work. And since the giving of the bill of sale the horses have been kept at the expense of the defendant, and she has had possession of them. The consideration as expressed in the bill of sale is stated to be $3,000, and the defendant made the affidavit required by statute, under date May 18, 1912, that the assignment made was *bonâ fide* and for valuable consideration, and that it was not made for the purpose of enabling the grantee (the defendant) to hold the goods mentioned therein as against the creditors of the grantor (Thomas J. Smith), nor for the purpose of protecting the goods against the creditors of the grantor, or of preventing the creditors of the grantor from obtaining payment of any claim against him.

B. C.
C. A.
KOOP
v.
SMITH.
McPhillips, J.A.

The plaintiff (respondent) in the action is a judgment creditor, having taken from Thomas J. Smith a confession of judgment, under date February 13, 1912, for the sum of $63,698.77 and interest and costs. Judgment, however, was not entered up until September 18, 1912, and then entered for the sum of $53,917.19 and costs of suit; that is, there had been paid in the interim a sum of approximately $10,000.

The contention of the plaintiff at the trial, and given effect to by the learned Chief Justice—the trial Judge—was that the bill of sale was given with the intent to defeat, hinder, delay and prejudice the plaintiff and the other creditors of Thomas J. Smith, and that the bill of sale was null and void under the Fraudulent Preferences Act and the Fraudulent Conveyance Act.

It is to be noted that the judgment of the learned Chief Justice as contained in the Appeal Book does not specifically set forth the findings of fact which, in my opinion, with all respect, are called for when a conveyance is set aside as being void under the Fraudulent Preferences and the Fraudulent Conveyance Act, or either of them. What is found is this—that a confession of judgment being given on February 13, 1912, the giving of the bill of sale some three months afterwards, being a sale by a brother to a sister, constituted suspicious circumstances, and that the burden of proof rested upon the defendant to support the validity of the transaction, and the defendant did not appear at the trial. Again, with all respect, I cannot subscribe to this view of the law. It was the bounden duty of the plaintiff to establish by evidence that the transaction was one that could reasonably, fairly and justly be impeached upon statutory grounds, and, failing that, the conveyance should be allowed to stand. In my opinion no cause of action such as was alleged by the plaintiff existed upon the facts as disclosed at the trial, and the judgment cannot be supported.

A striking commentary upon the contention of the plaintiff is the plaintiff's own action and conduct. What do we find the plaintiff doing? Taking a confession of judgment from Thomas J. Smith on February 13, 1912. What was Thomas J. Smith's financial condition at that time? It can only be assumed that the plaintiff believed him to be solvent, otherwise the confession of judgment would be void under the invoked statutes. To indicate

solvency, the plaintiff's claim was reduced by nearly $10,000 in the space of seven months, yet he complains of a bill of sale given to the defendant about 3 months after the giving of the confession of judgment to himself. A further circumstance that calls for consideration, and which indicates to my mind that the plaintiff did not consider that Thomas J Smith was in insolvent circumstances, and unable to pay his debts in full, is the non-entry of the judgment confessed on February 13, 1912, and not entered until September 15, 1912. The entry of this judgment at the time when given would have enabled the plaintiff to proceed to execution against the personal property of the judgment debtor, and the horses, the subject matter of the bill of sale, would have been levied upon, and a certificate of judgment could have been registered against the real property of the judgment debtor. This course was not adopted, the plaintiff no doubt preferring to wait and receive the substantial sum evidently received by way of cash payments, and then, notwithstanding this substantial advantage attained, it is sought to be made out that within three months of the giving of the confession of judgment, and during the time substantial payments were made to the plaintiff, Thomas J. Smith was in insolvent circumstances and unable to pay his debts in full, and that under such circumstances the impeached bill of sale was given, and that in the giving of it Thomas J. Smith intended to delay, hinder or defraud his creditors. Now this was the case the plaintiff had to make out—if it were the case the plaintiff was a substantial gainer, as during this time of insolvency he had received substantial payments, and if these payments were made by Thomas J. Smith when in insolvent circumstances, they could, if attacked within sixty days thereafter, have been declared utterly void—*vide* Fraudulent Preferences Act, sec. 3.

Therefore, approaching the facts of the present case as presented, it is conclusively impressed upon me that no such facts existed at the time of the making of the bill of sale which would warrant or support the same being set aside.

Certain statements were put in at the trial shewing the assets of Thomas J. Smith, and in the plaintiff's case (ex. 6 was put in Appeal Book, p. 93), dated September 8, 1911—comparing that statement with the statement which went in upon the cross-examination of Gerrard G. Koop (a son of the plaintiff), and

B. C.
C. A.
KOOP
v.
SMITH.
McPhillips, J.A.

which is marked as ex. 12—there is ample evidence to rebut any evidence (although I fail to see any) given upon the part of the plaintiff that Thomas J. Smith was at the time of the giving of the bill of sale in insolvent circumstances, or on the eve of insolvency, or that the facts were such as would entitle the bill of sale being set aside. It is a matter for remark that when ex. 12 was introduced in evidence it was accepted as being a statement of the assets of Thomas J. Smith as examined into by Messrs. Riddell, Stead, Hodges & Winter, of the City of Vancouver, chartered accountants.

Now this statement is very complete, and is in no way impugned; in fact, as stated, it would seem to have been admitted in evidence as portraying the actual state of Thomas J. Smith's business affairs and assets as of September 6, 1912, and would indicate that there was an estimated surplus of $445,179.43.

It is only necessary to glance over the statement to see that the properties and holdings of Thomas J. Smith are very considerable, and no doubt of possibly fluctuating value; but can it be said, bearing in mind all the attendant facts and the evidence as adduced at the trial, that it has been demonstrated—as it should be demonstrated in a Court of law, and proved as it should be proved in a Court of law—that Thomas J. Smith at the time of the giving of the bill of sale, namely, on May 15, 1912, was in insolvent circumstances and in any way constrained by the statute law? See *The Uplands Ltd.* v. *Goodacre* (1914), 20 D.L.R. 68, 50 Can. S.C.R. 75, where insolvency held to be not proved.

In my opinion there can be but one answer, and that is that the plaintiff has absolutely failed to make out a good and sufficient case to successfully impeach the challenged bill of sale.

The plaintiff alleges that he sues on behalf of himself and all other creditors of Thomas J. Smith, but it is a matter for remark that no other creditors come forward or give evidence in the action save one—the Bank of Ottawa—and the bank seems quite satisfied with regard to an indebtedness exceeding $50,000. It is true the bank has security, but it is a matter for remark that the plaintiff is also shewn to have security for the indebtedness of Thomas J. Smith to him.

Without further enlarging in detail upon the evidence, it is apparent, upon a careful study of the same, that the plaintiff has

fallen far short of establishing the case the law requires established, and evidence even upon which inferences may be drawn is wholly absent. It is true the learned Chief Justice has drawn inferences from circumstances detailed in his judgment, but, with all respect and deference, I cannot agree with the conclusions arrived at either that the *onus probandi* was shifted to the defence or that there was any need for corroborative evidence of the *bonâ fides* of the transaction, *i.e.*, the giving of the bill of sale. It cannot be gainsaid upon the evidence that Thomas J. Smith was indebted to the defendant in the amount which formed the consideration for the bill of sale, and the affidavit of *bonâ fides* as required by statute was made by the defendant.

It would appear that the defendant has been ill for some time, and was ill at the time of the trial, and the defence desired a postponement of the trial. This was opposed on the part of the plaintiff, and the action was tried necessarily without the evidence of the defendant.

Dr. W. D. Brydon-Jack, the family physician, was called, and he testified to the inability of the defendant to be present at the trial or examined in the action. The evidence of a physician of undoubted standing, in my opinion, must be taken and accepted in a Court of law when the physician is speaking as to the state of health of his patient. Of course there might be a case where something tangible is developed and where circumstances might call for further inquiry, but nothing of that kind was here disclosed. I cannot at all agree—and it is with respect and deference to the learned Chief Justice I state it—to the proposition that in the present case an independent physician should have been called. I know of no rule of law of this nature as affecting the evidence of a physician—what physician can better speak to the state of health of the patient than the family physician? And what interest can actuate or would be deemed to actuate a physician in the giving of his evidence other than to give it fairly and frankly and in accordance with the fact? It would have to be evidence of the most cogent character, and evidence that would affect the professional standing of the physician, which would have to be introduced to in any way tend to challenge or weaken the evidence of the attending physician. Therefore, in my opinion, no inference should have been drawn adverse to the

B. C.
C. A.
KOOP
v.
SMITH.
McPhillips, J.A.

defendant because of the fact that she was not present at the trial and did not give evidence thereat.

In my opinion the plaintiffs failed utterly in making out any such case as warranted the setting aside of a conveyance, which, upon the facts, must be accepted as being made for good and sufficient consideration in law, and at a time and under circumstances that were not affected by the existing statute law, and that therefore the transaction—the giving of the bill of sale—was a valid and effective sale.

Now, to deal with the law as affecting the impeached transaction—if it be that the giving of the bill of sale operated to prefer the defendant to other creditors and that ever was the intention—which is not proved—the transaction does not offend against the Fraudulent Conveyance Act, if the transaction be honestly entered into, *i.e.*, be *bonâ fide*—Lord Justice Giffard said, in *Alton* v. *Harrison* (1869), 38 L.J.Ch. 669, at 671:—

> I have no hesitation in saying that if the deed is *bonâ fide*, it makes no difference so far as regards the statute of Elizabeth whether or not it includes the whole property. By *bonâ fide* I mean that the deed is intended to operate according to its tenor, and is not a mere cloak for providing something for the benefit of the person who makes it.

See also *Ex parte Games, In re Bamford* (1879), 12 Ch.D. (C.A.) 314; *In re Reis* (1904), 73 L.J.K.B. (C.A.) 929, affirmed [1905] A.C. 443, 74 L.J.K.B. 918; *Mulcahey* v. *Archibald* (1898), 28 S.C.R. 523, Sedgwick, J., at pp. 528, 529.

With respect to the application of the Fraudulent Preferences Act, in my opinion no case has been made out, as it was incumbent upon the plaintiff to have shewn that the giving of the bill of sale was an unfair or improper transaction, and further, there must not only be proved a preference but a fraudulent preference: see *Bank of Australasia* v. *Harris* (1861), 15 Moo. P.C. 97, and at p. 116; *Molsons Bank* v. *Halter* (1891), 18 Can. S.C.R. 88; *Stephens* v. *McArthur* (1892), 19 Can. S.C.R. 446, Strong, J., at pp. 452-456; *Rae* v. *McDonald* (1887), 13 O.R. 352, at pp. 366, 367.

With respect to the suspicious nature of the transaction and where rests the onus—as remarked upon by the learned Chief Justice—it is noteworthy that in *Ex parte Lancaster, Re Marsden* (1883), 53 L.J.Ch. 1123, suspicious circumstances were considered, being a case where fraudulent preference was alleged, Cotton, L.J., at 1124, said:—

B. C.
C. A.
KOOP v. SMITH.
M. Phillips, J.A.

Now, undoubtedly the circumstances of this case are suspicious. There can be no doubt about that. . . . But what we have to consider is not what the object of the father-in-law was, but whether the son-in-law acted as he did in order to give his father-in-law a preference. The words of the statute are: "with a view to giving such creditor a preference over the other creditors." That must mean that it is done substantially with the object of giving a preference. . . . I cannot think that the proper inference to be drawn from the evidence is that the debtor did what he did in order to give his father-in-law a preference over the other creditors. This being a matter for the appellant to make out—not, of course, conclusively, but so as to satisfy us—in my opinion, he has failed to discharge the onus, and the appeal must be dismissed.

Also see *Laurie, In re; Green, Ex parte* (1898), 67 L.J.Q.B. 431.

In my opinion the transaction impeached was valid. It therefore follows that in my opinion the appeal should be allowed, and the judgment of the Court below set aside, with costs here and the Court below to the appellant.

Appeal allowed.

ONT.
S. C.

Re INTERNATIONAL ELECTRIC CO., LIMITED.
McMAHAN'S CASE.

Ontario Supreme Court, Meredith, C.J.C.P. May 5, 1914.

1. CORPORATIONS AND COMPANIES (§ VI—340)—DISSOLUTION AND WINDING UP—PROCEDURE—BOOKS OF COMPANY—EVIDENCE OF.

As between the contributories of a company in liquidation under the Winding-up Act, R.S.C. 1906, ch. 144, its books are *primâ facie* evidence by sec. 144, but that section does not make them evidence in favour of the liquidator against an alleged contributory where the issue is substantially between a creditor of the company and persons proceeded against as shareholders.

2. CORPORATIONS AND COMPANIES (§ VI—342)—WINDING-UP—PROCEDURE—SINGLE CREDITOR—RIGHT TO PROCEED BY.

An application for a winding up order should not be granted when sought for the sole purpose of enforcing a single creditor's claim in a case where such claim could be as well enforced by a writ of execution. (Dictum *per* Meredith, C.J.C.P.)

Statement

APPEAL by the liquidators of the company from the finding of the referee in a winding-up proceeding that one McMahan, deceased, was not at the time of his death the holder of unpaid shares in the company for the payment of which the respondents, his executors, were liable.

F. Arnoldi, K.C., for the appellants.

T. G. Meredith, K.C., for the respondents.

Meredith, C.J.C.P.

May 5. MEREDITH, C.J.C.P.:—The appellants allege that McMahan, at the time of his death, was the holder of 50 unpaid shares of the capital stock of this company, and so his

ONT.

S. C.

RE INTERNATIONAL ELECTRIC CO. LIMITED.

Meredith, C.J.C.P.

estate is liable to them for $1,250, the shares having been issued, and taken up, at $25 each; the defences raised by the respondents are: (1) a denial that McMahan ever was a shareholder of the company; (2) an allegation that, if he ever were, he became such a shareholder, under such circumstances as render the transaction invalid; and (3) an allegation that, in any case, a compromise of all claims of the company against him, in respect of any ownership of shares, was made in good faith by him with the company, many years ago, by which all such claims were satisfied and discharged.

The learned referee, against whose judgment this appeal is brought, found in favour of the appellants on the first ground of defence; but against them on the second; and does not seem to have considered the third.

In dealing with the evidence, the referee had no advantage over any Court that may have to deal with it now, because the evidence was not taken before him; it was all taken by his predecessor in office, who died after the argument of the case before him and before being able to give judgment in it. The point, whether the present referee had power to consider the case without taking the evidence again, was raised before him, but was not renewed here; and, as I understand them, both parties now desire that the case be finally disposed of on the evidence as it stands.

The onus of proof of liability is on them, and they must satisfy it just as fully as the company would be bound to do if suing for calls upon its stock.

The appellants must prove that McMahan was a shareholder of the company; that is the first step towards recovery from his estate. Have they done so?

Subscriptions for stock in this company were taken upon a regular form of application for shares. A "broker" was employed to solicit subscriptions, and was paid a large commission on all subscriptions procured by him.

It is alleged by the appellants that McMahan subscribed for, and was allotted, 50 shares of the stock, in the regular and usual manner; but there is no direct evidence of any subscription by him; if his estate be held liable, it can be only on circumstantial

evidence. The "broker" proved that he solicited McMahan, but was unable to say that he ever subscribed for, or promised to subscribe for, any of the stock; it would have been in the broker's interests to have proved a subscription. No application, or other writing, in McMahan's name, purporting to be a subscription, or request, for, or agreement to take, any stock, is produced.

The circumstances relied upon as proving that he was a shareholder are: (1) the existence at one time of an application purporting to have been McMahan's; (2) the sending to him by post of notice of the allotment to him of 50 shares; and (3) his conduct at a meeting of the directors of the company, and also at a meeting of its shareholders, as recorded in minutes of such meetings.

Much reliance was placed also upon entries in the books of the company, including the minute-books. But I am unable to perceive how the books of the company can be considered legal evidence against the respondents—how they can be such evidence any more than entries in McMahan's books would be evidence against the appellants: I mean, of course, in such a case as this. Entries in private books may, of course, in proper instances be used to refresh memories, but are not, in themselves, evidence, in such a case as this.

The Ontario Companies Act, under which, I understand, this company was incorporated, provides (2 Geo. V. ch. 31, sec. 121) that certain books, which the Act declares shall be kept, shall be *primâ facie* evidence in any action or proceeding "against the corporation or against any shareholder or member;" but how can McMahan be held to have been a shareholder so as to admit such evidence against him until he is otherwise proved to have been a shareholder? The books are evidence against the company and those who compose the company; that is reasonable; but it would be most unreasonable to use the books of the company against any one alleged to be a member of it until such membership should be proved.

The Winding-up Act, R.S.C. 1906, ch. 144, under which, properly or improperly, these proceedings are being taken, provides (sec. 144) that, "as between the contributories of the company," its books shall be *primâ facie* evidence; but this matter is not one between contributories; it is, as I have said, substantially one between a creditor of the company and persons proceeded

ONT.

S. C.

RE INTERNATIONAL ELECTRIC CO. LIMITED.

Meredith, C.J.C.P.

against as shareholders of the company; the contributories take no part or lot in it; it is a roundabout way of doing that which might directly be done under the creditor's writ of execution. And I have more than once said that no application for a winding-up order would ever be granted by me when sought for the sole purpose of enforcing a single creditor's claims in a case where such claims could be as well enforced in the ordinary method.

Upon the evidence adduced, reasonable men might find that the company at one time had an application for shares purporting to have been signed by McMahan on one of its usual forms; so too they might find that it had not. But there is no evidence whatever that any such application was signed by, or that the signature to it was in the handwriting of, McMahan; the direct evidence, even of him most likely to have known if McMahan ever signed such a paper, points to the contrary; those connected with the company falsely represented in bold print upon the company's prospectus that McMahan was president of the company, and thereby, if the evidence is believed, induced some persons to take stock who otherwise would not have done so.

Reasonable men might find also, upon the evidence, that notice of the allotment of 50 shares of the company's stock to McMahan had been posted, addressed to him; but there is no assertion that it was registered; and so it was not good notice under the provisions of the Ontario Companies Act, sec. 140, even if McMahan were a shareholder. But, even if it could be found that McMahan received the notice, it would afford little, if any, circumstantial evidence that he was a shareholder, because not only was there no evidence of actual acquiescence in the allotment, but, soon after the time when the notice is said to have been sent, McMahan was active and strong in repudiation of any connection with the company: it may possibly have been such a notice that gave cause for this activity.

The great weight of the evidence is in favour of his having repudiated the setting down of him as a shareholder as well as the setting down and advertising of him as president of the company.

The learned referee seems to me to have erred, in dealing with this question, in two respects: (1) in substantially accepting the entries in the company's books as evidence, in themselves, against the respondents; and (2) in holding McMahan bound by the words

of the company's resolution in the settlement with him as if they were his own, and not only holding him so bound, but also bound by such conclusions as the referee thought flowed logically from them. Neither man, nor the law, is always logical; nor are any of us ever too safe in relying altogether upon things which may seem to us to be logical conclusions; and in this case we must always remember that we have to deal with the sayings and doings of business men in a business transaction in which the niceties of accurate speaking or writing are not the strongest points of their dealings. The referee was led finally to his conclusion against the respondents on the short ground that "the man who paid a smaller sum in full of his subscription must have been a subscriber." But, in the next sentence, the referee declares that McMahan "certainly repudiated his liability;" and there is no suggestion that he repudiated liability on any ground but the one that he was not a subscriber. The ground upon which the referee has held that he was not liable does not seem to have occurred to any one until it was raised in these proceedings.

As I have pointed out, the words of the resolution relied upon by the referee are not McMahan's, but are those of the company seeking to fasten upon him the liability which he "repudiated."

McMahan's statement was, according to the witnesses, that he was not liable, but that, to help those who asserted that they had been misled by the unauthorised use of his name, he would contribute towards the fund that was being raised with a view to satisfying every one. Why should not the company be as much bound by his words, and by all logical deductions from them, as he by theirs?

But, even if I were so unreasonable as to be unwilling to accept anything but a literal interpretation of the resolution of the company as absolutely binding upon McMahan, was the referee justified in thinking that they must mean a payment in respect of the subscription for 50 shares made before the meeting? Assuredly he was not. McMahan, according to the referee, repudiated any such liability; and, according to the great weight of the evidence, denied that he was either shareholder or president of the company. The compromise made provided, in effect, that he should subscribe for 10 shares of the stock of the company, which he should pay for at the nominal value of $25 each, and that

ONT.

S. C.

RE INTERNATIONAL ELECTRIC CO. LIMITED.

Meredith, C.J.C.P.

he should pay an additional $70; both of which he did. In these circumstances, why should the words "his subscription" be attributed to the "subscription" he "repudiated," and not to the one he then made for the 10 shares? I am quite unable to find any substantial reason why they should not be read as applicable to the only subscription McMahan is proved to have made.

If McMahan had lived long enough to be a witness in his own behalf, and had, before his death, as such a witness, denied ever subscribing for, or accepting, the shares in question, could any judicial officer have hesitated, for a moment, in holding that his estate is not liable? If he should be found to have been liable, I could not but think that death had won the appellants' case. The observations of one of the Lords Justices in the case of *Hill* v. *Wilson* (1873), L.R. 8 Ch. 888—though doubtless going too far—as well as the case itself, are of assistance in dealing with any case in which death has disabled a person from testifying in his own behalf.

On this first question involved in this appeal, I can come to no other conclusion than that the appellants have not satisfied the onus of proof upon them, that McMahan was a subscriber for the 50 shares.

And, treating the entries in the books of the company as legal evidence against the respondents, I would also unhesitatingly reach the same conclusion.

[The learned Judge here referred to *In re Barangah Oil Refining Co., Arnot's Case* (1887), 36 Ch. D. 702, and continued.]

It is true that it would appear from the evidence that much less was said by McMahan against setting him down as a shareholder than against setting him out as president; but that was only natural; one would not expect anything else. The gravest feature of the case was in the complaint of subscribers that McMahan's name lured them into the company to their loss. Attention would be centred upon that.

I do not stop to consider whether I should or should not agree with the referee on the ground upon which he held that the respondents are not liable, because it does not seem to me to be needful to go as far as he went, in this respect, in order to defeat the appellants' claim, if subscription for the shares had been proved.

ONT.

S. C.

RE INTERNATIONAL ELECTRIC CO. LIMITED.

Meredith, C.J.C.P.

There was a real contest, waged in good faith, between the company and McMahan, as to whether he was liable or not as a holder of 50 shares of the company. At a meeting of the company, called for the purpose of considering all such matters, a compromise, made in good faith on both sides, was reached, and a settlement effected, which had been, entirely, carried out years before the winding-up order in this matter was made. Assuredly such a settlement is valid, and cannot now be ripped up by a creditor of the company or by any one else. In *Lord Belhaven's Case* (1865), 3 DeG. J. & S. 41, and in *Dixon* v. *Evans* (1872), L.R. 5 H.L. 606, persons who were admittedly shareholders were relieved under a compromise: in such a case as this, necessarily, there must be power to compromise, or otherwise release, a claim such as this, for, if not, relief would be obtained in an action, whether brought by the company or the alleged shareholders; and the law could hardly compel a company to litigate even a claim in which it was obvious that it must fail. There is no question of reducing the capital stock of the company; the stock remains; there was no subscription for it beyond the 10 shares.

The appeal must be dismissed with costs.

Appeal dismissed.

ASTLEY v. GARNETT.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. November 3, 1914.

1. BROKERS (§ II B—12)—REAL ESTATE—COMPENSATION—SUFFICIENCY OF BROKER'S SERVICES.

That a real estate agent, authorized by the owner to find a purchaser, but not having the exclusive agency, had introduced the property first to the eventual buyer, who had then declined to negotiate for it, will not entitle the agent to any compensation or commission on a sale being later effected through another agent if what the first agent did was not the efficient cause of the sale, nor was the fact of such introduction by him notified to his principal until after the sale had been effected through the other agent.

2. APPEAL (§ VII L—475)—REVIEW OF VERDICT—PERVERSE—NO EVIDENCE ON WHICH TO REASONABLY FIND—DISMISSAL RATHER THAN NEW TRIAL, WHEN.

If there was not evidence sufficient to go to the jury upon which they could reasonably find a verdict against the defendant, the case should not have been left to them, but if it was left to the jury and they bring in a perverse verdict in favour of the plaintiff without the insufficiency of the plaintiff's evidence being remedied during the progress of the case, an appellate Court may properly dismiss the action instead of directing a new trial.

[*MacKenzie* v. *B.C. Electric R. Co.*, 15 D.L.R. 530, 19 B.C.R. 1; *Skeate* v. *Slaters*, 30 Times L.R. 290; *Metropolitan* v. *Wright*, 11 A.C. 152; *Cox* v. *English, Scottish & Australian Bank*, [1905] A.C. 168, referred to; *Toronto Ry.* v. *King*, [1908] A.C. 260, 77 L.J.P.C. 77; *Fraser* v. *Drew*, 30 Can. S.C.R. 241; and *Reiffenstein* v. *Dey*, 13 D.L.R. 76, 28 O.L.R. 491, distinguished.]

B. C.

C. A.

ASTLEY v. GARNETT.

Macdonald, C.J.A.

APPEAL from the judgment of Macdonald, J., based, as alleged, on a perverse verdict.

The appeal was allowed, MARTIN, J.A., dissenting.

E. C. Mayers, for appellant (defendant).

Douglas Armour, for respondent (plaintiff).

MACDONALD, C.J.A.:—The appellants were holders of coal leases for which they authorized respondent to find a purchaser, agreeing to pay him a commission. After some efforts to do so which resulted in nothing, the respondent brought the leases to the attention of one Donald and his associates. This was in April, 1909. He then applied to Garnett, the husband of the appellant Mrs. Garnett, who acted for her throughout the transaction, for prices and terms, and was by Garnett referred to the appellant Stirling—the co-owner with Mrs. Garnett. Garnett informed the respondent that he would agree to whatever he might arrange with Stirling. Stirling gave a written authority to sell the leases at the price and on the terms therein set forth. Nothing was therein mentioned about commission, but appellants do not dispute that respondent would have been entitled to a commission had he procured a purchaser.

Shortly after bringing the leases to the attention of Donald, namely, at May, 1909, the respondent left British Columbia to reside in Toronto, and thereafter appears to have had no communications with Donald and his associates concerning the leases. While in Toronto he endeavoured to obtain a purchaser there for the leases, to which he had the consent of Garnett. He failed to make the contemplated sale at Toronto, and notified Garnett of this failure. Thereupon the appellants, in June, 1910, gave an option of purchase of the leases to Donald. The option was in due course exercised and the sale concluded. The option and sale was brought about through the agency of one Frampton, to whom appellants agreed to pay the commission. On hearing of this sale the respondent wrote Garnett claiming that it had been brought about by his bringing the leases to the attention of Donald, and he therefore claimed the commission.

There is a good deal of conflict of evidence on some phases of the case, but on what to my mind is the deciding point there is no conflict. I will assume in the respondent's favour that the sale which was finally effected was the result of his negotiations

B. C.

C. A.

ASTLEY v. GARNETT.

Macdonald, C.J.A.

with Donald, although, if I were sitting as a judge of the facts, I should not, perhaps, come to that conclusion. The appellants have shewn that they made the sale through Frampton; that they had no knowledge that the respondent had previously negotiated with Donald. The respondent frankly states that he had never disclosed the identity of Donald to Garnett, but claims that he had done so to Stirling. He thinks he must have told Stirling verbally, but is unable to swear to it; but he relies upon a letter which he says he wrote to Stirling on the eve of his departure from Victoria by which he informed Stirling of his negotiations with Donald, or Donald's then associates. He says he left the letter with the hall porter of the Union Club with instructions to give it to Stirling, or to mail it—he is not clear which. Stirling denied the receipt of the letter, or that he was ever made aware of the identity of respondent's clients, and the hall porter was not called to testify as to what he had done with the letter. In these circumstances the respondent cannot, in my opinion, possibly hold his judgment. The outstanding undisputed facts, then, are that when the appellants made the sale through their agent Frampton, they did so in good faith and without even a suspicion that they were selling to a person with whom the respondent had previously negotiated.

It does not help the respondent to say that he told Donald, or his associate Johnston, who the owners of the leases were; that is clearly beside the mark. If it were material I should not interfere with the jury's finding notwithstanding that Johnston has denied it, as belief or disbelief of that testimony was a matter essentially for the jury. Other grounds of appeal were taken, but in view of the conclusion I have come to as above set forth it becomes unnecessary to consider them.

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

Irving, J.A.

IRVING, J.A.:—Two points have been raised before us. The first is as to the jury's finding. The right to recover is founded on the service rendered; that service must be the efficient cause of the sale. If the jury had properly understood that question it was not possible for them to have found for the plaintiff. The sale took place June 16, 1910, to Johnston, through an agent named Frampton. The plaintiff claims that he had introduced the matter to Johnston in April, 1909. That fact is not disputed.

B. C.

C. A.

ASTLEY v. GARNETT.

Irving, J.A.

But Johnston says that he then had no intention of buying the property, and that it was not until September, 1909, when his engineer advised the purchase of the property for the more convenient working of his adjoining mine, that he determined to buy the defendant's property. It is possible that Astley's services were a *sine qua non*, but they certainly were not the efficient cause of the sale.

Garnett and Stirling, who had the matter in hand for Mrs. Garnett, swear that the plaintiff did not make them aware that Johnston was a possible purchaser.

In *Metropolitan R. Co.* v. *Wright* (1886), 11 App. Cas. 152, the principles on which new trials against evidence ought to be granted were considered by the Court of Appeal and House of Lords. That case has been followed in many cases, and was followed in the Privy Council in *Cox* v. *English, Scottish and Australian Bank*, [1905] A.C. 168, where it was said that the principle could not be better stated than it was by Lord Selborne in the Court of Appeal in the following terms:—

> It is not enough that the Judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the Judges in the Court where the new trial is moved for might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the Judge, should return such a verdict.

The rule is plain. The application of it is sometimes unfortunate. To my mind this verdict was perverse and should be set aside.

On the second point, the learned Judge, in my opinion, improperly excluded evidence which the defendant had a right to put before the jury as tending to support his case: Stephenson on Evidence, 4th ed., pp. 153-4; *Varrelmann* v. *Phoenix Brewery Co.* (1894), 3 B.C.R. 135.

I would allow the appeal and enter judgment for the defendant, or, in the event of the Court being against that view, the defendant is at least entitled to a new trial.

Martin, J.A.

MARTIN, J.A., dissented.

Galliher, J.A.

GALLIHER, J.A.:—I have weighed the evidence very carefully, and in my opinion it falls short of establishing that the plaintiff was instrumental in bringing about the sale of the coal lands in question, or contributed thereto.

I would allow the appeal.

McPHILLIPS, J.A.:—I concur in the reasons for judgment of the Chief Justice, and merely add some further conclusions with respect to some of the points pressed by counsel.

Mr. Armour, counsel for the respondent, very ably contended that the verdict of the jury and the judgment entered thereon was sustainable upon the ground that there was evidence to go to the jury and that the jury rightly passed upon the question of credibility, and that the case was not one to be disturbed upon appeal, and cited, amongst other cases, *Toronto Ry.* v. *King*, [1908] A.C. 260, 77 L.J.P.C. 77, as a controlling decision. It is true that their Lordships of the Privy Council have said that the findings of the jury will not be set aside or a new trial ordered simply on the ground that such findings are not such as a Court of Appeal might have arrived at; but the decision was based upon the premise that there was evidence to go to the jury, which, in my opinion, was not the situation in the present case, and the case should have been withdrawn from the jury when that application was very properly made at the close of the plaintiff's case. Then, with respect to *Fraser* v. *Drew* (1900), 30 Can. S.C.R. 241, that is an authority which takes the inquiry really no further, as the decision there was that, where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence notwithstanding that the trial Judge was dissatisfied with the verdict.

In the present case, whilst I am of the opinion that the case should not have been submitted to the jury, I am further of the opinion, upon the whole case, that the verdict of the jury was not, upon the facts before them, the conclusion of reasonable men, *viz.*, a verdict for the plaintiff for 10% — commission on $24,000 — when the outstanding facts of the case to my mind are incontrovertible that the sale was made in absolute good faith through Frampton, without there being anything whatever in existence which would entitle the plaintiff to claim any commission upon the sale from the defendants.

Counsel for the respondent also cited *Reiffenstein* v. *Dey* (1912), 7 D.L.R. 94, 13 D.L.R. 76, 28 O.L.R. 491. In that case several trials had been had with a jury. A new trial was directed, upon

B. C.
C. A.
ASTLEY
v.
GARNETT.
M. Phillips, J.A.

the ground that there was no evidence whatever to warrant the finding of the jury that the plaintiffs were guilty of contributory negligence, and in the result it was directed that there should be a new trial and striking out the direction of the Divisional Court that the new trial should be had before a Judge without a jury. I agree with Meredith, C.J.O., wherein he states, referring to the class of action, being one of negligence for personal injuries sustained, at p. 80:—

> A jury is an eminently proper tribunal for the trial of the matters that are in issue between the parties.

But in the present case I cannot say that it was one that was best tried by a Judge with a jury. I would prefer to say that it was more fitting that it should have been tried by a Judge without a jury, and unquestionably had it been so tried the learned trial Judge would not have found as the jury did for the plaintiff. The verdict cannot be said to be other than perverse, and further, when of the opinion that there is no evidence capable of being adduced fitting in its nature to be submitted to a jury of reasonable men, one is constrained to say that the present case is not one that calls for the direction that a new trial be had between the parties. I had occasion, in *MacKenzie* v. *British Columbia Electric R. Co.* (1914), 15 D.L.R. 530, 19 B.C.R. 1, to deal with the question, when should a new trial *not* be directed? My view of the law then was—and I am of the same opinion still—that if there is not evidence sufficient to go to the jury upon which a jury could reasonably find a verdict against the defendant, the case should not be submitted to the jury (and with all respect, in my opinion the learned trial Judge erred in the present case in not withdrawing the case from the jury), and whether the jury disagree or render a verdict, judgment may be entered for the defendant by the Judge or the Court of Appeal. (Also see *Skeate* v. *Slaters Ltd.* (1913-1914), 30 T.L.R. (C.A.) 290.)

I would therefore allow the appeal, the appellant to have the costs here and below.

Appeal allowed.

STOVEL CO. v. DETREMAUDAN.

MAN.

K. B.

Manitoba King's Bench, Galt, J. July 14, 1914.

1. PRINCIPAL AND AGENT (§ II B—17)—UNDISCLOSED AGENCY—HUSBAND AS WIFE'S AGENT—RIGHT TO SUE BOTH, HOW LIMITED.

Where the husband, who appeared to be principal in the transaction in respect of work ordered done by him, was in fact acting for his wife, who was the real principal, the parties doing the work, on discovering that fact, may elect whether they will look to the husband or to the wife for payment, but are not entitled to judgment against both.

TRIAL of action for work done, involving question of undisclosed agency. Statement

Judgment was given for the plaintiff against the principal; action dismissed as to the other defendant.

E. F. Haffner, for plaintiffs.

F. G. Taylor, K.C., for defendants.

GALT, J.:—On August 21, 1913, the plaintiffs commenced this action against A. H. Detremaudan, claiming the sum of $602.77 as a balance due to the plaintiff for printing a special issue of the defendant's newspaper, "The Hudsons Bay Herald." After examination of the defendant for discovery, the plaintiffs ascertained for the first time that the proprietor of "The Hudsons Bay Herald" was Madeleine Detremaudan, wife of the first-named defendant, who had acted as attorney for his wife in connection with the matters in question. The plaintiff thereupon added Madeleine Detremaudan as a party defendant, and claims judgment against both. The defences consist almost entirely of denials of the plaintiffs' claim. Galt, J.

It appears that in or about November, 1912, one C. K. Skales approached the defendant, A. H. Detremaudan, with a view to persuading him to issue a special edition of "The Hudsons Bay Herald" in order to advertise that newspaper and bring in subscribers for it. Skales was to obtain advertisements, and was to be paid a commission on the results of his labours. A. H. Detremaudan at length agreed to this proposal, and on the suggestion of Skales decided that the special edition should be printed and published by the plaintiff company.

Skales resided in Winnipeg, and most of the work of obtaining advertisers, etc., was to be done here. He accordingly interviewed Maxwell McElheran, general superintendent of the plaintiff company, and outlined the scheme to him. Skales was slightly known to the plaintiffs in connection with other business matters,

MAN.

K. B.

STOVEL CO. v. DETREMAUDAN.

Galt, J.

but Detremaudan was not known at all. The plaintiffs, with a view perhaps of ascertaining exactly with whom they were contracting, on November 26, 1912, wrote the following letter, addressed to "The Hudsons Bay Herald," Le Pas, Man.:—

Gentlemen,—We herewith enclose copy of letter delivered to-day to Mr. C.K. Skales. We understand Mr. Skales has been collaborating with you in the publication of a special edition. Trusting that our action meets with your approval, and awaiting your further instructions, we are,

Yours truly, STOVEL COMPANY.

The letter referred to as having been delivered to Mr. C. K. Skales was also addressed to "The Hudsons Bay Herald," at Le Pas, Man., and reads as follows:—

Attention Mr. C. K. Skales.

Dear Sirs,—We hereby agree to print special edition of the "Hudson's Bay Herald" for you, to be delivered by about February 1st, 1913, for $35 per page. Copy to be in our hands not later than the 24th of December, 1912. Awaiting your further instructions, we are,

Yours truly, STOVEL COMPANY.

A great deal of evidence was called by the defendants from witnesses who happened to be present at one or more interviews, prior to the letters above quoted, between Skales and Detremaudan. These witnesses confirmed Detremaudan in his contention that it was specially agreed between him and Skales that he, Detremaudan, was to be under no liability whatever in connection with the publication of the special edition. Whatever be the truth in regard to the mutual arrangements between Skales and Detremaudan, the real question for decision is, what was the arrangement, if any, between Detremaudan and the plaintiffs.

On December 7, 1912, Detremaudan, writing from Le Pas, on a letter-head of "The Hudsons Bay Herald," shewing himself to be the editor, answers the plaintiffs' letter of November 26, as follows:—

Messrs. Stovel Company, Winnipeg, Man.

Attention Mr. C. K. Skales.

Gentlemen,—Answering your favour of the 26th ult., I beg to state that it is true I am collaborating with Mr. C.K. Skales in the publication of a special edition of "The Hudson's Bay Herald," and the prospects look satisfactory so far. In case Mr. Skales finally succeeds in obtaining the necessary advertising help required, as soon as he furnishes me with substantial proof that he has done so, I will advise you and forward you the material that I am supposed to furnish. The price of $35 a page for the printing is quite satisfactory to me.

It appears to me that this letter was a clear notification by

MAN.

K. B.

STOVEL CO. v. DETREMAUDAN.

Galt, J.

A. H. Detremaudan to the plaintiffs that he was willing to accept responsibility for the publication of the special edition.

In due course copy was prepared by this defendant, and a large amount of advertising was obtained by Skales and furnished to the plaintiffs, and the proof of the special edition was submitted to and revised by Detremaudan in accordance with the arrangement. The edition was duly got out. It resulted in a loss, and the plaintiffs' claim is for the balance due to them on the contract. I think it quite unnecessary to examine the various contradictions which exist in the evidence of the parties prior to the date of the above correspondence, which, to my mind, clearly fixes Detremaudan with liability.

At the conclusion of the trial I pointed out to counsel for the plaintiffs that the liability of the defendant Madeleine Detremaudan could only arise by virtue of her husband's agency, and I reserved my decision in order to consider the situation created by making both principal and agent defendants. The plaintiffs doubtless had a right to look to A. H. Detremaudan, who appeared to be principal in the transaction. They also had a right to hold Madeleine Detremaudan liable as soon as they discovered that she was the real principal. But they could not hold both. The plaintiffs acted under a misapprehension in attempting to hold both husband and wife liable. They have now elected to look to the husband. I therefore give judgment in favour of the plaintiffs against A. H. Detremaudan for the amount claimed, together with interest and costs. The action must be dismissed as against Madeleine Detremaudan with such costs as she incurred in her own defence.

Judgment for plaintiffs.

STOVEL v. DETREMAUDAN.

MAN.

K. B.

Manitoba King's Bench, Galt, J. November 14, 1914.

1. COSTS (§ II—37)—APPORTIONMENT; DIVISION—TWO DEFENDANTS; SAME CONTEST.

Where defendant's wife was joined as a defendant after her husband's examination for discovery and was represented by the same counsel at the trial, a judgment against the husband with costs but dismissing the action as against the wife with such costs as she incurred in her own defence solely because plaintiff elected to proceed against the husband as having held himself out as principal instead of taking judgment against the wife as the real principal, is properly worked out by allowing in the wife's costs one-half only of the counsel fee which would be taxable to her had she been the sole defendant and had succeeded.

MAN.

K. B.

STOVEL v. DETREMAUDAN.

Galt, J.

APPEAL from taxing officer.

The appeal was dismissed.

E. F. Haffner, for the appellant.

J. P. Foley, for the respondent.

GALT, J.:—This action was originally commenced against A. H. Detremaudan, but after an examination for discovery, it appeared that the defendant's wife was the real proprietor of the business conducted by A. H. Detremaudan. Thereupon the plaintiff obtained leave to add the name of Madeleine Detremaudan as a party defendant.

At the conclusion of the argument I pointed out to counsel for the plaintiff that A. H. Detremaudan had acted throughout in the capacity of agent for his wife, and, although his conduct may have been such as to estop him from contesting his liability, yet it would be impossible to give judgment against both the agent and the principal, and that he must elect as to which of the defendants he would look to. Shortly afterwards counsel for the plaintiff elected to look to A. H. Detremaudan, and I gave judgment in favour of the plaintiff against this defendant (20 D.L.R. 463) for the amount claimed together with interest and costs, but directed that the action be dismissed as against Madeleine Detremaudan, with such costs as she incurred in her own defence.

The bill of costs brought in on behalf of Madeleine Detremaudan appears to be a reasonable one; the total amount taxed (including counsel fee for two days' trial) amounting to $123.93. The taxing officer, in dealing with the items which are objected to, has adopted the plan of allowing to the defendant Madeleine Detremaudan one-half of the items charged—for instance, counsel fee charged at $125 has been allowed at $62.50. It is quite true that this defendant was only brought into the action at a comparatively late stage of it, but it was open to the plaintiff to have elected to hold her liable for the full amount of the plaintiff's claim and costs. I am unable to see that the taxing officer has erred in the course he adopted.

This appeal must be dismissed with costs.

Appeal dismissed.

DUFFIELD v. MUTUAL LIFE INSURANCE CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. November 30, 1914.

1. EVIDENCE (§ II E—156)—PRESUMPTIONS — DEATH — UNHEARD OF FOR SEVEN YEARS—BURDEN OF PROOF—R.S.O. 1914, CH. 183, SEC. 165.

As part of the evidence on the question of presumption of death of a person who has not been heard of for seven years as regards his life insurance under R.S.O. 1914, ch. 183, sec. 165, it is admissible to shew by the testimony of a person who was well acquainted with him that he had been informed by another acquaintance that the latter had within a year met the assured and that he was then leading a dissolute life. (*Per* Mulock, C.J.Ex., and Sutherland, J.)

2. INSURANCE (§ VI H—425)—LIFE INSURANCE—LIMITATION OF ACTIONS—UNHEARD OF FOR SEVEN YEARS—PRESUMPTION OF DEATH—BURDEN OF PROOF.

The life insurance company which pleads the bar of the action brought on the policy where the assured had not been heard of for seven years and was to be presumed dead, has cast upon it the onus of shewing that the death occurred more than one year and six months before the writ was issued, that being the period of limitation provided by R.S.O. 1914, ch. 183, sec. 165. (*Per* Mulock, C.J.Ex., and Sutherland, J.)

3. EVIDENCE (§ II E—156) — PRESUMPTION OF DEATH — UNHEARD SEVEN YEARS—BURDEN OF PROOF.

In a case of presumption of death of a person because he has not been heard of for seven years, the presumption simply is that he is dead, not that he died at any particular time; if after evidence warranting that presumption, it be of importance to the contesting party to establish the date of death, the onus is upon him to adduce evidence as to that fact. (*Per* Riddell, J.)

4. EVIDENCE (§ II E—156)—PRESUMPTION OF DEATH — UNHEARD SEVEN YEARS.

The seven years which raises the presumption of death are the seven years preceding the issue of the writ for the recovery of a claim based on that presumption. (*Per* Clute and Riddell, JJ.)

5. INSURANCE (§ VI H—425)—LIFE INSURANCE—LIMITATION OF ACTIONS —R.S.O. 1914, CH. 183, SEC. 165(2).

Where there is an absolute promise to pay in a life insurance policy and it is expressly provided therein that the payment of the sum insured shall not be disputed, sec. 165(2) of R.S.O. 1914, ch. 183, specifying one year and six months as a period of limitation does not apply; sec. 165 was enacted for the benefit of the representatives of the assured to override restrictions as to time of action contained in the policy and where there is no such restriction it has no application. (*Per* Clute and Middleton, JJ.)

Statement

APPEAL from the judgment of MIDDLETON, J., on an action for insurance.

October 6. The appeal was heard by MULOCK, C.J.EX., CLUTE, RIDDELL, and SUTHERLAND, JJ.

F. Arnoldi, K.C., for the appellants.

J. E. Jones, for the plaintiff, the respondent.

ONT.

S. C.

DUFFIELD v. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Mulock, C.J.Ex.

November 30. MULOCK, C.J.Ex.:—This is an appeal from the judgment of Middleton, J.

The action was begun on the 16th July, 1913, by Mary Jane Duffield, the mother of James M. Duffield, to recover the sum of $2,500, the amount of an insurance policy, dated the 20th May, 1901, on the life of the said James M. Duffield, payable to her on his death. Duffield disappeared, and had not been heard of for at least seven years prior to the commencement of this action; and, in consequence, the plaintiff claims that his death is to be presumed.

The defence is, that the claim is barred by the Statute of Limitations, and the defendants plead sub-sec. 2 of sec. 165 of ch. 183, R.S.O. 1914: "Where death is presumed from the person on whose life the insurance is effected not having been heard of for seven years any action or proceeding may be commenced within one year and six months from the expiration of such period of seven years, but not afterwards."

The insured, who had lived in the city of London, deserted his wife, Emily Duffield, in the year 1899, since which time she has not seen him. Duffield was of intemperate habits, and gave up business in London in the year 1900, becoming a wanderer, staying for a while at different places, namely, Hamilton, Buffalo, Toronto, Detroit, and elsewhere. He was very musical and fond of theatricals and associated with theatrical people.

His brother-in-law, Frederick Henry Heath, had met him in August, 1903, in Toronto, when Duffield stated that he was then residing in Buffalo. Dr. J. R. McDonald knew Duffield intimately, and in 1905, when coming by train from Chicago, was told at Sarnia by the conductor that within probably six months or a year he had met Duffield at Buffalo; that he was then living in Buffalo and playing the piano at a sporting house; that he had not reformed, but was drinking as heavily as ever. These statements were admitted without objection, and, if they are evidence, they shew that Duffield was alive in 1905.

In *Jackson ex dem. Miner* v. *Boneham* (1818), 15 Johns. (N.Y.) 226, the question was whether Miner was dead. A witness swore that she heard in 1776 that he was with the New York troops, but never heard of him again until fourteen years after

the war, when she was told that he had been killed, and it was held that this evidence was admissible for the purpose of shewing his death.

In *Scott* v. *Ratliffe* (1831), 5 Peters 80, 85, the question was when James Madison died. Mrs. Eppes, a witness, swore that she was acquainted with James Madison; that she resided in Petersburg, and that James Madison resided in Williamsburg, Virginia; that in the year 1811 she was in Williamsburg, and was told that Mr. Madison was dead. The trial Judge excluded this evidence, and an appeal was had to the Supreme Court of the United States, and Marshall, C.J., delivered the judgment of the Court, which held that Mrs. Eppes' evidence was admissible to prove the death of James Madison.

Following these cases, I think the evidence of Dr. McDonald was admissible, and establishes a starting-point from which to compute the period of seven years within which Duffield may not have been heard from. On the expiry of that period, the plaintiff became entitled to the insurance money; and the defendants, who plead the Statute of Limitations as a bar to the action, must shew that the death occurred more than one year and six months before writ issued, namely, before the 16th July, 1913.

In 1905, the conductor fixed the time when he had seen Duffield as being probably six or twelve months before his conversation with Dr. McDonald. Consistently with this evidence, the conversation may have taken place at about the close of 1905. If so, Duffield was alive either six or twelve months prior thereto. It was for the defendants to establish affirmatively that, reckoning the seven years from the time in 1905 when the conductor saw Duffield, the expiration of that period was at least one year and six months prior to the commencement of the action. This they have not done; and, therefore, their defence fails, and this appeal should be dismissed with costs.

SUTHERLAND, J.:—I agree.

CLUTE and RIDDELL, JJ., also agree in the result.

Appeal dismissed with costs.

SASK.

S. C.

BROWN v. CITY OF REGINA.

Saskatchewan Supreme Court, Lamont, J. September 15, 1914.

1. MUNICIPAL CORPORATIONS (§ II G—237)—OBSTRUCTION OF SEWERS—OVERLOADING THE SYSTEM—ADDITIONAL SEWERS—LIABILITY, TEST OF.

Where a city, for sanitary or other reasons, attaches additional sewers to its system, well knowing that such additional sewers will overload the system, it must be responsible for the damage resulting from such overloading, unless by contract with the owners of property served by such additional sewers it makes it a condition of granting a sewer connection that it shall not be liable for resulting damage.

Statement

ACTION for damages for flooding a cellar through defective sewers.

Judgment was given for the plaintiff.

J. F. L. Embury, K.C., for plaintiff.

G. F. Blair, for defendants.

Lamont, J.

LAMONT, J.:—The plaintiff's goods were damaged by water from the defendants' sewer backing up and flooding the cellar of the house on Garnet St. in which the plaintiff lived. The plaintiff occupied only one room in the house, and his goods and chattels were stored in the cellar. For the damage caused by the flooding he asks the city to pay. The defendants allege that the damage was not caused by any act or omission of theirs, but by an act of God in the form of an exceedingly heavy storm. On the evidence, particularly that of A. J. McPherson and L. A. Thornton, both engineers, the one a former commissioner of the defendant city, and the other a commissioner at the present time, I find that the defendant city's main sewer was already overloaded to the defendants' knowledge when they attached the Garnet St. sewer to the main sewer, and that the backing up of the water in the plaintiff's house took place as a result of the main sewer being overloaded. Mr. McPherson, in his evidence, said:—

> The defendants' sewer system, when constructed, was adequate for the area intended to be served by it, but the system was made to serve other areas, and was overloaded before there were any houses within three blocks of Garnet St. Therefore, when the Garnet St. sewer was attached, the main sewer was already overloaded.

And Mr. Thornton said, "the water backed up in the city sewers because the main sewer was overloaded." The backing up of the water which caused the damage to the plaintiff being a direct result of the deliberate overloading of the sewer system by the defendants, they are liable unless they can shew that on account of the unprecedented nature of the storm the damage to the plain-

tiff would have been the same, and that it would be unreasonable to expect them to provide a system capable of taking care of such a deluge. The onus of establishing this is on the defence. They have not satisfied that onus. They have established that the storm was exceedingly heavy, but they have not established that had the sewer not been overloaded the plaintiff would have suffered damage to the extent which he did suffer it, or at all. Where a city, for sanitary or other reasons, attaches additional sewers to its system, well knowing that such additional sewers will overload the system, it must be responsible for the damage resulting from such overloading, unless by contract with the owners of property served by such additional sewers it makes it a condition of granting a sewer connection that it shall not be liable for any resulting damage. The defendants are therefore liable to the plaintiff.

For books, pictures and photos destroyed, I allow the plaintiff $300. The claim for damage to furs was withdrawn, except as to $30, the cost of having the furs cleaned. This $30 I allow. Then there is a claim for four suits, two overcoats and six pairs of trousers, $340 in all. The suits, the plaintiff says, were all practically new, and were in a trunk. Concerning these clothes, the plaintiff says: "They may have been all right, but I didn't care to wear clothes so saturated." So he threw them out into the back yard, and they disappeared. I have no doubt the plaintiff did not feel like wearing suits saturated as these were, and in that feeling I entirely sympathise with him. But can I, on that account, say that they did not have any value at all? In the face of the fact, admitted by the plaintiff, that the furs saturated with the same water were by the cleaners so cleaned and purified that they were again serviceable for the plaintiff's own wear, I cannot, without evidence beyond the fact that the suits were similarly saturated, hold that they had no value. If the soaking did not damage the plaintiff's fur coat beyond what could be repaired by the cleaners at a small cost, it is difficult to see how the suits could be damaged to any greater extent. If they were not, they were of some value. If there had been any evidence that clothes saturated with this water would be, after drying and cleaning, unsanitary for wearing purposes, I would have held that they had no value at all, because they should not be worn; but in the

SASK.

S. C.

BROWN v. CITY OF REGINA.

Lamont, J.

absence of such evidence, and in view of the defendants' admissions in reference to the furs, I do not see how I can hold that they were absolutely valueless. The defendants are only liable for the difference between the value of the suits before they were soaked, and the value they had afterwards. As there was no evidence given upon which I can determine what that difference is, I cannot allow these items.

The plaintiff also claims in reference to a quantity of underclothing and bed-clothing also stored in the cellar. Some of the bed-clothing he sent to the laundry and had washed and cleaned, and subsequently used them. Why they were not all so cleaned I cannot see. Washable articles can be perfectly cleaned by being washed and laundered, and would not be damaged by the water unless left in it too long, of which there is no evidence. I disallow all items of this class. I allow damage to three pairs of slippers, $5; damage to trunk, $20; also one set of white silk vestments which were spoilt, $40. There will therefore be judgment for the plaintiff for $395, with costs on the District Court scale.

Judgment for plaintiff.

ONT.

S. C.

WATSON v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. November 13, 1914.

1. CARRIERS (§ III A—379)—SETTLER'S EFFECTS—CARLOAD LOT—AGENT—SCOPE OF DUTIES—EXCESS CHARGED—RECOVERY OF—RAILWAY ACT—R.S.C., 1906, CH. 37.

Excess freight charges collected at destination in respect of a carload lot of settler's effects over and above the amount quoted at the point of shipment and on the faith of which quotation the shipment was made may be recovered by the shipper who paid the same under protest; the contract by the railway agent for a lower rate than the ordinary one was within the apparent scope of the agent's authority and being in respect of settler's effects it was permissible under sec. 341 of the Railway Act, R.S.C. 1906, ch. 37, for the railway to make a specific bargain to carry one lot of such goods at a reduced rate subject to the action which the Railway Commission may take under sec. 341 to extend or restrict the railway's power in that respect, and the low rate quoted inadvertently was therefore not illegal as an unjust discrimination.

[*Toronto* v. *G.T.R.*, 11 Can. Ry. Cas. 365, and *Brampton* v. *G.T.R.*, 11 Can. Ry. Cas. 370, distinguished.]

Statement

APPEAL by the defendant company from the judgment of the County Court of the County of Kent.

The action was brought to recover the difference between the amount specified by the defendant company's agent at Mission

ONT.

S. C.

WATSON v. CANADIAN PACIFIC R.W. CO.

Junction, British Columbia, as payable on a car-load of settlers' effects shipped by the plaintiff there, and the amount demanded by the defendant company's agent at Chatham, and paid by the plaintiff under protest. The judgment of the County Court was in favour of the plaintiff for the recovery of $174.75 with costs.

J. D. Spence, for the appellant company.

R. L. Brackin, for the plaintiff, respondent.

Hodgins, J.A.

November 13. The judgment of the Court was delivered by HODGINS, J.A.:—Section 341 of the Railway Act, R.S.C. 1906, ch. 37, seems to dispose of this case without reference to the question so fully argued. But for that section the respondent would have had difficulty in establishing his claim. To recover back what he paid, he would have to set up and prove a contract which, if contrary to the statute, would be void.

The goods carried were "settlers' effects," and are so described in the bill of lading. The contract for their transportation has been fully performed; and, while it is clear that the rate stated was the result of inadvertence, it was within the apparent scope of the agent's authority, and the contract would govern the right of recovery in this case unless it was contrary to the statute and in that way an illegal one.

But it was argued that sec. 341 did not cover the situation here, but applied only to a rate made upon all settlers' effects and open to all persons shipping them. In other words, that "reduced rates" did not include a specific bargain to carry one lot of these goods.

I do not see anything in sec. 341 to refute the contention that a specific reduced rate may be made under it. The design of the Act to compel equality of treatment in the carriage of traffic is explicitly set out in certain sections, but the opening words of sec. 341 exclude these as controlling, *inter alia*, the carriage of settlers' effects at reduced rates. They are that "nothing in this Act shall be construed to prevent" such carriage at the reduced rates. How, then, can the Court insist on a construction applying these very sections, relief from which is expressly given?

In the case of *City of Toronto and Town of Brampton* v. *Grand Trunk and Canadian Pacific R.W. Companies*, 11 Can.

ONT.
S. C.
WATSON
v.
CANADIAN
PACIFIC
R.W. Co.
Hodgins, J.A.

Ry. Cas. 370, and in the case in the Supreme Court of Canada, *City of Toronto* v. *Grand Trunk R.W. Co. and Canadian Pacific R.W. Co.*, *ib.* 365, it was held that sec. 77 applied to the issue of commutation tickets under sec. 341. That decision, it was argued, shews that all reduced rates made under sec. 341 must be shewn to be free from undue preference or unjust discrimination; implying thereby that they must be open to more than one person. This would eliminate such a situation as the present.

There are several answers to this, I think. The decision of the Supreme Court was in a case where from its nature tickets must be issued to more than one person. Besides this, if the decision could be read as applying to every case under sec. 341—a conclusion certainly not warranted by the report—it may be fully complied with when the Railway Board's intervention, under the proviso with which sec. 341 concludes, is invoked. Neither sec. 77 nor the proviso operates to prevent the reduced rate being made, but they in fact assume its existence, and only give power to the Board to extend, restrict, limit, or qualify it. If the rate in question here, when granted and acted upon, was shewn to be limited in its operation to one specific instance, it might be extended by the Board to cover all similar cases: a possible consequence which the railway company must bear in mind when making its bargain. But that falls far short of prohibiting its being made at all.

Then again the carriage of traffic for the Dominion free or at reduced rates necessarily cannot include carriage for any other than the named shipper. Section 77 cannot be applied in the case of free carriage, for it is limited to the charging of lower tolls, and does not apply to cases where no charge is made.

It must also be borne in mind that if a lower and non-discriminating rate for all settlers' effects is what is provided for, then there is no necessity for sec. 341. Section 326, sub-sec. 3, already gives power to lower the tolls on any class or classes of freight classification, and at the same time that lower rate is subject to sec. 315, which provides for equality of treatment. The use of the words "reduced rates" indicates something less than the usual or normal rates previously fixed or used. The proviso at the end of sec. 341, to which I have referred, is, there-

ONT.

S. C.

WATSON v. CANADIAN PACIFIC R.W. CO.

Hodgins, J.A.

fore, on this point, a wholly unnecessary clause if sec. 319 governs, as it must do if action under sec. 341 is only to be upon the terms of equality to all.

It may be remarked in passing that in the *Brampton* case the question submitted to the Supreme Court was, whether sec. 341 was modified or affected by sec. 77 *or any other section of the Act*. The answer that sec. 77 is applicable may, therefore, have been intended to exclude the other sections, such as 315, 317, 319, and 320, which relate to the same subject-matter as 77.

These considerations indicate that the section now in question is intended to deal with exceptional cases of traffic upon a wholly different basis from the one underlying the tolls and tariff sections, which cover the main general business of railways. Unless, therefore, the section in question is so expressed as to carry into its provisions some inherent disability not derived solely from the other sections of the Act, its plain terms should govern.

It is unnecessary to consider the liability which, it was said, would flow from erroneous quotation of rates acted upon by the shipper, or the effect of the bargain in this case treated as an illegal contract. But it may be pointed out that by the interpretation section of the Railway Act the word "charge," when used as a verb with respect to tolls, includes "to quote;" so that the statement of the rate, if different from the tariff rate, is prohibited by sec. 315. This seems to weaken somewhat the reasoning upon which *Urquhart & Co.* v. *Canadian Pacific R.W. Co.* (1909), 2 Alta. L.R. 280, 12 Can. Ry. Cas. 500, is founded.

Appeal dismissed with costs.

HAIR v. TOWN OF MEAFORD.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. March 23, 1914.

1. JUDGMENT (§ II A—60) — BY CONFESSION — NO JUDICIAL INQUIRY IN MERITS—EFFECT OF—RES JUDICATA.

A judgment obtained by arrangement between the contending parties and without the court making any judicial examination of the merits of the question, does not become *res judicata*.

[*Jenkins* v. *Robertson*, L.R. 1 Sc. App. 117, and *Allan* v. *McTavish*, 8 A.R. (Ont.) 440, referred to.]

2. INTOXICATING LIQUORS (§ I C—33) — LOCAL OPTION — PROCEDURE AND ELECTION—REMOVAL—LIMITATIONS.

A municipal council cannot by its consent interfere with the statutory prohibition of renewal of a local option contest for three years

ONT.

S. C.

HAIR
v.
TOWN OF MEAFORD.

after a vote properly taken, nor with the right of the electors to compel the submission of the question by a properly signed petition where the three year limitation does not apply; nor can the council's admission on the pleadings in an action against the municipality for a declaration that a by-law had not been legally submitted, give jurisdiction to the court to bind other ratepayers not before it by a judgment which is nothing more than a private bargain between the municipality and the suing ratepayer that the statutory provisions shall not be effective against him and other ratepayers in the like interest.

[*Re Vandyke and Grimsby*, 19 O.L.R. 402; *Stoddart* v. *Owen Sound*, 8 D.L.R. 932, and *Carr* v. *North Bay*, 13 D.L.R. 458, and *Re Hickey and Orillia*, 17 O.L.R. 317, considered.]

3. INTOXICATING LIQUORS (§ I C—30)—LOCAL OPTION—MUNICIPAL REGULATION—LEGISLATIVE ACT—VALIDITY OF BY-LAW.

The act of a municipal council in passing a local option by-law is a legislative act and so would be its repeal by the council; and the court has no jurisdiction to compel the repeal of the third reading of a by-law by mandatory order to the council, whether or no an interim injunction against the third reading remained effective pending an appeal from the trial judgment.

Statement

APPEAL from the judgment of HODGINS, J.A., dismissing an action for an injunction to restrain the Municipal Corporation of the Town of Meaford and the council thereof from passing a certain local option by-law.

A. E. H. Creswicke, K.C., for the appellant.

W. E. Raney, K.C., for the defendants, respondents.

Mulock, C.J.Ex.

THE JUDGMENT of the Court was delivered by MULOCK, C.J. Ex.:—The action is for an injunction to restrain the Municipal Council of the Town of Meaford from passing a certain local option by-law.

An interim injunction was granted, to continue until Monday the 2nd day of February, 1914, at the hour of eleven o'clock in the forenoon, or "until such time as the trial hereof to be on that day had shall have been heard and disposed of," restraining the council from passing the by-law.

The trial was held on the 2nd February before Mr. Justice Hodgins, who, on the 11th February, delivered judgment dismissing the action; and on the same day the formal judgment was issued dismissing the action and declaring the injunction dissolved.

On the 12th February, notice of appeal was given, and on the 13th February, the appeal was set down. On the 16th February, the council passed the by-law.

Whether or not the injunction was then in force, the by-law had been passed and become law, and nothing short of its rescis-

sion would secure to the plaintiff any relief which it is open to the Court to grant to him in this action.

Such relief could only be enforced by mandatory order.

The plaintiff, in his statement of claim, alleges that in the year 1913 a similar by-law had been submitted to the electors at Meaford, and defeated; and that, under the Liquor License Act, a second by-law for the same purpose could not be submitted for a period of three years.

He also attacks the various proceedings connected with the by-law in question, including the voting thereon.

It is open to the plaintiff to raise these questions on the motion to quash the by-law; nevertheless we are in effect asked to compel the council by mandamus to repeal the third reading.

The act of the council in passing the by-law was a legislative act, and its repeal would be an act of the like character, and we are aware of no jurisdiction in the Court to compel legislation such as would be involved in repealing the third reading.

Further, even if it were open to the Court to issue a mandatory order directing such repeal, it is to be observed that the Court exercises extreme caution in granting mandatory orders, only doing so in cases where the remedy of damages is inadequate in order to meet the ends of justice, or where procedure by mandamus in order to restore matters to their former condition is the only available remedy.

There being here another remedy open to the plaintiff, the Court should not exercise its extraordinary jurisdiction of dealing with the matter by way of mandamus.

For this reason, therefore, the appeal must fail.

There may be also another formidable difficulty in the way of the plaintiffs.

The judgment of the Court dissolved the injunction on the 11th day of February. It was granted only until the trial was "heard and disposed of." No proceedings by way of appeal were taken on the 11th February. Was there any injunction in force on that day after the judgment was entered? If not, it is difficult to understand how proceedings by way of appeal, short of an order of the Court, would bring into existence an injunction which had been dissolved.

ONT.

S. C.

HAIR v. TOWN OF MEAFORD.

Mulock, C.J.Ex.

Thus it may be that, in giving the by-law a third reading, the council was not violating any order of the Court.

However, for the purposes of this appeal, it is not necessary for us to pronounce an opinion upon that point.

The only remaining matter to consider is that of costs. The injunction was sought at the hands of certain members of the Licensed Victuallers' Association, or persons interested in that association. Mr. Kennedy was one of them, and this plaintiff was acting for Mr. Kennedy and others. They had all united in retaining a solicitor to promote the common object, the whole body speaking through Mr. Haverson, their solicitor.

As the result of the arrangement come to, the authorities granted licenses to the interested applicants, members of the association, and the council in turn sought to give effect to the arrangement so far as the local option people were concerned, by submitting the new by-law.

Under these circumstances, we think it proper, in dismissing the appeal, to do so without costs.

Appeal dismissed without costs.

B.C.

C. A.

WRIGHT v. W. CANADA ACCIDENT & GUARANTEE INS. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. July 14, 1914.

1. PRINCIPAL AND SURETY (§ I B—10)—CONTRACT—SURETY — RELEASE OF —SURETY DEPRIVED OF RIGHT UNDER CONTRACT—OMISSION BY CONTRACTOR.

To release the contractor's surety who has guaranteed the completion of a contract for excavating a building site, there must be some act done which deprives the surety of a right under the contract or of the power to insist on its exercise, or some omission to do some act which the contractor has contracted with the surety to do or to preserve some security to the benefit of which the surety is entitled.

[*Kingston upon Hull* v. *Harding*, [1892] 2 Q.B. 501; *Croydon Gas Co.* v. *Dickenson*, 2 C.P.D. 51, referred to.]

Statement

APPEAL by defendant from judgment of Gregory, J.

The appeal was dismissed.

F. J. Stacpoole, K.C., for appellant, defendant.

E. C. Mayers, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—By its terms the contract, ex. 2, requires the construction company to excavate for the basement of the building as well as to erect it. Nothing is said as to the character of the material to be excavated, and hence *prima facie*

at least, the contractors were bound to excavate rock as well as earth if rock should be encountered. But it is manifest from their subsequent acts and conduct that both the plaintiff and the contractors understood that if rock should be encountered something extra should be paid to the contractors for excavating it. Some evidence of a custom to pay extra for such work and to extend the time for completion of the building on account thereof was offered, but in my opinion it falls short of proving such a custom so as to affect the rights of the guarantors. In the view I take of this case on another ground, the question of custom becomes of no importance. When the rock was encountered the contractors notified the plaintiff of that fact and asked that an extra price should be paid for the removal of the rock, and that the time fixed by the building contract should be extended. This request was acceded to, and a contract was entered into fixing the extra price, and by letter of the architect written with the plaintiff's approval, the time was extended. The defendants who had entered into the bond sued on guaranteeing the due completion of the contract were not consulted, and they now contend that this extension of time released them from their obligation.

I am of the opinion that there was no binding extension for the reason that it was not founded on a valuable consideration. If the contractors were obliged under their contract to excavate irrespective of the material they might encounter, a subsequent agreement to do what they were already bound to do is no consideration. But taking a more liberal view of the contract, and the one which in the light of the plaintiffs subsequent conduct appears to me to be the correct one, that rock-work would be an extra, the subsequent agreement was nothing more than an agreement to fix the price to be paid for it as contemplated in article 3 of the original contract.

The situation then was that the plaintiff either under the impression that he was obliged under the contract to pay extra for rock-work, or being willing to do it, agreed with the contractors upon a price, and there is no suggestion that the price was affected one way or the other by the extension of time. If the contractors had said we will do this extra work at a lower

B. C.
C. A.
WRIGHT
v.
W. CANADA ACCIDENT & GUARANTEE INS. CO.
Macdonald, C.J.A.

price than we are entitled to charge for it if you will extend the time for completion of the building, and the plaintiff had agreed accordingly, then there would undoubtedly have been consideration given by the contractors to him for the extension, but there is nothing in the case from which such an agreement can be inferred, and if I am not at fault in my recollection of his argument, counsel for the defendants did not suggest that there was. On the contrary both parties seem to have had the idea that by some vague sort of custom or local usage, the contractors had a right to an extension when rock had been encountered.

I am also of the opinion that there is nothing in any of the other grounds of appeal to justify interference with the judgment appealed from.

I would, therefore, dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—As stated by Lord Loughborough in *Rees* v. *Berrington* (1795), 2 Ves. 543, it is the clearest and most evident equity not to carry on any transaction without the knowledge of the surety who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.

The bond given by the defendants did not contain a clause providing that the surety's liability should not be affected by breaches of building contract, such as is set out in the Encyclopædia of Forms, vol, 6, 246.

The result is that the liability of the defendants must depend on the strict adherence to the contract which is incorporated in the bond.

Conceding this, I would nevertheless dismiss this appeal on the following grounds:—

(1) The granting of the rock contract did not violate the bond. (2) What was done was for the advantage of the principal and his surety. (3) There was not such a grant of further time as would discharge a surety. (4) There was no binding contract to extend the time.

According to *Jones* v. *St. John's College*, 40 L.J.Q.B. 80, the contractor was bound to do this rock-work. But as the architect thought that by some local custom this was work not

to be regarded as included in the contract, he gave the contractor an additional sum for doing it, and postponed the time for completion.

I do not think any custom or local usage was proved to exist. It would be an unfortunate thing if slackness on the part of some architects would prove an established custom. Nor do I think the architect had power to alter a written contract by adding thereto a supposed custom: see *Re North-Western Rubber Co. & Huttenback*, [1908] 2 K.B. 907.

Mr. Justice Amphlett in *Croydon Gas Co.* v. *Dickenson* (1877), 2 C.P.D. 46 at p. 51, said:—

> The rule that when time is given or the position of the surety has been altered by the dealings of the principals, the surety must be discharged . . . must be taken with certain limitations. If it depends upon inquiry, the Court will not go into that inquiry, and unless the fact is self-evident, the Court will not consider the question, and of course the rule will not be applicable where the change cannot be otherwise than advantageous to the surety.

He illustrates this as where as creditor reduced his demand.

In *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495, Cotton and Thesiger, L.JJ., at p. 505-6, accept this statement as the law, and lay down in the plainest terms that where it is, without inquiry, evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged. In cases where it is not self-evident, then it is a matter for the surety to decide. The paying extra (for it amounts to that) for the removal of something the contractor was bound to do is manifestly for his advantage. That disposed of one point.

As to the extension of time. In this case the contract of necessity contemplated the contractor being bound by the arbitrament of the engineer or architect. It also contemplated an extension of time for completion.

In *Kingston-upon-Hull* v. *Harding*, [1892] 2 Q.B. 494, 501, the jury found that the contract had not been complied with, that the work had been scamped and fraudulently done; that the plaintiffs were cheated by the way the work was done, that the certificates issued by the architect had been obtained by fraud of the contractors; and that there was an omission on the part of

B. C.

C. A.

WRIGHT v. W. CANADA ACCIDENT & GUARANTEE INS. CO.

Irving, J.A.

the corporation to properly superintend the work. The sureties tried to escape on these findings, but failed to do so.

In the judgments of the Court of Appeal it is pointed out that it is not every failure on the part of the owner to exact the uttermost from the contractor, that entitles the surety to be discharged. To release the surety there must be some act done which deprives the surety of a right under the contract or of the power to insist on its exercise, or some omission to do some act which the contractor has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled. The extension of the time for completion consequent upon the architect's construction of the contract does not fall within these cases.

The provision as to completion on or before a fixed day, with a penalty thereafter was for the owners benefit, because the owner signified his willingness not to look for completion. The expression of intention to extend the time was not founded on any valuable consideration, as the contractor was in any event bound to do this excavation: See Leake on Contracts (6th ed.) p. 444. If—and then it might be a good consideration—, the transaction amounted to a compromise, that is to say if there was a reasonable doubt to be settled by the arbitrator architect, then the surety would remain bound under the bond and contract.

Martin, J.A.

MARTIN, J.A.:—This appeal in my opinion should be dismissed because, apart from other matters not necessary to discuss, the judgment can be supported on the ground that according to the custom or usage of the building trade in Victoria when rock is unexpectedly struck in making an excavation the additional cost of excavating the same is treated as an extra, and a new contract is made to cover the cost and the time for completion of the original contract is extended. The evidence in support of the custom is that of two architects at pp. 17, 19, 21 and 22 of the appeal book, and it is not disputed, and sets up facts which sufficiently establish it within the authorities which will be found conveniently cited in Taylor on Evidence, pars. 1187-9, and Phipson on Evidence (1911), 91-2, in the latter of which it is said:—

A business usage, as distinguished from a common law custom, need not be long established, or strictly uniform; it is sufficient if it be reasonably certain, and so notorious and generally acquiesced in that it may be presumed to have formed an ingredient of the contract.

B. C.

C. A.

WRIGHT v. W. CANADA ACCIDENT & GUARANTEE INS. CO.

Martin, J.A.

There can be, in my opinion, no question of the reasonableness of such custom in Victoria where the rocky formations which add so much to the picturesque beauty of the locality yet have a way of turning up in unexpected places.

I note that the citation, which we were given by the appellant's counsel, from 15 Hals. par. 1038, p. 555, that "custom of trade does not justify the creditor in agreeing to give time to the principal debtor" is too broadly stated and is misleading, the cases cited in support of it referring simply to the private practice or custom of the creditor in the conduct of his own business, and not to a general usage of trade.

GALLIHER, J.A.:—The grounds upon which appellants seek to evade payment under their bond which were seriously urged before us, were:

Galliher, J.A.

(*a*) The granting of an extension of time to the contractors in which to complete the building in question; (*b*) The making of the contract for excavation of rock materially varies the first contract entered into.

These two grounds may be considered together.

The plans and specifications in the original contract provided for earth excavation for foundation and basement, no provision being made in case rock was encountered.

After this excavation was started a large quantity of rock was encountered, and the contractors wrote to plaintiff on September 9, 1912, asking that this matter be taken up and arrangements made for excavating same and for an extension of time in consequence thereof.

This was granted by plaintiff in a letter written to the contractors by L. W. Hargreaves, plaintiff's architect, dated September 25, 1912, extending the time from December 31, 1912 to February 21, 1913, and on the same day a contract was entered into between the contractors and the plaintiff for such rock excavation for the sum of $3,243, less the sum of $902 for yardage of clay not excavated according to the original contract.

B. C.

C. A.

WRIGHT v. W. CANADA ACCIDENT & GUARANTEE INS. CO.

Galliher, J.A.

The defendants had no notice either of the extension of time or of this second contract.

The rule as laid down in the decided cases and summed up in Halsbury's Laws of England, vol. 15, p. 546, par. 1025, is as follows:—

> Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract the performance of which is guaranteed. When a person becomes surety for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract, and if the creditor, without the consent of the surety, alter those terms to the prejudice of the surety, the latter will be free, it being the clearest and most evident equity not to carry on any transaction without the privity of the surety, who must necessarily have a concern in every transaction with the principal debtor, and who cannot as surety be made liable for default in the performance of a contract which is not the one the fulfilment of which he has guaranteed.

We have to consider—was the granting of the extension of time for completion and the entering into the contract for rock excavation, material variations of the terms of the contract, or could it be said that they were within the contemplation of the contract?

Rock underlies all of the city of Victoria at greater or less depth, and in many cases outcrops many feet above the surface of the ground, and in this particular case after excavation was started rock was encountered which it was necessary to remove, the cost of which was fixed by contract at exceeding $3,000.

The result of this was to render it practically impossible to complete the contract within the time first limited.

What was done in regard to extending the time seems to me to have been so advantageous both to the contractor and to the sureties who guaranteed the completion of the contract, that in the words of Amphlett, J.A., in *Croyden Gas Co.* v. *Dickinson* (1876), 2 C.P.D. at p. 51, "the rule (as to extension of time) will not be applicable where the change cannot be otherwise than advantageous to the surety."

Article III of the contract which was incorporated in the bond contemplates alterations in the work, and I do not think it is going too far to say that what was done here in entering

into the new contract for excavation of rock was covered by section III of the original contract.

I also think there was no valuable consideration for the extension of time granted by the owner.

The appeal should be dismissed.

MCPHILLIPS, J.A., concurred with MACDONALD, C.J.A.

B. C.

C. A.

WRIGHT v. W. CANADA ACCIDENT & GUARANTEE INS. CO.

MUNRO v. HOESCHEN.

SASK.

S. C.

Saskatchewan Supreme Court, Lamont, J. September 11, 1914.

1. VENDOR AND PURCHASER (§ I D—20)—DESCRIPTION—VARIANCE BETWEEN SIGNED CONTRACT AND CONVEYANCER'S ENDORSEMENT—EFFECT.

Where in a contract the land sold is described in a certain way and the parties thereto have affixed their signatures to that contract, a subsequent purchaser is justified in relying on the description contained in the contract certified by the signatures of the parties as against a summarized description varying therefrom and unsigned, which had been endorsed by the conveyancer upon the contract.

ACTION for damages for breach of contract. Statement

Judgment for plaintiff against society; action dismissed as to Hoeschen.

H. Y. MacDonald, K.C., for plaintiff.

J. A. Allan, K.C., for defendant Hoeschen.

P. E. Mackenzie, K.C., for defendant society.

LAMONT, J.:—By an agreement in writing bearing date March 28, 1904, the defendant company agreed to sell to one Grace Brown the north-west quarter of legal subdivision 16 (excepting the right-of-way of the C.N.R.) and the fractional portion of legal subdivision 15, lying east of the South Saskatchewan River, in section 20, township 36, range 5, west of the 3rd meridian, for $382.50, payable by instalments. The agreement alleged that the land sold contained eight and a half acres more or less. As a fact, the portion of the north-west quarter of legal subdivision 16 sold comprises 7.88 acres. The fractional portion of legal subdivision 15, lying east of the river, comprises 4.61 acres, divided as follows: .22 acres in the north-east quarter and 4.39 acres in the south-east quarter of the subdivision. By another agreement in writing bearing date August 16, 1905, the defendant company sold to the plaintiffs the said south-east quarter of legal subdivision 15, for $337.50, also payable by instalments, the final payment to be made in 1911. In October, 1906, the defendant Hoeschen visited Saskatoon with a view of securing Lamont, J.

SASK.

S. C.

MUNRO v. HOESCHEN.

Lamont, J.

a piece of land suitable for a site for a brewery. He went over a portion of legal subdivision 16 with H. E. Munro, who pointed out to him certain other adjacent lands then owned by the plaintiffs. Hoeschen selected a portion of the property of Grace Brown as most suitable for his purpose, and agreed with Walter Brown, the husband of Grace Brown, that he would purchase that portion of Grace Brown's property lying between the railway track and the river for $3,500. Hoeschen and the Browns went to Saskatoon to complete the deal. There Mr. Sumner, to whom they went to have the necessary documents drawn up, informed them that the defendant company would not accept an assignment of part of the property covered by the contract. Hoeschen then agreed to buy the whole of the property covered by Grace Brown's contract for $4,500. An assignment was drawn up and executed and forwarded to the defendant society, and on October 23, 1906, the society issued a transfer to Hoeschen covering the north-west quarter of legal subdivision 16 and the fractional part of legal subdivision 15 lying east of the river. Hoeschen registered the transfer and obtained a certificate of title. In November, 1906, Hoeschen saw some men on the south-east quarter of legal subdivision 15. They told him it was Dr. Munro's land. He told them it was his land. He spoke to Munro about it. Munro got his contract, and they compared the contract with the certificate of title and found that both covered the south-east quarter of legal subdivision 15. Notwithstanding that Hoeschen had the title for the land in dispute, the plaintiffs went on making payments under their agreement until 1911, when it was paid up. They then demanded and obtained a transfer from the defendant company. The transfer could not, as they well knew, be registered, because Hoeschen had the title. In February, 1913, the plaintiffs brought this action, and they now contend that Hoeschen is not entitled to the 4.39 acres embraced in the south-east quarter of legal subdivision 15, on the ground (1) that he knew when he took the assignment from Grace Brown that the said lands belonged to the plaintiffs and that they held them under an agreement of sale from the defendant society, and (2) that he knew at such time that Grace Brown had never understood or interpreted her agreement as giving her any claim to the said land, and that the description

of the fractional part of legal subdivision 15 was a mistake and should have read, "the fractional part of the north-east quarter of legal subdivision 15."

On the evidence, I am of opinion that the plaintiffs must fail. There is no evidence on which I can find that Hoeschen knew the plaintiffs had any agreement from the defendant society for this land. Dr. Munro says he told him that the plaintiffs owned all the land south of a fence which ran part way at least across subdivision 16 near its south line. Hoeschen says he walked along the railway track with Munro, who shewed him lands mostly on the east side of the railway track and which the plaintiffs were endeavouring to sell. Hoeschen also says, and in this I accept his testimony, that the first time he knew that the plaintiffs had or claimed to have any interest in the south-east quarter of legal subdivision 15 was when the men he saw on the land informed him that it belonged to Munro. The circumstances under which he purchased, in my opinion, make his testimony in this regard very probable. When he arranged with Walter Brown for the brewery site, I am satisfied the land in dispute was not within his contemplation; but when he found he could not get the defendant company to make a title to a portion of the Brown holding it was clearly his intention to purchase all the land covered by the Brown contract. How much land was covered by the fractional part of legal subdivision 15 east of the river he did not know, nor do I think that he cared. It comprised the face of the river bank, and was very rough, and for the purpose he had in view he says it was of no value. He was getting the part that was valuable as a brewery site, and the rest he was taking because he had to.

Then it is contended he had notice that only the north-east quarter of legal subdivision 15 was covered by the Brown contract, because on the back of the contract the conveyancer had endorsed the words, "n.w. ¼ 16 & fr. of n.e. ¼ of 15 east of river." Where, in a contract, the land sold is described in a certain way, and the parties thereto have affixed their signatures to that contract, a subsequent purchaser is justified in relying on the description contained in the contract certified by the signatures of the parties as against another description endorsed on the back of the contract by the conveyancer but not certified by the signature of the

SASK.

S. C.

MUNRO v. HOESCHEN.

Lamont, J.

parties. Again, it was argued that Grace Brown never understood that her contract related to the south-east quarter of 15. What Mrs. Brown understood, if she had any understanding at all as to what the fractional part of legal subdivision 15 comprised—which I very much doubt—is, in my opinion, immaterial, so long as no intimation was made to Hoeschen that the agreement was different from what it appeared on its face to be. The evidence does not shew that any such intimation was ever made. I cannot find anything in the nature of fraud on the part of Hoeschen in the transaction. The plaintiffs' action, therefore, as against him, will be dismissed with costs.

As against the defendant society, I think the plaintiffs are entitled to succeed. The society sold the land to the plaintiffs, and by its own act made it impossible to fulfil its contract. Counsel for the society argued that under the contract the only damages the plaintiffs could obtain were a return of the moneys they had paid and interest. I do not think this is so. The adverse possession under a valid title therein referred to does not mean a valid title given by the society itself in breach of its contract with the plaintiffs.

The amount of damages to be allowed is a difficult matter. In October, 1906, the whole property purchased by Hoeschen, of which the land in question was of the least value, was worth $4,500, or $360 per acre. In November of the same year the plaintiffs knew they could not get title to the land. In 1907, according to the testimony of G. Munro, the land had no market value. From 1908 to 1911 its selling value increased, and was put by some of the witnesses as high as $30,000. At the date of the trial, 1914, it again had no market value. The high price placed upon it in 1911 was purely speculative, and bore no relation to its real value, which I fix at $600 per acre.

There will therefore be judgment for the plaintiffs against the defendant society for $2,634, and costs.

Judgment for plaintiffs against the society; action dismissed as to Hoeschen.

McGREGOR v. WHALEN.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. June 15, 1914.

1. Sale (§ I B—5)—Passing of title—Delivery—Sufficiency of—Retention of vendor's lien.

Where a bargain and sale is completed with respect to goods, and everything to be done on the part of the seller before the property should pass has been performed, then the property in the goods vests in the purchaser, although the vendor still retains his lien, the price of the goods not having been paid.

[*Sweeting* v. *Turner*, L.R. 7 Q.B. 313, and *Tarling* v. *Baxter*, 6 B. & C. 360, applied.]

2. Sale (§ I B—5)—Delivery—Standing timber—Severance—Effect of.

On a sale of a quantity of logs of stated dimensions to be taken out of the seller's standing timber by the buyer by which the latter acquired the right to cut all the timber of a suitable class upon the land, the severance from the freehold makes the cut timber chattels.

[*McGregor* v. *McNeil*, 32 U.C.C.P. 538, followed.]

3. Sale (§ III B—61)—Vendor's lien—Loss of—Parting with possession.

A vendor's lien for the price of chattels sold is lost when he parts with possession by a wrongful sale of the chattels to another.

[*Mulliner* v. *Florence*, 3 Q.B.D. 484, referred to.]

Statement

Appeal from the judgment of Britton, J.

H. Cassels, K.C., for the appellant.

Casey Wood, for the defendant Whalen.

H. E. Rose, K.C., for Niemi.

Mulock, C.J.Ex.

June 15. Mulock, C.J.Ex.:—This is an action for damages because of the conversion of certain chattel property, and was tried by Britton, J., who took the opinion of the jury on two questions, but otherwise dealt with the facts himself and dismissed the action. The appeal is from his judgment. The facts are as follows:—

Mickalai Niemi owned certain piling, some thereof being then cut and some standing upon lot No. 8 in the 2nd concession of the township of Strange, and he entered into the following agreement respecting the same: "Whitefish, Ont., Nov. 16, 1912. To whom it may concern. I hereby agree to sell to A. McGregor, of Stanley, 350 pieces of piling, cut and standing in bush as they are on lot 8, con. 2, township of Strange, for $2 per stick; same to be suitable to the requirements of the Canadian Stewart Co.; about 60 ft. long, 12 inches, 2 feet from butt, and 6 inches in top; the piling are to be paid for before loading or leaving Whitefish siding."

ONT.
S.C.
McGREGOR
v.
WHALEN.
Mulock, C.J.Ex.

This agreement, which is not signed by the plaintiff, was put in at the trial. During the argument before us, a duplicate of this agreement, signed by McGregor, was produced.

At the time of this contract, 9 piles were cut and lying on the said lot 8, and, within a couple of weeks thereafter, the plaintiff cut 82 piles, and caused them, together with the 9 already cut, to be stamped with the name of the Canadian Stewart Company, being the company to which the plaintiff intended to sell them. These 91 piles remained on lot 8, and in the following July the plaintiff informed one Dolan, the agent of the defendant Whalen, that he had a quantity of piles for sale, stating where they then were. Dolan expressed a wish to contract with the plaintiff for the purchase of 500 piles in all, the same to include the 91 in question, but nothing came of these negotiations.

Shortly thereafter, the plaintiff agreed to sell to the Stewart company 500 piles, including in the number the 91 in question, and on the 27th July he, with men and teams, proceeded to the district where Niemi's lands lay, in order to get out the additional number of piles, but then learned that on the previous Wednesday Niemi had sold the 91 piles in question to the defendant Whalen.

The plaintiff then went to lot 8, where the piles still were, and stamped them with his own initials. Niemi, by writing dated the 28th day of August, 1913, sold to Whalen the 91 piles, and authorised him "to remove the said piles at once." Whalen then took possession and sold them to the defendant company for $819, which amount the company paid into Court to abide the result of this action. In the event of the defendant Whalen being liable, he claims indemnity over against Niemi, who has been added as a third party.

The following are the questions submitted to the jury with their answers:—

(1) Did the defendant Whalen, before the purchase by him from Niemi, have notice of the agreement between McGregor and Niemi? A. Yes.

(2) Did McGregor, the plaintiff, leave the piling beyond what was a reasonable time for taking it away under the contract? A. Yes.

ONT.
S. C.
McGregor v. Whalen.
Mulock, C.J.Ex.

The learned trial Judge dismissed the plaintiff's action and the defendant Whalen's claim against Niemi, and ordered that out of the money paid into Court there be paid to the defendant company for costs $20, to Whalen $356, and to Niemi $443.

The first question to determine is what interest the plaintiff acquired, under the agreement, in the 91 piles. It reads, "I hereby agree to sell," etc. Is this an executory or an executed contract? It is open to either interpretation; and, therefore, the situation of the parties, the subject-matter of the contract, and other surrounding circumstances, may be taken into consideration in order to ascertain the intention of the parties. From them it seems that the purchaser was to have the right at once to cut the piles, and, on payment therefor, to ship them and those already cut. Nothing remained for the seller to do. These circumstances indicate that the agreement was for an immediate and not a prospective sale: *Tarling* v. *Baxter*, 6 B. & C. 360.

So far as appears from the evidence, there were not more than 350 piles, cut and uncut, in the woods. Thus the contract entitled the plaintiff to cut all those then standing, being the only ones to which the contract could apply (*Swanwick* v. *Sothern* (1839), 9 A. & E. 895); and, as soon as severed from the freehold, if not before, they became chattels (*McGregor* v. *McNeil* (1882), 32 U.C.C.P. 538); thus what were sold were either ascertained chattels at the time of the contract or became such immediately upon severance.

In *Tarling* v. *Baxter*, *ante*, the contract arose out of two written memoranda, one signed by the vendor, the other by the purchaser. The vendor's memorandum of sale was as follows: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first of May next." The purchaser's memorandum added the term "the same hay not to be cut until paid for," and Bayley, J., said: "Where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee." So in *Wood* v. *Bell* (1856), 5 E. & B. 772, 791, 792, *per* Lord Campbell, C.J.: "Where a bargain is made for

ONT.
S. C.
McGREGOR v. WHALEN.
Mulock, C.J.Ex.

the purchase of an existing ascertained chattel, the general rule, in the . . . absence of opposing circumstances, is, that the property passes immediately to the vendee." And in *Sweeting* v. *Turner* (1872), L.R. 7 Q.B. 310, 313, Blackburn, J., says: "It is thoroughly established . . . that by the English law, where a bargain and sale is completed with respect to goods, and everything to be done on the part of the vendor before the property should pass has been performed, then the *property* vests in the purchaser, although the vendor still retains his lien, the price of the goods not having been paid."

The fact that the plaintiff was obliged to cut the uncut piles and remove them, and also remove those cut at the time of the contract, from the vendor's premises, within a reasonable time, does not prevent the property passing: *Turley* v. *Bates* (1863), 2 H. & C. 200.

The circumstances of the present case might support a finding that the purchaser took actual possession, and that the vendor's only remaining control over the piles was the right to prevent their being loaded or shipped before payment of the purchase-money, and in that case not only the property but also the actual possession passed to the purchaser.

In *Cooper* v. *Bill*, 3 H. & C. 722, which was an action of detinue for timber sold on credit, Pollock, C.B., says (p. 729): "The vendors allowed him (the vendee) to measure the timber, mark it with his initials, and expend money in having it squared. I think those acts are evidence of a taking actual possession."

But, adopting the view most favourable to the defendants here, namely, that the vendor retained his lien, which implies that he also retained possession, his position was, that he was in possession of the purchaser's property with the right to retain it until his lien was discharged. The piles when cut had become the property of the plaintiff, subject at most to the vendor's lien, and delay in their removal did not divest him of the ownership, nor was he in default in payment of the purchase-money. By the terms of the contract, the purchase-money was not payable until the plaintiff sought to load or ship the piles. He was entitled to remove them from off the vendor's land and leave them where he liked, and as long as he wished, without payment, provided he did not attempt to load or ship them.

ONT.
S. C.
McGregor v. Whalen.
Mulock, C.J.Ex.

The vendor had a mere passive right to detention, no right to sell: *Thames Iron Works Co.* v. *Patent Derrick Co.*, 1 J. & H. 93; Halsbury's Laws of England, vol. 19, p. 25.

Thus the vendor was guilty of an actionable wrong in selling the plaintiff's property and is liable in damages.

It was further contended before us that the defendant Whalen was a *bonâ fide* purchaser for value without notice. On the facts such defence fails. The jury, upon ample evidence, found notice to Whalen, and he is liable to the plaintiff for $819, the value of the timber. His co-defendants having paid that amount into Court to abide the result, the plaintiff is entitled to have his judgment satisfied out of that fund.

If the original vendor's lien still existed, there should be deducted from the $819 the sum of $182, the amount of the original lien, but that lien was lost by reason of Niemi's wrongful sale. By that act he lost possession and with it his right of lien: *Mulliner* v. *Florence* (1878), 3 Q.B.D. 484, 491. So far as appears, however, the plaintiff is still indebted to Niemi in the sum of $182; and, if Niemi consents to treat as payment the retention of $182 in Court to abide the issue between him and the defendant Whalen, then that amount can be so disposed of. Otherwise, the plaintiff will be entitled to the full amount of $819, and Niemi will be left with his claim against the plaintiff for unpaid purchase-money.

The merits of the issue between the third party and the defendant Whalen were not argued before us. If both parties consent to that issue being disposed of on the present pleadings and evidence, the case may be again set down for argument of that issue. If not so set down within 15 days, the claim of the defendant Whalen against the third party is dismissed, without prejudice to any action the defendant Whalen may see fit to bring.

The plaintiff is entitled to his costs throughout against the defendant Whalen; no costs between that defendant and the third party.

Clute, J.
Sutherland, J.
Leitch, J.
Riddell, J.

Clute, Sutherland, and Leitch, JJ., concurred.

Riddell, J., dissented.

Appeal allowed.

N. B.

S. C.

McDONALD v. PINDER.

New Brunswick Supreme Court, Landry, McLeod, White, and McKeown, JJ. January 17, 1914.

1. JUDGMENT (§ I A—2)—SUMMARY JUDGMENT—PROMISSORY NOTE — RELEASE—PLEA OF.

Leave to defend should be allowed where the defendant's affidavit in answer to a motion for summary judgment on a promissory note alleges that the note payable in one month was delivered to plaintiff's solicitor in escrow to hold until a release in form satisfactory to defendant's solicitor should be signed and that plaintiff proceeded to sue without waiting for such approval and thereby committed a breach of the agreement under which the notes were given, for there is at least the question to be submitted to the jury: whether or not ample time and opportunity had been afforded to defendant of submitting the release to his solicitor.

2. JUDGMENT (§ I A—1)—SUMMARY JUDGMENT—COUNTERCLAIM — RIGHT TO PLEAD.

If the defendant shews in answer to a motion for summary judgment that he has a reasonable ground for defending or if he has a counterclaim arising out of the same matter, he is entitled to defend. (*Per* McLeod, J.).

Statement

APPEAL from an order of Barry, J., giving the plaintiff leave to sign summary judgment against the defendant under order 14.

O. S. Crocket, for the defendant.

P. J. Hughes, for the plaintiff.

Landry, J.
White, J.
McKeown, J.

LANDRY, WHITE and MCKEOWN, JJ., agreed in the result.

McLeod, J.

MCLEOD, J.:—This is an application to set aside an order made by Mr. Justice Barry, allowing the plaintiffs to sign final judgment against the defendant under Order 14. The action was brought on a promissory note for $625 dated November 14, 1912, due one month after date and the writ was specially indorsed under Order 3, rule 6.

It appears by the affidavits before the learned Judge that there were disputes between the plaintiffs and the defendant. The plaintiffs had a contract under the defendant, Pinder, for the building of a portion of the railway known as the Southampton Railway. Disputes arose between the parties; the defendant claiming that the plaintiffs owed him something like $7,000; the plaintiffs denying that and claiming that Pinder owed them a considerable amount of money. After some negotiations in the office of Mr. Guthrie, who was the solicitor for the plaintiffs, there appears to have been an arrangement made

whereby the defendant was to give plaintiffs two notes for $625 each; and it is also stated in the affidavit of the defendant that he was to have from the plaintiffs a release releasing him from all claims by the plaintiffs in connection with the railway, and that agreement was to be drawn subject to the approval of his own solicitor, Mr. Crocket. The release appears to have been handed to Mr. Pinder, and Mr. Crocket being out of town Mr. Pinder shewed it to Mr. Richards, Mr. Crocket's partner, who advised him not to sign it; and the matter stood that way. The plaintiffs sought to sign immediate judgment, the writ being specially endorsed. The defendant applied for leave to defend stating the facts somewhat fully in his affidavit, and also stating that Mr. Guthrie was to hold the notes given by defendant in his hands and not deliver them over to the plaintiffs until this release was signed. Then he says further: "A few days later, and before I had an opportunity of discussing the matter further with Mr. Guthrie, and after I had called twice at his office for the purpose of seeing him in regard thereto, I received a letter from him stating that the plaintiffs had endorsed the notes to him and threatening suit if I did not pay the one that was due. In the meantime other claims contracted by the plaintiffs under their said contract, for which I was advised the railway would be liable, and which I had supposed had been paid by the plaintiffs with moneys previously advanced to them, which moneys, with others I was compelled to pay on other claims under their contract, exceeded by upwards of $3,000 the total amount of all their monthly estimates from the commencement of their work, were presented to me, and in view of the fact that the plaintiffs had transferred the said notes in violation of the express agreement under which they were delivered, and that I believed there was no legal consideration to support the said notes, I determined not to carry the negotiations further with the plaintiffs, and to resist their demands, and so informed Mr. Guthrie."

To this there were two affidavits made in reply, one by the solicitor, Mr. Guthrie, and the other by the plaintiff Robert McDonald, and they contradict Mr. Pinder distinctly in several important matters.

The learned Judge, on hearing all the affidavits, ordered im-

N.B.

S.C.

McDONALD v. PINDER.

McLeod, J.

mediate judgment. From my view of the matter, I think the learned Judge was in error in making the order.

It was claimed that Mr. Pinder should have had this release signed and that he delayed in having it signed, and whether or not there was unreasonable delay in having it signed was a matter of fact; and the defendant had a right to have that fact tried by a jury if he wished. The defendant however in his affidavit alleges that a few days after receiving the release and before he had an opportunity of discussing the matter further with Mr. Guthrie although he had called twice at his office he received a letter from him stating that plaintiffs had endorsed the notes to him and threatening suit if the one overdue was not paid and he also says that there were other claims contracted by the plaintiffs under their contract for which he was advised the railway would be liable and which he supposed had been paid by the plaintiffs with moneys previously advanced to them. This is a matter of defence that the defendant had a right to have tried by a jury. There is also a question as to whether there was a greater obligation on the part of the defendant to have the release signed than there was on the part of the plaintiffs. If the signing of the release by the plaintiffs was a condition precedent to the handing-over of the notes by Guthrie to the plaintiffs then it was as much the duty of the plaintiffs to have it signed as it was the duty of the defendant.

As the case stands on the affidavits I think the defendant has a right to present his defence. This power to order summary judgment against a defendant must be used with great care.

In Sheppards & Co. v. *Wilkinson & Jarvis*, 6 T.L.R. 13, it is said:—

> The summary jurisdiction conferred by this order must be used with great care. A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion.

In *Jones* v. *Stone*, [1894] A.C. 122, Lord Halsbury, referring to some remarks which the Chief Justice had made in a judgment, where he said that the case seemed to him to be

> eminently one which required the fullest investigation before a jury, as the conduct of the plaintiff in his dealings with the defendant in connection with the land in question was of a most suspicious character,

said:—

Whether this is so or not, it is abundantly clear to their Lordships that there are very serious questions of fact in debate which never ought to have been determined in a summary manner under order XIV. The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. See also *Saw* v. *Hakin*, 5 Times Rep. 72.

I do not think, having examined the affidavits carefully, that it can be said in this case that there is no reasonable doubt. If the party shews he has a reasonable ground for defending, or if he has a counterclaim arising out of the same matter, he is entitled to defend In this case the defendant does claim he has a counterclaim arising out of this same matter. Mr. Justice Barry in his judgment says:—

As I have already remarked, if he has a good counterclaim that does not disentitle the plaintiffs to judgment, although the defendant might, in such circumstances, be entitled to a stay of execution until after the trial of the counterclaim; but he has not asked for that.

In the Annual Practice of 1912, at p. 173, the cases with reference to that are all reviewed, and then it is said:—

The result of the above cases appears to be that when a *bonâ fide* counterclaim is set up arising out of the subject matter of the action and connected with the grounds of defence, unconditional leave to defend should be given, even where the defendant admits part of the plaintiff's claim, as in such circumstances such admission is only "subject to the counterclaim, which might turn out to be larger in amount."

The result is that in my opinion the order of Mr. Justice Barry should be set aside, with costs.

Appeal allowed, order of BARRY, J., *set aside without costs.*

DUCK v. FLOHT.

Saskatchewan Supreme Court, Lamont, Brown and Elwood, JJ.
November 28, 1914.

1. APPEAL (§ IV B—116)—DISTRICT COURT—FACTS IN EVIDENCE—APPEAL BOOK—REMEDYING DEFECT.

On an appeal from a District Court in Saskatchewan, the trial Judge is to furnish the party appealing with a signed copy of the facts in evidence as noted by him and of his decision, with the reasons therefor and findings of fact; and where this has not been done, the appeal book may be referred back to have the defect remedied.

Statement

APPEAL from a District Court.

T. D. Brown, for appellant, defendant.

B. D. Hogarth and *J. Hancock*, for respondent, plaintiff.

SASK.

S. C.

DUCK v. FLOHT.

Lamont, J.

The judgment of the Court was delivered by

LAMONT, J.:—On the argument before us, the Court decided that this appeal would stand over until the next sittings, and the Appeal Book should be referred back to the learned District Court Judge for further information. The action was brought on two lien notes, one for $200 and interest, and the other for $150 and interest. The former was alleged to have been given for a team of horses, and the latter for a binder, mower and rake purchased from the plaintiff by the defendant. The defendant alleged that the plaintiff had warranted the horses to be good work-horses and not more than 14 years of age, and, further, that he had warranted the implements to be in a good state of repair. He also alleged a breach in each case of the warranties given, and he counterclaimed for damages in respect of those breaches. The claim of the plaintiff amounted to $411.14. The learned Judge, in his notes, endorsed the following: "Judgment for $362.36 and costs." This is the only memorandum. There is nothing from which we can determine whether the reduction of the claim was made by an allowance for breach of warranty in respect of the horses or in respect of the implements. The claim was reduced, but in respect of what we cannot say. Rule 662 *b* requires the Judge of the District Court, when an appeal is taken from his decision, to furnish the party appealing with a signed copy of the facts in evidence as noted by him, and of his judgment or decision thereon, with his reasons therefor, including his findings of fact. There has been a clear breach of this rule in this case. To reduce the plaintiff's claim, the learned Judge must have found the defendant entitled to damages in respect either of the horses or of the implements. The appellant is entitled, and this Court is entitled, to know what his findings of fact were, and in respect of what claim such reduction was made. The Appeal Book will, therefore, be referred back to the trial Judge for information as to the facts found by him upon which he based his judgment. The appeal will stand over until the next sittings.

Direction accordingly.

COMMERCIAL PLATE GLASS ASSURANCE CO. v. ROBILLARD.

QUE.
C. R.

Quebec Court of Review, Archibald, Mercier and Beaudin, JJ. May 22, 1914.

1. Debtor and creditor (§ I—3)—Promise of extension of payment—No consideration—Validity.

The promise of an extension for payment of a debt is a "*nudum pactum*," and not binding on the promisor unless there was a consideration for same.

2. Debtor and creditor (§ I—4)—Promissory note—Agreement to accept—Misrepresentation—Refusal to accept.

The creditor who has agreed to accept on the following day the debtor's promissory note for two months for a debt past due on his representation that he had never been sued may refuse to accept such note or to grant the extension if the representation were untrue.

Statement

Appeal from an action to recover certain insurance premiums.

R. Roy, for plaintiff.

Lamarre & Brodeur, for defendant.

The judgment of the Court was delivered by

Archibald, J.

Archibald, J.:—The plaintiff sues for $174.81 for premiums of insurance After action brought, the defendant came to the plaintiff and begged for a delay for payment, and offered his note at two months. The plaintiff agreed to grant that delay, and the defendant was to come the next day and bring his note.

The defendant pleads to the action that he had obtained the delay in question and that the action was accordingly premature, or that the continuation of the action after the delay was illegal.

The plaintiff answers the plea by stating that it was true that it agreed to give a delay of two months, but that that agreement was upon the representation of the defendant that he had never been sued; that before the defendant returned the next day to bring the promissory note in question and to carry out the transaction, plaintiff had discovered that the defendant had been frequently sued, and when the defendant offered his note the following day, the plaintiff refused it and continued the action.

The defendant alleged that he had never stated to the plaintiff that he had never been sued; but, finally, that he said he had never been sued, meaning in connection with premiums of insurance.

The judgment found in favour of the plaintiff, holding that the defendant's evidence was unsatisfactory. I think this judgment is clearly right. In the first place, the burden of proof to establish that delay was given upon the defendant. The plain-

QUE.

C. R.

COMMERCIAL PLATE GLASS ASSURANCE CO. v. ROBILLARD.

Archibald, J.

tiff admits that it gave the delay, but conditionally only, *viz.*, that it gave it in consequence of the representation of the defendant about his not having been sued. This admission cannot be divided. Certainly the defendant had not overturned the plaintiff's evidence with regard to the matter. Besides, there is no suggestion that any consideration was given by the defendant to the plaintiff for the promise in question. That is one of the essential elements of a contract that it must have a consideration. Even supposing that the plaintiff had granted an additional delay without any consideration whatever, I cannot see that the plaintiff was obliged to carry out that promise. It was what is known in Roman law as a *nudum pactum*, and not binding upon the party.

I am of opinion that the judgment is right and must be confirmed.

Judgment confirmed.

ONT.

S. C.

PARKERS DYE WORKS v. SMITH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. November 13, 1914.

1. CONTRACTS (§ III E—285)—TO REFRAIN FROM BUSINESS—VIOLATION OF COVENANT—ACTING AS MANAGER.

Acting as manager of a competing business is a breach of a covenant given by defendant on selling out to plaintiffs that the defendant would not "alone or jointly with or as agent or otherwise for any other person, firm or company, directly or indirectly, enter into competition with or opposition" to the business of the plaintiffs within a stated time and radius.

[*Parkers Dye Works* v. *Smith*, 18 D.L.R. 631, affirmed.]

2. INJUNCTION (§ I B—24)—CONTRACT RIGHTS—COVENANT NOT TO COMPETE IN BUSINESS—MODE OF PLEADING.

An order enjoining the breach by defendant of a covenant in restraint of trade may be in general terms conforming with the restriction and need not set out specifically the acts from the doing of which it was intended to restrain; it will be left to the party enjoined to find out how to comply with its terms.

[*Dysert* v. *Hammerton*, [1914] 1 Ch. 822, and *Wood* v. *Conway*, [1914] 2 Ch. 47, applied.]

Statement.

APPEAL from the order of LATCHFORD, J.

E. B. Eyckman, K.C., for the appellant.

W. R. Cavell, for the plaintiffs, the respondents.

Meredith, C.J.O.

November 13. MEREDITH, C.J.O.:—This is an appeal by the defendant from an order dated the 19th September, 1914, made by Latchford, J., restraining the appellant until the trial or

other final disposition of the action "from entering into or continuing in business as a dyer and cleaner of cloth, laces, gloves, feathers, and other articles of dry goods, including French cleaning, dyeing, and pressing, in the Province of Ontario, and from entering into competition with or opposition to the business carried on by the plaintiffs or either of them as dyer and cleaner of cloths and other articles of dry goods, including what is known as French cleaning, dyeing, and pressing, either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly."

The material before the learned Judge fully warranted the conclusion that this business was being carried on under her management; and that, in my opinion, constituted a breach of her covenant.

None of the cases cited by Mr. Ryckman supports the proposition for which he contended, that the appellant, by acting as manager of the competing business, did not violate her agreement with the respondents.

It may be that, if the covenant had been merely not to enter into competition with or opposition to the business of the respondents, acting as manager of a competing or opposing business would not be a breach of the covenant, but the covenant is far wider than that, and extends also to the act of entering into competition or opposition as agent or otherwise for any other person, firm, or company; and becoming the manager of a competing or opposing business was, I think, clearly a breach of that part of the covenant, both in its spirit and its letter.

It will, of course, be open to the appellant upon the trial of the action to adduce further evidence which may lead to a different conclusion from that which has been reached upon the present material as to her position with reference to the competing or opposing business which has been carried on under the daughter's name, and it will also be open to the respondents to establish, if they can, that the business is really the business of the appellant.

It was also contended by the appellant that the injunction order was too wide in its terms, and that it ought to have specified the acts from the doing which it was intended that it should

ONT.

S. C.

PARKERS DYE WORKS v. SMITH.

Meredith, C.J.O.

restrain the appellant; but that contention is not, I think, well-founded.

As was said by Cozens-Hardy, M.R., in *Earl Dysart* v. *Hammerton & Co.*, [1914] 1 Ch. 822, 833: "It is not the practice of the Court, when a wrong has been established, to suggest how or under what circumstances, if at all, the defendant may so far modify his arrangements as not to infringe the injunction;" and, as is pointed out in the Law Quarterly, vol. 30, p. 265: "The practice of granting an injunction in general terms, and leaving the party enjoined to find out how to comply with its terms, was familiar practice in the days of Lord Eldon: *Lane* v. *Newdegate* (1804), 10 Ves. 192, 7 R.R. 381; and has the authority of the House of Lords: *Elliott* v. *North Eastern R.W. Co.* (1863), 10 H.L.C. 333, at pp. 358, 359, 138 R.R. at p. 189. In *Curl Bros. Limited* v. *Webster*, [1904] 1 Ch. 685, 73 L.J. Ch. 540, Farwell, J., adopted the same rule in the case of a breach of contract;" and in *Wood* v. *Conway Corporation*, [1914] 2 Ch. 47, this practice was followed.

I think, however, that, as my brother Hodgins points out in his opinion, which I have had the opportunity of reading, the injunction order is wider in its terms than it should have been, and that it should be varied by restraining the appellant until the trial or other disposition of the action from, either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly entering into competition with or opposition to the business of the respondents or either of them.

The order with that variation will be affirmed, and the appeal dismissed with costs.

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

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A., dissenting as to costs.

Appeal dismissed.

SASK.

S. C.

Re D. H. COLE.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, Brown, and Elwood, JJ. July 18, 1914.

1. SOLICITORS (§ I B—11)—SUSPENSION—GROUNDS FOR—NOT ACCOUNTING FOR CLIENT'S MONEY.

The suspension of a solicitor for not accounting for and paying over money due to a client may be extended notwithstanding a settlement in full made with the client.

SASK.

S. C.

RE D. H. COLE.

MOTION to suspend a solicitor.

Judgment was given extending the suspension till September 15th.

G. H. Barr, for the Law Society.

D. McNiven, for the solicitor.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—The barrister and solicitor in this case was suspended on May 21 last by my brother Lamont, until the close of the present sittings of this Court, under sec. 46 of the Legal Profession Act, for professional misconduct, consisting in not accounting for and paying over money received by him on account of a client as far back as 1903. On June 20 last, three days before the opening of this Court, settlement in full was made with the client. The question now arises whether or not payment under these circumstances and a suspension of less than two months entitle the solicitor to plenary absolution at our hands. I think it should be understood generally by the profession and the public that the disciplinary sections of the Legal Profession Act were not passed merely for the purpose of creating an alternative procedure for the collection of debts due by solicitors to their clients, and that upon payment of the amounts involved the whole object of the Act has been accomplished. Applications of this sort are based on the idea not only that solicitors should account promptly for moneys received by them for clients, but that non-accounting is an act of professional misconduct which will involve graver consequences than a judgment and execution for moneys received. Too often in recent years there have been cases which not only involved professional misconduct but misconduct of such a nature as to warrant criminal proceedings rather than proceedings such as the present. It should be further understood by the profession that the Act was not intended to be a genteel substitute for the Criminal Code specially made for barristers and solicitors. The foregoing remarks do not apply to the present case, but the facts of the present case disclose professional misconduct which will justify a longer term of suspension than that already undergone.

Counsel for the Law Society stated to us that other complaints against this solicitor were now being considered by the Law Society, and suggested that the suspension should continue until these matters were inquired into. I do not think that that should

SASK.

S. C.

RE D. H. COLE.

Haultain, C.J.

be done. We have no reason to suppose that an enquiry into these cases by the Law Society will result in further proceedings under the Act. If other proceedings were now pending we might reasonably extend the term of the present suspension until their determination. As the guardians of the honour and good name of the profession in this province, we might very well say to this solicitor: "We will not restore you to your profession until you have shewn us that you have not only expiated this offence but that you have cleared yourself of other and further charges which the proceedings disclose." On an application for restoring to the rolls after being struck off, the solicitor must shew among other things complete restitution in all cases and a clean sheet. Why should this not be required in cases like the present? In future I would favour some such requirement. In the present case I think that the suspension should be continued until September 15 next.

Judgment accordingly.

ALTA.

S. C.

MANUFACTURERS LIFE INSURANCE v. WALSH.

Alberta Supreme Court, Scott, Stuart, and Simmons, JJ.
December 18, 1914.

1. EVIDENCE (§ XI—846)—RELEVANCY AND MATERIALITY — PAYMENT — PROMISSORY NOTE—MEMORANDA OF— ADMISSIBILITY —SALE OF LAND.

A memorandum given on the day before the date of the agreement for sale of lands acknowledging receipt of a promissory note for the cash payment and specifying certain reservations and restrictions against the land in more detail than they were described in the formal agreement is properly admitted in evidence in an action to enforce the agreement for the purpose of shewing that the purchaser knew that the transfer was to be subject to the specified reservations.

2. SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—NOTICE OF RESCISSION—RIGHT TO REMEDY.

A vendor suing for a declaration that the sale had been rescinded and payments made had been forfeited for the purchaser's default by reason of notice given under the contract or in the alternative for specific performance, is not barred from the latter remedy by its allegation in the pleadings that notice of rescission had been duly given where this was denied by the defendant's pleading and no proof was adduced that the notice had been given.

Statement

APPEAL by defendant Walsh from the judgment of Beck, J., in favour of the plaintiffs.

J. T. Shaw (*Short, Ross, Selwood & Shaw*), for the plaintiff, respondent.

A. G. Virtue, for the defendant, appellant.

The judgment of the Court was delivered by

SCOTT, J.:—Defendant Josephson is shewn to have filed a caveat against the lands claiming under an agreement for the sale thereof by the O. W. Kerr Company to him. The only relief claimed by the insurance company as against him was the removal of his caveat and costs. No defence was made by him and the trial Judge at the conclusion of the trial stated that he would make an order declaring that he had no claim. The appellant having by his statement of defence charged that the insurance company had not given him notice of the assignment from the O. W. Kerr Co., the insurance company obtained leave at the trial to amend by adding the O. W. Kerr Co. as a party plaintiff and by alleging that they were joined for the purpose of perfecting the right of the insurance company to maintain the action.

In his statement of defence the appellant denies that any notice was given by or on behalf of the insurance company declaring the agreement void, or determining his interests thereunder and I may here state that no evidence of any such notice having been given was adduced at the trial.

The other defences relied upon by the appellant at the trial were that the insurance company was, by reason of defects in its title, unable to give him a clear title to the property and that, at the time the agreement was entered into, certain false and fraudulent representations were made by the O. W. Kerr Co. or its agents as to the nature of the soil, the contour of the land and its value and that he entered into the agreement relying upon those representations.

The trial Judge held that there was no intentional misrepresentation with regard to the land nor any unintentional material misrepresentation and that plaintiffs were entitled to specific performance of the agreement.

On May 11, 1910 the insurance company obtained a certificate of title to the lands except all coal and other mineral rights and the right to work the same, the title being also subject to the right of expropriation of certain portions of the land reserved in the transfer thereof from the Alberta Railway and

ALTA.

S. C.

MANUFACTURERS LIFE INSURANCE v. WALSH.

Scott, J.

Coal Co. to the O. W. Kerr Co. The reservations in that transfer are as follows:—

All coal and other minerals in and under the said land and the right to use so much of said land or the surface thereof as the company may consider necessary for the purpose of removing the said coal and minerals, and any portion of said land heretofore taken for public purposes, and also excepting and reserving thereout a right of way 100 feet wide to be used by the company or its successors or assigns for the purpose of irrigation, canals or works, said right of way, if taken, to be paid for in accordance with the value of the land and any improvements upon same, said privilege to be exercised within the period of ten years next following the 26th day of June, A.D. 1906.

The appellant contends that, by reason of these reservations, the plaintiffs are unable to give him a clear title to the property and that he is therefore entitled to rescission of his agreement to purchase.

On the day before the date of the agreement the appellant gave to the selling agents of the O. W. Kerr Co. his note for the cash payment of $5,120 and he and they then signed a memorandum in which the agents acknowledged receipt of the note subject to the approval of the company, the contract price and the terms of payment being set out substantially the same as in the agreement, the appellant thereby agreed to pay the company the remainder of the purchase-money and interest and the company, in consideration of such payment, agreed to convey the lands to him in fee simple.

Subject to the reservations, limitations, provisoes and conditions expressed in the original grant from the Crown, or original contract with the railroad company and reserving all mines, minerals, coal or valuable stone in or under said land and the right of user of part of the surface necessary for working the same and the other reservations and exceptions as above stated.

The agreement is upon a printed form in which a blank left for the name of the company obtaining the grant from the Crown was not filled in and the name of any railroad company does not appear in the agreement or in the memorandum of the previous day. I am of opinion however, that there was upon the face of the agreement sufficient to shew the purchaser that the transfer was to be subject to certain reservations and to enable him to ascertain their nature and extent as, although their nature and extent was not stated, they were described in

such manner as would enable him to ascertain what they were with absolute certainty. If he entered into the contract knowing that certain reservations were intended and without making any inquiry as to their nature, he should not now, in my opinion, be permitted to say that he is entitled to a transfer free from them.

The memorandum referred to describes the intended reservations with more detail than they were described in the agreement. Objection was taken, however to its admissibility as evidence, presumably on the ground that it was superseded by the subsequent agreement. In my opinion the trial Judge was right in admitting it even if the only ground for its admission was to shew that the purchaser knew that the transfer was to be subject to the specified reservations.

The reservation by the Alberta Railway and Irrigation Co. of a right of way for irrigation purposes appears to me to have been unnecessary as, in the absence of any such reservation, that company under its act of incorporation (ch. 43 of 1904) could exercise that right as against any subsequent owner of the land. The Act confers upon it all the powers as to expropriation of lands for its purposes as are possessed by railway companies under the Railway Act. Apparently the only effect of the special reservation, if it has any effect, as to restrict to a limited period the right of the company to exercise that power as, under the Railway Act, there is no limit to the time for exercising it. Since the issue of the certificate of title to the insurance company the only registrations affecting its title are the filing of the caveat by defendant Josephson which I have already referred to, and of a caveat filed by the appellant claiming an interest under the agreement in question. As to the latter no question can arise as, upon his fulfilling his agreement, he will obtain a transfer and certificate of title and his caveat will thereby be removed.

As to the caveat filed by defendant Josephson the effect of the judgment of the trial Judge is that he has no claim upon the land. The judgment is therefore conclusive as against him and the insurance company is entitled to obtain an order removing it. Under the agreement the company was not bound

ALTA.
S. C.
MANUFACTURERS LIFE INSURANCE v. WALSH.
Scott, J.

to complete his title until the time for the payment of the last instalment of the purchase-money and, even if the filing of that caveat constituted a cloud upon his title, the company took the necessary steps to remove it before the purchaser was entitled to call upon it to do so.

The only evidence adduced at the trial respecting Josephson's claim consisted of certain letters written by him to defendant, the appellant in which he stated in effect that he had bought the land from the O. W. Kerr Co. but had sold it back to them a few days before they sold it to the appellant and that his only claim was for the balance of the purchase-money due by the company to him, and a letter from that company to the Standard Trust Company stating that the land was originally sold to Josephson but that they had repurchased from him and resold to the appellant.

If these letters were properly received as evidence of the transactions referred to in them, the utmost that can be inferred from them is that the only interest Josephson could have had in the land was a lien for the balance of the purchase-money due him. This would therefore be nothing more than an incumbrance which the appellant would be entitled to require the insurance company to pay out of the purchase-money due by him but it would not constitute a defect in title or a ground which would entitle him to repudiate the purchase.

One of the grounds of appeal is that the trial Judge erred in holding that the notice of cancellation given by the insurance company amounted to a rescission of the agreement and entitled the appellant to *restitutio in integrum* and it is contended on his behalf that the company having elected to take that course, it is not now entitled to claim specific performance.

I have already stated that there was no evidence to shew that such a notice was given. There is, however, the allegation in the statement of claim that it was given and, if the appellant had, by his statement of defence, admitted that it was given, a question might then have arisen whether the insurance company might not have been bound by the allegation, but the appellant having denied the giving of the notice and the giving of it not having been proved, the insurance company is not,

in my opinion, bound by its allegation and there is, therefore, nothing to shew that it had elected to rescind the agreement.

Other grounds of appeal are that the trial Judge erred in holding that there was no wilful misrepresentation in a material particular and in not deciding whether or not there was innocent misrepresentation and in not holding that there was innocent misrepresentation and that the contract should be rescinded.

The trial Judge found that there was no intentional misrepresentation and that the appellant had not satisfied him that there was any unintentional material misrepresentation. This, in effect is a finding that the appellant had failed to establish that there was any material misrepresentation and, as it is only material misrepresentations that are important, he left nothing undecided.

A large number of witnesses were examined upon the question of misrepresentation and there is a mass of contradictory evidence respecting it. The trial Judge had ample ground for reaching the conclusion he did upon the question and, in my view, this is not a case in which this Court should review his finding upon that question of fact.

In *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, Lindley, M.R., in his judgment uses words which seem peculiarly applicable to such a case as this. He says:—

> When much turns upon the relative credibility of witnesses who have been examined and cross-examined before him a Judge, the Court is sensible of the great advantages he has in seeing and hearing them. . . . and, when the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be guided by the impression made on the Judge who saw the witnesses.

The conduct of the appellant subsequent to the alleged misrepresentations was such as might reasonably lead the trial Judge to entertain a doubt whether they were made, or, if made, whether the appellant himself considered them material. He admits that, some months after the agreement was entered into, he entered into possession of the land and that, while in possession, he became aware that it was not such as was represented to him and yet, with that knowledge he, without com-

ALTA.

S. C.

MANUFACTURERS LIFE INSURANCE v. WALSH.

Scott, J.

plaining of the misrepresentations afterwards applied for and obtained an extension of time for the payment of the purchase-money at a higher rate of interest and also placed the land in the hands of several agents for sale at a price in excess of that he had agreed to pay for it.

The only other ground of appeal is that the trial Judge erred in not holding that the plaintiff should pay the appellants costs up to the time the O. W. Kerr Co. was added as plaintiff, the ground of this contention being that, as the insurance company had not given notice of the assignment of the agreement, it was not entitled to sue upon it and, therefore, that the action was not properly constituted until the O. W. Kerr Co. was added as plaintiff.

The trial Judge held that, as the insurance company had obtained from the O. W. Kerr Co. a transfer of the land as well as an assignment of the agreement, the ordinary law respecting assignments of choses in action did not apply and that the O. W. Kerr Company and the Standard Trust Co. were therefore unnecessary parties. He therefore held that the appellant should be entitled to the costs occasioned by their being added.

I express no opinion as to whether the trial Judge was right in this conclusion as, in my view, it is unnecessary to do so. If the appellant is right in his contention that the action was not properly constituted until the O. W. Kerr Co. was added and if upon that company being added, the appellant had consented to judgment for the plaintiffs, it might be open to question whether he would not have been entitled to the costs of the action up to that time, but having continued to defend the action after it was properly constituted, I see no reason why the plaintiffs should not have the costs of the action from its inception except of course such costs as may have been occasioned to the appellant by reason of the amendment.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

SINGH v. CANADIAN PACIFIC R. CO.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 2, 1914.

1. MASTER AND SERVANT (§ IV—312)—DAMAGES—NEGLIGENCE OF FELLOW-SERVANT—INFRINGEMENT OF MUNICIPAL BY-LAW—PROTECTION OF PUBLIC.

The infringement of a general prohibition in a municipal by-law prohibiting blasting operations without a permit from a municipal officer will not make liable the proprietors on whose behalf the operations are conducted, for injury to a workman occasioned by the negligent act of a fellow-workman under circumstances in which the fellow-servant doctrine would otherwise apply: such by-law is not one particularly designed to benefit or protect a class but is intended as a protection of the public at large.

[*Bell* v. *G.T.R.*, 15 D.L.R. 874, 48 Can. S.C.R. 561; *Butler* v. *Fife Coal Co.*, [1912] A.C. 149 and *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 693, followed; *Thacker Singh* v. *C.P.R. Co.*, 15 D.L.R. 487, affirmed.]

Statement.

APPEAL from judgment at trial in a negligence action.

Appeal dismissed.

Joseph Martin, K.C., for appellant, plaintiff.

J. E. McMullen, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A., agrees with MARTIN, J.A., dismissing the appeal. MCPHILLIPS, J.A., dissenting.

Martin, J.A.

MARTIN, J.A.:—I would also dismiss the appeal. It was argued on the assumption that merely because the by-law, which declares generally that blasting operations should not be carried on in the municipality without a permit, has been infringed, that such infringement of that general prohibition gives a cause of action, but an examination of the authorities shews it does not, on the principle laid down in *Love* v. *Fairview* (1904), 10 B.C.R. 330, and cases therein cited, and the later decisions of *London & Western Australian Explor. Co.* v. *Ricci* (1906), 4 Com. L.R. 617 (Aus.); *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146; [1910] A.C. 74, 79 L.J.K.B. 153; *Butler* v. *Fife Coal Co., Ltd.*, [1912] A.C. 149; *Watkins* v. *Naval Colliery Co.*, [1912] A.C. 695; and of *Bell* v. *Grand Trunk R. Co.* (1913), 15 D.L.R. 874 at 876, 48 Can. S.C.R. 561 at 564. The plaintiff herein is not entitled to invoke this by-law so as to avoid the consequences of the negligent act of a fellow-servant, because there is no class which it is particularly designed to benefit or protect, but simply the public at large, and therefore the by-law must be excluded from consideration in that respect.

Then there is the question as to whether the learned trial

B. C.
C. A.
SINGH
v.
CANADIAN PACIFIC R. CO.
Martin, J.A.

Judge was right or not in arriving at the conclusion he did on the facts before him as to the blowing out of the stump. All I need say about this is that after a careful reading of the evidence I have no doubt that it was abundantly open to the learned trial Judge to take the view he did, bearing in mind the language used by their Lordships of the Privy Council in regard to over-ruling the verdicts of trial Judges in *Bryce* v. *Canadian Pacific R. Co.* (1909), 15 B.C.R. 510. So far as the question of system is concerned, it is quite clear to my mind that it cannot be complained of as it was one which answered the reasonable requirements of the case, and there is no evidence to support the contention that the man who was doing the blasting was not a competent and proper person to whom that duty might be delegated. The case of *Sword* v. *Cameron* considered in *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H.L. 266 at 289-90, is one of a somewhat similar nature, and it is only necessary to read that case to shew how the facts in essential particulars differ from this; there, time was not given for the workman to get away from the scene of the blasting despite the fact that there had been frequent occasions on which stones from blasts had flown over the heads of the retreating workmen, whereas in this case abundant time was given the deceased, which is shewn by the fact that he went to a place one thousand feet off, after admitted ample notice, to a presumably safe distance, but was unfortunately nevertheless killed by a small stone which, I should be inclined to infer from the facts, had become in some strange way so lodged in the roots that the effect was that by the unprecedented concentrated force of the explosion it was shot out to a great and wholly unexpected distance almost as though discharged from a gun.

The appeal must therefore be dismissed.

ONT.
S. C.

BANNISTER v. THOMPSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. September 21, 1914.

1. HUSBAND AND WIFE (§ III—143)—ACTION BY HUSBAND—ALIENATION OF AFFECTION—PROOF OF ADULTERY UNNECESSARY.

An action for enticing away and alienating the affections of plaintiff's wife is maintainable without proof of adultery and notwithstanding that the wife continues to live with her husband.

[*Winsmore* v. *Greenbank*, Willes R. 577, followed; *Bailey* v. *King*, 27 A.R. (Ont.) 703, referred to.]

2. DAMAGES (§ III E—135)—ALIENATION OF WIFE'S AFFECTIONS—ENTICEMENT—MEASURE OF DAMAGES.

Where separate claims were submitted to the jury, firstly as to enticing away the plaintiff's wife and, secondly, as to alienating her affections, and damages were awarded separately for each, the verdict will stand only as to the larger sum awarded on the second claim if the whole damages were included in its submission and there was nothing to justify a further damage award on the first claim.

ONT.

S. C.

BANNISTER v. THOMPSON.

Statement

APPEAL by the defendant from the judgment of MIDDLETON, J., 29 O.L.R. 562, 15 D.L.R. 733.

C. W. Bell, for the appellant.

R. McKay, K.C., and *C. V. Langs*, for the plaintiff, the respondent.

September 21. The judgment of the Court was delivered by MACLAREN, J.A.:—This action was brought to recover damages for (1) enticing away and (2) alienating the affections of the plaintiff's wife by the defendant. Maclaren, J.A.

These claims were set out in two paragraphs, and separate questions were submitted to the jury embodying them. They found in favour of the plaintiff on each, and assessed the damages at $500 and $1,000 respectively. The trial Judge entered judgment in favour of the plaintiff for $1,500.

The defendant has appealed to this Court firstly on the ground that no action lies on such a charge where, as here, the wife is still living with her husband, or where the jury have not found that adultery has been committed.

The first reported case on which the trial Judge relied for the sufficiency of the ground of action is *Winsmore* v. *Greenbank*, Willes 577. It is cited as still being law in the leading textbooks on the subject. See Addison on Torts, 8th ed., p. 858; Clerk & Lindsell on Torts, 3rd ed., p. 5; Pollock on Torts, 9th ed., p. 235; Eversley on Domestic Relations, 3rd ed., p. 175. It is also cited with approval by Armour, C.J.O., in *Bailey* v. *King*, 27 A.R. 703, at p. 713.

This ground of objection, in my opinion, is not well-founded.

The appellant also urges that the two paragraphs above referred to overlap. The first alleges that the defendant enticed away from the plaintiff his wife and procured her to absent herself unlawfully for long intervals from his house and society;

ONT.
S. C.
BANNISTER v. THOMPSON.
Maclaren, J.A.

the second, that the defendant by his wrongful acts alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society.

For the wrongful acts of the defendant whereby he alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society, the jury have awarded the plaintiff $1,000. What damage has the plaintiff suffered beyond the loss of his wife's affections, love, services, and society? Nothing more is suggested in the evidence, and it is difficult to imagine any further loss or damage. The first paragraph refers rather to the means used, the second to the damages resulting therefrom. This is dealt with in the case of *Winsmore* v. *Greenbank, supra,* at p. 582, where, in answer to the objection that procuring, enticing, and persuading were not sufficient, if no ill consequences followed from them, it was held to be sufficient in that case because it was specifically alleged that the plaintiff had thereby lost the comfort and society of his wife, and the advantage of her fortune, etc.

See also the case of *Metcalf* v. *Roberts*, 23 O.R. 130, where the cases on the subject are fully discussed.

I am consequently of opinion that the whole damages which the plaintiff can recover are included in the third question, based upon the second paragraph, and that the judgment should be reduced to $1,000, and that there should be no costs of the appeal.

QUE.
S. C.

BELL TELEPHONE CO. v. O'DELL & DUGGAN.

Quebec Superior Court, Charbonneau, J. March 13, 1914.

1. GARNISHMENT (§ II D—51)—GARNISHEE—EFFECT OF GARNISHMENT—DEFAULT IN NOT DEPOSITING AMOUNT—CONTRAINTE PAR CORPS NOT AVAILABLE.

Arrest by process of *contrainte par corps* is not available against a garnishee in respect of his default in depositing under Court order the seizable portion of the debtor's salary due from him; the effect of the garnishment is only to transfer a debt to the plaintiff, and it is enforceable only as a condemnation to pay money.

Statement

MOTION for arrest in civil proceedings.

S. L. D. Harris, for plaintiff.

Charbonneau, J.

CHARBONNEAU, J.:—The 31st day of January, 1914, the Court ordered the garnishee to deposit the sum of $6, being the seizable portion of defendant's salary for two weeks, under a writ

QUE.

S. C.

BELL TELEPHONE CO. v. O'DELL & DUGGAN.

Charbonneau, J.

of attachment after judgment taken by plaintiff against him. The garnishee having neglected to make such deposit, the plaintiff made a motion for *contrainte par corps* against him.

This motion was rejected:

Considering that the judgment above mentioned should not be considered as ordering the defendant to do a specific thing; but is, as a matter of fact, a simple condemnation to pay a sum of $6 to the credit of the defendant; that the only effect of such a judgment is to create in favour of plaintiff a judicial assignment to the seizing of the defendant's title of debt: Art. 692 C.P.

Considering that the enactment of art. 680 C.C.P., stating that the effect of the seizure is to sequestrate in the hands of the garnishee all corporeal things in the same manner as if he had been appointed guardian, cannot apply to this case, and that the effect of the seizure is only to transfer a debt to the plaintiff.

Considering that the above-mentioned judgment should be executed as any other judgments condemning the *tiers-saisi* to pay a sum of money.

Dismisses said motion without costs.

Motion dismissed.

LANDREVILLE v. BOULAIS.

YUKON.

Y. T. C.

Yukon Territorial Court, Macaulay, J. September, 1914.

1. STATUTES (§ II A—95)—CREEK—MEANING OF—LOSES ITS IDENTITY WHEN —PLACER MINING ACT (YUKON)—INTERPRETATION.

After the stream of a creek has passed beyond the jaws of that creek, and entered the valley of another stream, it loses its identity as a "creek" within the meaning of the Placer Mining Act (Yukon), and becomes absorbed in the valley of the river or stream which it has entered.

2. STATUTES (§ II A—95)—PLACER MINING CLAIM—ACTION TO VACATE—ADVERSE CLAIMANT—CONSENT OF COMMISSIONER.

An action to vacate the staking of a placer mining claim under the Yukon Placer Mining Act, and the grant issued thereunder by the Mining Recorder, may be maintained by a plaintiff who is an adverse claimant if brought with the consent of the Commissioner of the Yukon Territory, under sec. 44 of that Act.

3. STATUTES (§ II A—95)—PLACER MINING ACT—ILLEGAL OR FRAUDULENT—MORTGAGEE—TITLE OF.

If the staking of a placer mining claim under the Yukon Placer Mining Act is illegal or fraudulent, the purchaser or mortgagee thereof takes no better title than that held by his grantor or mortgagor.

[*Pilcher* v. *Rawlins*, 21 Eng. Ruling Cases 729, referred to.]

Statement

TRIAL of action respecting placer mining claims.

F. T. Congdon, K.C., and *F. X. Gosselin*, for plaintiff.

J. P. Smith, for defendant Boulais.

C. W. C. Tabor, for defendants Nadeau and Dupont.

YUKON.

Y. T. C.

LANDREVILLE v. BOULAIS.

Macaulay, J.

MACAULAY, J. (after reviewing the facts):—Sub-section C of sec. 2 of the Yukon Placer Mining Act defines a creek as follows:

> Creek means and includes all natural water courses whether usually containing water or not, but does not include streams which may be considered rivers under the provisions of the dredging regulations, that is, streams having an average width of 150 feet.

Section 20 of the said Act defines the nature and size of creek claims. Section 37 provides that any person having recorded a claim shall not have the right to locate another claim within the valley or basin of the same creek within sixty days of the date on which he has located the said claim.

The question I am called upon to decide is whether, upon the facts as they exist in this case, Five Mile Creek can be considered a creek within the meaning of the provisions of the Yukon Placer Mining Act, having a valley or basin of its own after it passes beyond its jaws, or whether it becomes absorbed in the valley or basin of the Sixty Mile River and loses its identity and therefore ceases to be a creek upon which placer mining claims may be staked within the meaning of the Act. Much skilful argument was advanced by counsel in favour of both contentions and it is a question that opens a large field for argument.

The unreported judgments of this Court in the cases of *French* v. *Schade*, *Fleischmann* v. *Creese* and *Boyle* v. *Sparks* were cited on behalf of the plaintiff, and while they were decisions dealing with matters under a set of mining regulations which differ in many respects from those of the present Placer Mining Act, and the issues raised in those cases differed from those in the case before me, still the principle was maintained, where it did arise in any of those cases, that after the stream of a creek or the water-course passed beyond the jaws of that creek and entered the valley of another stream it lost its identity as a creek within the meaning of the Placer Mining Regulations and became absorbed in the valley of the stream or creek or river which it entered.

Many definitions of a valley were given to me; but I think a fair definition is as follows:—

> A hollow or surface depression of some width bounded by hills or mountains and usually traversed by a stream or river.

Accepting this definition of a valley, then, according to the evidence, Five Mile Creek had a well-defined valley bounded by high hills on either side before the creek passed its jaws and

entered the valley of the Sixty Mile. And also, according to the evidence, the North Fork of the Sixty Mile has a well-defined valley bounded by high hills on either side. It is quite clear, then, that notwithstanding the slight depression towards the creek on either side of Five Mile Creek after it passes the jaws of the creek, Five Mile Creek becomes absorbed in the valley of the Sixty Mile, as the only hills by which it is then bounded are the hills on either side of the Sixty Mile River, and I can only conclude that the valley of Five Mile Creek ceases at the jaws of the said creek, and the stream of the creek when it passes beyond the jaws of Five Mile Creek continues to flow in the valley of the Sixty Mile River, and the said valley through which it thus flows is wholly the valley of the Sixty Mile River within the meaning of the provisions of the Yukon Placer Mining Act.

At the time of the staking of discovery claim on Five Mile Creek by the defendant Boulais there was no base line run on the creek, but there was a base line plainly visible on Sixty Mile River, and claims had been staked on the base line of Sixty Mile River in the vicinity of the river where the said defendant staked discovery claim on Five Mile Creek. By staking a discovery claim on Five Mile Creek at this point the defendant was enabled to acquire more ground than he would have acquired had he staked the ground from the base line of the Sixty Mile River, which fact evidently induced him to stake the ground in the manner in which he did stake and make his application for a grant.

Having arrived at the conclusion above stated in regard to the meaning of the word "valley" within the provisions of the Yukon Placer Mining Act, I am of the opinion that the said discovery claim staked by the defendant Boulais was not staked according to the provisions of the said Act, and the evidence shews that the said defendant made no attempt to comply with the provisions of the Act, and did not intend to stake a creek claim on the North Fork of the Sixty Mile River at the place where he planted his stakes.

The said defendant Boulais had, on March 31, 1913, already staked creek placer mining claim No. 14 below the mouth of Big Gold Creek on the North Fork of the Sixty Mile River, and obtained a grant therefor; and, according to the provisions of sec. 37 of the Yukon Placer Mining Act, he was not entitled to locate

YUKON.

Y. T. C.

LANDREVILLE v. BOULAIS.

Macaulay, J.

another claim within the valley or basin of the same creek within sixty days of the date on which he located the said claim No. 14 below the mouth of Big Gold Creek.

It was argued that the plaintiff, having obtained a grant for placer mining claim No. 24-B below the mouth of Big Gold Creek on the North Fork of the Sixty Mile River, with the reservation mentioned therein, *viz.*, subject to existing locations, was a person claiming an adverse right, and that he was, therefore, not entitled to bring this action with the leave of the Commissioner of the Yukon Territory under the provisions of the Act before referred to. I am of opinion that, if any objection could have been raised to the plaintiff's right to maintain the action as an adverse claimant, it was cured by the consent which he obtained under the provisions of sec. 44, as he is now enabled to bring and does bring the action in both his personal capacity and with the consent of the Commissioner under sec. 44, and the action is, therefore, properly constituted.

It was argued on behalf of the mortgagees that they were innocent purchasers for value and without notice, and should not now be disturbed in their title, and that the plaintiff was guilty of laches in not bringing his action at once, and the case of *Pilcher* v. *Rawlins*, 21 English Ruling Cases 729, was cited in support of the contention. I am of opinion, however, as was Craig, J., in the unreported case of *Landreville* v. *Gage* in this Court, that the whole question depends on the staking, and the law as applicable to innocent purchasers for value and without notice is not applicable to this case. If the staking is illegal or fraudulent, the purchaser can obtain no better title than that held by his vendor. It would be easy for any man to evade the law of staking if he could by a simple transfer to another validate an illegal or fraudulent staking. Nor am I able to say that the delay of less than eight months in bringing the action would constitute the plaintiff as being guilty of laches. Besides, the evidence shews that the mortgagees are amply secured for the amount of their mortgage money and interest by other placer mining claims conveyed to them by the defendant Boulais, under the provisions of the said mortgage held by the said defendant mortgagees.

I am, therefore, of the opinion that the said grant issued by

YUKON

Y. T. C.

LANDREVILLE v. BOULAIS.

Macaulay, J.

the Mining Recorder on April 18, 1913, for discovery placer mining claim on Five Mile Creek, should be cancelled and set aside, and I do so order accordingly. The mortgage executed on November 7, 1913, by the defendant Boulais to the defendants Nadeau and Dupont, should be declared not to be an incumbrance on the placer mining ground covered by discovery placer mining claim on Five Mile Creek, and I do so order accordingly. The grant to the plaintiff on July 5, 1913, for placer mining claim No. 24-B below discovery on Big Gold Creek on the North Fork of the Sixty Mile River, should be amended, and the reservations therein made by the Mining Recorder should be rescinded, and I do so order. The other declarations asked by the plaintiff in his statement of claim, in my opinion, are already provided for by law, and require no further order from me. The plaintiff will be entitled to his costs of this action.

Judgment for plaintiff.

UNITED TYPEWRITER CO. v. KING EDWARD HOTEL CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A. November 13, 1914.

1. INNKEEPERS (§ V—30)—LIEN OF—EFFECTS OF STRANGER—R.S.O. 1914, CH. 173.

The provisions of the Innkeepers Act, Ont. [R.S.O. 1914, ch. 173], are supplemental to the common law and an innkeeper still has his common law lien on the property of a stranger brought to the inn by the guest as part of his personal effects; the hotelkeeper may be justified in retaining under such right of lien against a transient guest a typewriting machine brought by him to the hotel, although the property in the machine was in a typewriter company.

[*Huffman* v. *Walterhouse*, 19 Ont. R. 186, and *Newcombe* v. *Anderson*, 11 Ont. R. 665, followed.]

Statement.

APPEAL by the plaintiff company from the judgment of the Senior Judge of the County Court of the County of York dismissing an action brought in that Court to recover a typewriting machine, the property of the plaintiff company, brought to the defendant company's hotel by a guest, and detained by the defendant company in the assertion of an innkeeper's lien.

Gideon Grant, for the plaintiff.

H. E. Rose, K.C., for the defendant.

Meredith, C.J.O.

November 13. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the

ONT.
S. C.
UNITED TYPEWRITER CO. v. KING EDWARD HOTEL CO.
Meredith, C.J.O.

judgment of the County Court of the County of York, dated the 1st June, 1914, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him sitting without a jury on the 14th May, 1914.

The question for decision is, whether or not the common law right of an innkeeper to a lien on the property of his guest brought to his inn has been limited by 1 Geo. V. ch. 49, now R.S.O. 1914, ch. 173, so as to deprive the innkeeper of the lien which it is admitted by the appellant he would have had at common law on the property of a stranger brought to his inn by the guest.

In our opinion, this common law right of the innkeeper has not been taken away by the statute. That was the view expressed by Galt, C.J., in delivering the judgment of a Divisional Court in *Huffman* v. *Walterhouse*, 19 O.R. 186, 188-9, and was evidently the view of Armour, J., in *Newcombe* v. *Anderson*, 11 O.R. 665.

That the statute is a codification of the whole law as to the lien of innkeepers was contended by counsel for the appellant, but the statute contains internal evidence that that was not intended, for sub-sec. 2 of sec. 3 of 1 Geo. V. ch. 49 provides that the persons mentioned in the sub-section, among whom are innkeepers, shall have the rights which the sub-section confers, in addition to all other remedies provided by law.

The provisions of the statute are, in our opinion, supplementary to the common law, and its main purposes were: (1) to extend the right of lien which an innkeeper has to boarding house keepers and lodging house keepers, limited in their case to the property of the boarder or lodger: (2) to give, where the lien exists either at common law or by the statute, the right to sell; and (3) to limit the liability of the innkeeper to $40 in certain cases and in certain other cases to $5.

It follows from this conclusion that the respondent is entitled to the lien which it claims, and that the appeal should be dismissed with costs.

Appeal dismissed.

MacMAHON v. TAUGHER.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. December 21, 1914.

1. Conflict of laws (§ I B—10)—Contracts—Attorney and client—Contingent fees—Extortionate terms.

An agreement made in a foreign country between a foreign attorney and his client for remuneration for the attorney's services in respect of an estate or fund in Ontario upon a contingent basis and a percentage of the fund will not be enforced in Ontario against the client if the agreement is extortionate and unconscionable and would be subject to attack in the foreign country upon the same equitable ground.

[*Strange* v. *Brennan*, 2 Coop. temp. Cott. 1, disapproved; *Ram Coomar* v. *Chunder Canto*, 2 A.C. 186, approved; *Cox* v. *Delmas*, 99 Cal. 104; *Cooley* v. *Miller*, 156 Cal. 510, referred to.]

Appeal from the judgment of Kelly, J., 32 O.L.R. 494.

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

C. A. Moss and *O. H. King*, for the plaintiff, respondent.

December 21. Meredith, C.J.O.:—It is not necessary, in my view, to decide whether the validity of the agreement in question and the rights of the parties under it are to be determined by the law of Ontario or by that of California, for in either case the nature and terms of the agreement and the circumstances under which it was entered into are such that it must be held to be extortionate and unconscionable so as to be inequitable against the respondent MacMahon and not binding upon her. Meredith, C.J.O.

As I understand the testimony of the witnesses who gave evidence as to the law of California, it is lawful there for an attorney to undertake to institute and carry on proceedings for the recovery of property and to stipulate with his client for a contingent fee, as it is called, which may be a part of the property or a part of the value of it; and that, where the business is undertaken after the relation of attorney and client has been established, the onus rests upon the attorney of proving that the bargain was a fair one; but, if the business is undertaken before that relation is established, the validity of the agreement is to be determined according to the law applicable to contracts between parties who do not stand in that relation to one another, and that the law applicable in the latter case does not differ from the law of England.

It was argued that the validity of the agreement and the rights of the parties under it are to be determined according to the law of Ontario, and that by that law the agreement is cham-

ONT.
S. C.
MACMAHON v. TAUGHER.
Meredith, C.J.O.

pertous and void. It is unnecessary, in the view I take, to decide whether or not this contention is well-founded; for, even if the agreement is not champertous, the respondent MacMahon is entitled to have it set aside, for the reasons I shall afterwards mention.

I may say, however, that I do not share the views expressed by Lord Chancellor Cottenham in *Strange* v. *Brennan* (1846), 2 Coop. temp. Cott. 1. . . .

I prefer the view expressed by Sir Montague E. Smith in delivering the judgment of the Judicial Committee of the Privy Council in *Ram Coomar Coondee* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186. . . .

The trend of modern opinion is against the view expressed by Lord Cottenham and in accord with that expressed by Sir Montague E. Smith; and in many of the States of the neighbouring Republic an attorney and his client may lawfully agree that the attorney's compensation for services rendered in recovering property for his client shall be a part of the property or a proportion of its value, and that such an agreement is valid and binding upon the client, subject always to the condition that the compensation is not extortionate and unconscionable so as to be inequitable against the client; and, although such agreements are not valid according to the law of Ontario, there are many who think that no harm would be done if a similar latitude were by legislation allowed to solicitors in this Province.

A bare statement of the effect of the agreement in question in this case is enough to shew that it was an extortionate and unconscionable agreement. It is true that the contingent interest to which the respondent MacMahon was entitled was such that it was possible, and indeed in view of the state of her health probable, that she would never become absolutely entitled to anything. What it was in the contemplation of the parties to effect by the employment of the appellant was the making of an agreement with D'Arcy MacMahon, another beneficiary under the will, by which a present division of the estate between him and the respondent MacMahon might be brought about, and it was thought, whether rightly or not, it is unnecessary to consider, that if the two of them were to come to an agreement nothing

ONT.

S. C.

MacMahon v. Taugher.

Meredith, C.J.O.

would stand in the way of that object being accomplished. What the agreement provides for is, that, in the event of an agreement being come to which should result in the respondent MacMahon getting anything out of the estate, the appellant should be entitled to one-half of it for his services and any expenses he might have been put to, and that, if no agreement should be come to, or perhaps if after negotiation had so far progressed that the making of an agreement was in sight, D'Arcy MacMahon should die and the respondent MacMahon should become entitled under the terms of the will to the whole of the estate, the appellant should receive for his services and outlay one-fourth of the estate which should come to her.

It was not the case of the employment of an attorney to recover an estate which would involve his entering upon litigation, perhaps long and expensive, but an employment merely to endeavour to effect an agreement, of the character I have mentioned, with D'Arcy MacMahon, and possibly, if that became necessary, to bring a friendly action to protect the executor and trustee for giving effect to the agreement.

It might well have happened, and in fact did actually happen, that after the writing of a few letters it would be ascertained that no agreement could be come to with D'Arcy MacMahon; and all that, in the event of that happening, the appellant had to do, was to sit down and wait until his client or D'Arcy MacMahon died; when, if his client outlived D'Arcy MacMahon, the appellant would step into the enjoyment of one-fourth of the estate; or, if his client died first, he would get no compensation for his trouble in writing the letters and the small expenditures he might have incurred.

But, even if an agreement had been come to with D'Arcy MacMahon, the compensation for which the appellant stipulated was out of all proportion to any services it was at all likely that he would be called upon to render.

The respondent MacMahon was, no doubt, a bright, intelligent woman and had some knowledge of business, and it appeared that she was alive to the unfairness of having to pay one-half of what she should receive if she became entitled to the estate by its falling into her in consequence of D'Arcy Mac-

ONT.
S. C.
MACMAHON v. TAUGHER.
Meredith, C.J.O.

Mahon predeceasing her; and it is manifest that no lawyer, except one with whom she was making such a bargain, would have advised her to enter into the agreement. In addition to these considerations, she was, as the appellant knew, in dire straits for money, out of employment, and dependent on the generosity of a friend for even the means of subsistence, as well as in bad health, and therefore likely to jump at anything which seemed to promise even the chance of getting money, regardless of the price she was to pay for it.

In bargaining with such a woman, and a woman so circumstanced, every principle of fair dealing demanded that, before exacting such a price for his services as the appellant stipulated, he should have taken care to see that she thoroughly understood not merely the terms but the effect of the agreement she was entering into, and that he did not do; and, even if he had done all this, he cannot escape from the position of having exacted from her an agreement which required her to pay him for his services a compensation which he must have known was grossly in excess of the value of any services he was likely to be called upon to render.

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

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

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed.

GARROW, J.A., agreed in the result.

Appeal dismissed with costs.

SASK.
S. C.

MANITOBA BRIDGE & IRON WORKS v. GILLESPIE.

Saskatchewan Supreme Court, Haultain, C.J., Newlands and Lamont, JJ. July 18, 1914.

1. STATUTES (§ II A—95)—CONSTRUCTION OF—TECHNICAL COMPLIANCE—NO ONE PREJUDICED—MECHANICS' LIEN ACT (SASK.).

Technical compliance with the directions of the Mechanics' Lien Act (Sask.) may be excused where no one is prejudiced by the defects and there is a substantial compliance under sec. 19.

[*Barrington* v. *Martin*, 16 O.L.R. 635; *Robock* v. *Peters*, 15 Man. L.R. 124, applied.]

Statement

APPEAL in mechanics' lien action.

Judgment varied.

W. A. Boland, for appellant.

H. Y. MacDonald, K.C., and *Doherty*, for respondent.

SASK.

S. C.

MANITOBA BRIDGE & IRON WORKS v. GILLESPIE.

Haultain, C.J.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—The defendants the Gillespie Elevator & Construction Co. are a firm of contractors who carried on business at Brandon, Manitoba. This firm had a contract with the defendant company James Richardson & Sons, Ltd., for the erection of an elevator at Stenen, in the Province of Saskatchewan. The plaintiff company furnished certain material to the Gillespie Co. which was used by them in the construction of the elevator, and on March 8, 1912, filed a claim of lien for $1,136.09, under the Mechanics' Lien Act, claiming a lien upon the estate of the defendant John A. Stenen on the land and in respect of the materials described therein. On August 13, 1912, the plaintiff brought this action to enforce its lien. The defendants Mackenzie, Mann & Co., Ltd., and the C.N.R. Co., were joined in the action as alleged owners in fee simple respectively of portions of the land described in the lien, and the defendant Stenen is alleged in the statement of claim to be the owner in fee simple of another portion of the same land. The only reference to the defendant Watson in the statement of claim is contained in the following paragraph:—

6. The defendant James William Gordon Watson is the assignee under the Assignments Act of the Province of Manitoba of all the assets of the above-named defendants, Malcolm Gillespie and Joseph Hugh Ross Gillespie.

The statement of claim asks for relief in the following words:—

12. The plaintiffs claim:—

(1) Payment of the said sum of $1,136.09, together with interest thereon, the costs of registering the said lien, being the sum of $7.31, and the costs of this action.

(2) A declaration that the plaintiff is entitled to a lien on the said lands and building for the sum of $1,136.09, together with interest thereon and costs.

(3) In default of payment of the said sum of $1,136.09, together with such interest and costs of registering the said lien and costs of this action as may be ordered or allowed by this honourable Court, an order that all the estate and interests of the said defendants in the said lands and building thereon, or a competent part thereof, may be sold and the proceeds thereof applied in and toward the payment of the plaintiff's debt and the costs of registering the said lien and the costs of this action pursuant to the said Mechanics' Lien Act.

(4) For the purpose aforesaid that all proper directions be given and accounts taken.

(5) Such other and further relief as the nature of the case may require.

The defendant James Richardson & Son, Ltd., in its statement of defence filed, puts the plaintiff on proof of its account, and admits that it is the owner of the elevator in question and has

SASK
S. C.
MANITOBA BRIDGE & IRON WORKS v. GILLESPIE.
Haultain, C.J.

a leasehold interest in the property upon which the elevator is situated. It also admits a contract with the Gillespie Co. The defence then alleges that during the construction of the elevator the Gillespie Co. became insolvent and made an assignment in Manitoba for the general benefit of creditors to the defendant Watson, who thereupon instructed it to complete the elevator and to charge the costs of completion against the contract price. A balance of $1,893.25 in favour of the Gillespie Co. is admitted, and is paid into Court, with the suggestion that other mechanics' liens are registered against the property in question. On the trial of the action the only parties represented were the plaintiff and the defendant Watson and the C.N.R. Co. The defendant Watson had by his defence put the plaintiff on proof of its account, and a good deal of evidence was taken on that point. It was admitted for the purposes of the trial that the elevator is built on the land mentioned in the claim for lien. In his reasons for judgment the learned District Court Judge said as follows:—

> Now, would the plaintiffs be entitled to a lien against the building and interest of the owner, Richardson & Son, in the land notwithstanding the C.N.R. Co. are the owners? I think that an elevator built on a railway siding on leasehold property is lienable, at any rate in so far as the leasehold interest and building are concerned, notwithstanding the C.N.R. are the owners.
>
> I find that the leasehold interest of Richardson & Sons is lienable. There will be judgment for the plaintiffs for $1,136 and costs. There will be an order to pay out of Court to the plaintiffs sufficient of the moneys paid in by James Richardson & Sons, Ltd., in this case to satisfy this judgment and costs.

The Appeal Book does not contain the formal judgment.

The defendant Watson now appeals on the following grounds, among others:—

> 3. That under the facts as found by the learned trial Judge the plaintiffs were not entitled to recover as against the defendant James William Gordon Watson for the relief claimed and granted in the said judgment of the learned trial Judge.
>
> 8. That the learned trial Judge erred in finding that the plaintiffs were entitled to a lien against the leasehold interest of the defendant James Richardson & Sons, Ltd., in the land on which the elevator is situated and on the elevator building.
>
> 9. That the learned trial Judge erred in finding that the plaintiffs were entitled to a lien against the leasehold interest of the said James Richardson & Sons, Ltd., in the land on which the elevator is situated and on the elevator building.
>
> 10. That the learned trial Judge erred in holding that, as against the

defendant James William Gordon Watson, the plaintiffs were entitled to judgment for the sum of $1,136 and costs.

11. That the learned trial Judge erred in holding that the plaintiffs were entitled to an order to pay out of Court to the plaintiffs sufficient of the moneys paid in by the defendant James Richardson & Sons, Ltd., to satisfy the judgment and costs.

On the argument in appeal counsel for both appellant and respondent confined themselves to questions relating to the validity and effectiveness of the claim for lien. The questions necessary to be considered in this case are as follows:—

(1) Is a lien claimed "upon the estate of John A. Stenen" in the land in question enforceable under the facts of this case? (2) Is the lien in question enforceable against the leasehold interest of James Richardson & Son, Ltd.?

Section 17 of the Act prescribes the form of lien and what it shall set out. Among other things, it directs that the claim for lien shall set out the name and residence "of the owner of the property to be charged." In this case the "owner" is James Richardson & Son, Ltd., as the elevator was built for it on land held by it under lease. Section 17 also requires the claim for lien to set out a description of the property to be charged. In this case a lien is claimed upon the estate of John A. Stenen in the south-west quarter of section 9, township 34, range 3, west of the 2nd meridian, in Saskatchewan.

On these facts, has there been a "substantial compliance" with sec. 17? There can be no doubt that there has been a failure to comply with two important requisites of sec. 17, as neither the name of the "owner" nor a description of the property to be charged has been set out. Section 19 of the Act provides that:—

(19) A substantial compliance with sees. 17 and 18 of this Act shall only be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites of the said sections unless, in the opinion of the Court or Judge who has power to try an action under this Act, the owner, contractor or sub-contractor, mortgagee or other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section contained shall be construed as dispensing with filing of the lien required by this Act.

The claim for lien states that the materials in respect of which the claim is made were supplied by the plaintiffs to the Gillespie Elevator Construction Co., Brandon, Man., and that they were supplied for an "elevator erected at Stenen, Sask., for the James

SASK.

S. C.

MANITOBA BRIDGE & IRON WORKS v. GILLESPIE.

Haultain, C.J.

Richardson Co." It must be quite plain to anyone reading this claim that the lien is claimed under sec. 4 of the Act against the building and the lands occupied thereby. In what respect, then, is the appellant prejudiced by reason of the failure to comply with these requisites? So far as I can see, there is no suggestion in the evidence that anyone was prejudiced to the slightest extent by any defect in the lien, and the whole argument on behalf of the appellant was confined to technical points. In my opinion the grounds set up should not be allowed to invalidate the lien. See *Barrington* v. *Martin* (1908), 16 O.L.R. 635; *Robock* v. *Peters* (1900), 13 Man. L.R. 124.

The learned trial Judge was wrong, in my opinion, in appropriating the money paid into Court to the plaintiffs' judgment. The pleadings allege other liens, and the other lien-holders may be entitled to rank upon this fund, which now takes the place of the property which was attached.

The appeal should therefore be dismissed and the judgment should be varied, and the money paid into Court should remain in Court until the other lien-holders, if any, are found by a reference to the District Court clerk, after which the money will be paid out according to the Mechanics' Lien Act.

The formal judgment is not before us, but it is unreasonable to suppose on the facts of the case that the learned trial Judge, in saying, "there will be judgment for the plaintiffs for $1,136 and costs," intended to give personal judgment for that amount against the defendant Watson. The question of costs is not dealt with by the learned trial Judge. The plaintiff is entitled to its costs of action against the defendants James Richardson & Sons, Ltd., Watson, and the C.N.R. Co. The defendant Watson will also pay the plaintiff its costs of this appeal.

Judgment varied.

B. C.

C. A.

CREVELING v. CANADIAN BRIDGE CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. June 2, 1914.

1. APPEAL (§ VIII C—675)—NEGLIGENCE—COMMON LAW—EMPLOYER'S LIABILITY—NEW TRIAL WHEN.

Where in a negligence action based both at common law and under the Employers' Liability Act, B.C., the verdict is in excess of that allowed under the Act, a new trial will be ordered so as to dispose of the claim under the Act if the verdict cannot be supported at common law.

[*Shearer* v. *Canadian Collieries*, 16 D.L.R. 541, followed.]

APPEAL from the verdict in a negligence action.

C. W. Craig, for appellant, defendant.

S. S. Taylor, K.C., for respondent, plaintiff.

MACDONALD, C.J.A.:—I do not think the plaintiff made out a case of negligence at common law. The system under which defendant was carrying on the work provided for the protection of its employees from such an injury as the plaintiff suffered by a warning signal to be given by the engineer in charge of the car called a "traveller," which injured the plaintiff. The plaintiff admitted that that system, if properly carried out, provided a sufficient protection. Alternatively the plaintiff claimed under the Employers' Liability Act. He was employed in the erection of a large steel bridge over the Thompson River, at Ashcroft, for the C.N.P.R. Co. Rails were laid upon the floor of the bridge, and the car, propelled by an engine placed on it, travelled backwards and forwards on these rails. It was the engineer's duty to give a signal whistle when about to move the car either way. This signal he did not give before making the forward movement which resulted in the plaintiff's injury. Was the way upon which this car was operated a tramway or railway within the meaning of sub-sec. 5 of sec. 3 of said Act? I think it was, and that the defendants cannot rely on the doctrine of common employment, and are responsible in damages to be assessed as provided in the Act.

In *Doughty* v. *Firbank* (1883), 10 Q.B.D. 358, the natural as distinguished from the technical meaning was given to the term "railway," and it was pointed out that that term was not to be confined to those railways only which are operated by railway companies; that a railway is "a way upon which trains pass by means of rails"; and in *McCord* v. *Cammell & Co.*, [1896] A.C. 57, Lord Halsbury thought that the term "train" was not to be narrowly construed.

Sub-section 5 of our Act is wider than the corresponding English section, and under it there can, I think, be no great doubt that the "traveller" in question falls within it: see also *Cox* v. *G.W.R. Co.* (1882), 9 Q.B.D. 106.

As the jury, in awarding $9,000 damages, must, of necessity, have found their verdict at common law, the case must go back for assessment of damages under the Act. The appeal should be

B. C.

C. A.

allowed and a new trial ordered, confined to the assessment of damages under the Act.

CREVELING v. CANADIAN BRIDGE CO.

Irving, J.A.

IRVING, J.A.:—I do not think the plaintiff is entitled to a judgment at common law. Nor if he were could I approve of the amount of the verdict. The proper direction to a jury is set out by Brett, J. (as he then was), in *Rowley* v. *London & N. W. R. Co.* (1873), L.R. 8 Ex. 221, at 231, 42 L.J.Ex. 153:—

> They must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.

The jury must have ignored this rule or measured the damages by some measure which ought not to have applied: *Johnston* v. *G.W.R. Co.*, [1904] 2 K.B. 250, 73 L.J.K.B. 568. The Court of Session (Scotland) has recently discussed the principle to be applied on the hearing of an application for a new trial on the ground of excessive damages in *Thomas* v. *Caledonian R. Co.* (1913), Sc. 804. Unfortunately we have not the report of that case. The plaintiff, in my opinion, can maintain an action under sub-sec. 5 of sec. 3 of the Employers' Liability Act, and I would send the case back for a new trial. Were it open to us to do so, I would like to send the case back for an assessment of damages under that statute, without interfering with the question of negligence, but Order XXXIX. of the English Rules has not been carried into our B.C. Rules. Whether 869A, O. 58, r. 5a, applied to a case like this, where the damages are only recoverable by virtue of a statute, is doubtful, to say the least of it.

Martin, J.A.

MARTIN, J.A.:—This verdict at common law cannot, I think, be supported, because there was an adequate system of warning by whistling, and the plaintiff admits that the accident would have been averted if the engineer on the traveller had whistled as he ought to have done before moving the traveller forward on the bridge: A.B., pp. 23-4, 32, 88-9. The consequence is that there should be a new trial on the Employers' Liability branch of the case, as the parties will not agree on the damages thereunder. The appellant should have the costs of this appeal, and those of the former trial should abide the event of the new one.

Galliher, J.A.
McPhillips, J.A.

GALLIHER and MCPHILLIPS, JJ.A., agree that there should be a new trial.

[Appeal to Supreme Court of Canada allowed, March 15th, 1915.]

Re CITY OF OTTAWA AND PROVINCIAL BOARD OF HEALTH.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. December 28, 1914.

1. HEALTH (§ I—2)—POWERS OF BOARD OF HEALTH—REGULATION OF WATER SUPPLY—JURISDICTION OF BOARD.

The provincial Board of Health, when entrusted by statute with the performance of a public duty, such as the approval or rejection of the plans and specifications for a city water supply scheme, is an inferior tribunal subject to the jurisdiction of a superior court exercising the jurisdiction formerly pertaining to the Court of King's Bench, in respect of its power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the board by law and also in respect of the board's refusal of its true jurisdiction by the adoption of extraneous considerations in arriving at its conclusion or deciding a point other than that brought before it.

[*R. v. Board of Education*, [1910] 2 K.B. 165, followed; *Graham v. Commissioners*, 28 Ont. R. 1, distinguished.]

Statement.

MOTION by the Corporation of the City of Ottawa for a peremptory order of mandamus directing the Provincial Board of Health to consider certain plans and specifications prepared for the applicants under the authority of the statute 4 Geo. V. ch. 84 (O.), an Act respecting the City of Ottawa, and submitted for the approval of the Board.

Wallace Nesbitt, K.C., and *T. A. Beament*, for the applicants.

Edward Bayly, K.C., for the Provincial Board of Health, relied on sec. 9 of the Act as an answer to the application.

Middleton, J.

MIDDLETON, J.:—The water supply for the city of Ottawa has been polluted and unsatisfactory, and for some years the question of securing a sufficient and satisfactory supply has been not only before the people but before the Legislature and the Courts.

It will be noticed that the Provincial Board has not followed the wording of sec. 5, and that its refusal is not merely to approve of the plans and specifications, but is also a refusal to approve of the report recommending the filtration of the river water.

The action of the Board is now attacked, upon the ground that it has usurped a function not entrusted to it when it undertook to consider the report, and that its decision, which involves the rejection of the Ottawa river as the source of supply, is *ultra vires*, and upon the ground that the Board has refused to exercise the functions which it is called upon to discharge.

[Extracts from the depositions.]

From all these extracts it is quite apparent that the Board has acted upon the assumption that it was justified in refusing

ONT.
S. C.
RE CITY OF OTTAWA AND PROVINCIAL BOARD OF HEALTH.
Middleton, J.

to approve of the plans because the scheme propounded by Mr. Currie did not meet with the approval of the Board.

Whatever the functions of the Board may be, I have no right to consider, and do not consider, the merits or demerits of these schemes.

[Reference to the Public Health Act, 2 Geo. V. ch. 58, sec. 89.]

The Board has clearly gone beyond what was referred to it by the statute, when it assumed, as it undoubtedly did, to criticise and reject the engineer's report upon the source of supply.

Have I jurisdiction to make the order sought?

[Reference to *R.* v. *Board of Education*, [1910] 2 K.B. 165.]

The Board, acting under the Public Health Act and under this Act, is not to be regarded, as the defendants were in *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, as a mere emanation from the Crown. It is a body created for the discharge of very important administrative and quasi-judicial functions. As put in other cases, it constitutes "a public authority performing a statutory duty:" *Rex* v. *Lords Commissioners of His Majesty's Treasury*, [1909] 2 K.B. 183; *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531; *Regina* v. *Commissioners for Special Purposes of Income Tax* (1888), 21 Q.B.D. 313.

For these reasons, I think the Board has failed to discharge the precise duty imposed upon it by the statute, and that the mandamus sought should now be granted.

It was suggested that the mandamus ought not to be granted because the Court can in no way control the Board, and that the Board might refuse to approve of the plans, not because they are in themselves in any way defective, but because the Board disapproves of the source. I cannot suppose that professional men of the standing of the gentlemen constituting the Board could act otherwise than properly and in the honest discharge of the duty imposed upon them by the statute. If in the result the order I now make stands, the Board will, no doubt, yield obedience to the views expressed.

The case is not one for costs.

COUGHLAN v. CARVER.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Gallihe and McPhillips, JJ.A. November 5, 1914.

1. MECHANICS' LIENS—(§ VIII—66)—MATERIALS—SUPPLYING—LIEN—TIME FOR FILING—MECHANICS' LIEN ACT (B.C.).

A person supplying materials only for the building under a contract therefor with the principal contractor must file his lien under the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, sec. 19 (2), within 31 days after the last delivery of materials made by him.

[*Irvin* v. *Victoria Home*, 12 D.L.R. 637, 13 B.C.R. 318, distinguished; *Fitzgerald* v. *Williamson*, 12 D.L.R. 691, 18 B.C.R. 322, referred to.]

Statement.

APPEAL from a County Court in a mechanics' lien action.

Appeal allowed.

Douglas Armour, for appellants, defendants.

Mayers, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is an action for the enforcement of a mechanic's lien. Two questions were presented at bar for our consideration: First, were the respondents (plaintiffs) persons supplying materials merely, and therefore not only bound to give the notice prescribed by the proviso to sec. 6 of the Mechanics' Lien Act, which they gave, but also bound, if they would preserve the lien, to file their claim within 31 days after the last delivery of materials, as prescribed by sec. 19 (2); and secondly, if not, had they 31 days from the completion of the main contract, or only 31 days from the completion of their own contract within which to file their claim? In the view I take of the first question it becomes unnecessary to consider the second.

The respondents accepted an order from the contractors for steel beams, angles, channels and plates to be used by the contractors in the erection of the building. The different members were to be fashioned to meet specified requirements, and were to be made ready to be placed and fastened together when required in construction. All that the respondents had to do was to be done at their factory, and nothing was to be done by them on or about the building itself. The material so made ready was to be delivered at the building site, where the respondent's connection with it ended. Their submission was that they were not mere "material men," to use the popular and convenient designation for those supplying material only, but were subcontractors for work and material; that the fact that they had to expend labour on the material before delivery distinguishes their

B. C.

C. A.

COUGHLAN v. CARVER.

Macdonald, C.J.A.

status from that of "material men," such, for instance, as merchants who supply hardware from their stock-in-trade to a contractor. The distinction is too refined to be admissible. We held, in *Irvin* v. *Victoria Home Construction and Investment Co., Ltd.* (1913), 12 D.L.R. 637, 18 B.C.R. 318, that persons who contract with the principal contractors to do a portion of the work on the building itself, supplying the material with which to do it, are not mere material men, but are sub-contractors in the sense in which that term was employed in the Mechanics' Lien Act prior to the amendment giving a lien for materials, and hence were not required to give the notice prescribed by sec. 6, from which it follows that such persons would be within sec. 19 (1) and not sec. 19 (2) in respect of the time limited for the continuance of their liens. It is such sub-contractors that the plaintiffs claim to be, but so to hold I should have to decide that they are persons who have done "work or service or caused work or service to be done upon" the building within the meaning of sec. 6 (1) of the Act. I might as reasonably hold that if locks of a special design were ordered from a manufacturer, he could claim not merely as a material man, but as a person who had done or caused work to be done on the building.

The definition "sub-contractor," in the Interpretation Clause of the Act, is wide enough to include the "material man," but the Act contemplates different classes of sub-contractors with different rights and obligations affecting their status as lien holders. A sub-contractor, for the supplying of material only, cannot acquire a lien unless he complies with the provisions of sec. 6, and cannot maintain it after 31 days from the last delivery of his material unless he comply with sec. 19 (2). A person who sub-contracts for a portion of the work of construction, including the materials to be used therein, is not, as we have already held in the case above referred to, and in other cases, required to give such notice, and is entitled to the time prescribed in sec. 19 (1) within which to file a claim which would keep his lien in good standing.

I would allow the appeal and dismiss the action.

Irving, J.A.

IRVING, J.A.:—I concur in the judgment of the learned Chief Justice.

Martin, J.A.

MARTIN, J.A.:—This appeal raises the question as to whether or no a sub-contractor who "furnishes" materials alone (which is

all that he did here, because the fact that he manufactured them specially before "furnishing or placing" them clearly does not extend his lien to cover work done on the building by others with said materials after they got there) is to have only "31 days after the furnishing or placing of the last materials so furnished or placed," under sub-sec. 2 of sec. 19, instead of "31 days after the completion of the contract," under sub-sec. 1, the contention being that the contract here means the main contract. The plaintiff here clearly comes within the definition of "sub-contractor" in sec. 2, as he did not contract with and was not employed directly by the owner or his agent, but contracted with the contractor "to place or furnish material" on the work. So it is conceded that the language is in terms wide enough to embrace the plaintiff and bring him under sub-sec. 1, and it only remains to be seen if there is any limitation that could legally be placed upon that language, either from other sections in the Act or judicial decisions, so as to exclude him. In the first place, I do not doubt that the "contract" mentioned in said sub-sec. 1 is the original and main contract. That view is supported by analogous reasoning on the words "completion of the work" in *Coughlan* v. *National Construction Co.* (1909), 14 B.C.R. 339, and by the closer decision of *Dempster* v. *Wright* (1900), 21 C.L.T. 88, which, though given on a differently worded statute, in one respect, is nevertheless in point generally. In the second place, though the matter is not free from doubt, in view of the very plausible submissions made by Mr. Mayers, yet I am of opinion that, considering the history of the Act in question, sub-sec. 2 (appearing for the first time in the Act of 1910) was intended to cover only the case of a "material man" who was not a sub-contractor, and that the case of "sub-contractors" is provided for in sub-sec. 1. Before the Act of 1900, ch. 20, sec. 7, the material man had no lien, though the sub-contractor had one for work done, and his time for filing it was governed by the Act of 1897, R.S.B.C. ch. 132, sec. 8, and I cannot resist the conclusion that the new provisions covering the new case of the time given the material man was intended to apply to him only, even though by the terms of the existing definition of "sub-contractor" the latter partook also of the nature of the new material man and had his lien correspondingly extended to include materials. Therefore in this respect of time he still differs from the material man, though in

B. C.

C. A.

COUGHLAN v. CARVER.

other respects and under other sections his right may be in the same category, *e.g.*, under the proviso in sec. 6 where he supplies materials only: *Fitzgerald* v. *Williamson* (1913), 12 D.L.R. 691, 18 B.C.R. 322.

It follows that the appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I would allow the appeal.

The plaintiffs in my opinion are material men and not sub-contractors. They undertook to deliver and did deliver certain structural steel to be used in the building in question. This they assembled at their own works according to plans and specifications, and delivered on the ground, but did not work it into the building. As material men their lien was out of time: see sub-sec. 2 of sec. 19, ch. 154, R.S.B.C. 1911.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the judgment of His Honour Judge Grant of the County Court of Vancouver, in a mechanics' lien action, the judgment being the upholding of a mechanics' lien for materials supplied in the erection of a building upon property of the C.P.R. Co. in the city of Vancouver. The lien allowed was in amount $715. J. Coughlan & Sons, the plaintiffs in the action (respondents), supplied certain structural steel in the construction of the building, supplying the same under an order from the America Can Co., Ltd.

The letter confirming the receipt of the order is ex. 2, at p. 24 of the Appeal Book, and is said to be steel work for the America Can Co. factory. It is not made clear that the America Can Co., Ltd., are really the proprietors of the factory, title to the land being vested in the C.P.R. Co., but this may perhaps be assumed. The evidence does shew that the principal contractors—the contractors for the construction of the building—were John Carver & Co. The required statutory notice was given that the plaintiffs would claim a lien for materials.

The trial to a very large extent proceeded upon admissions. The last of the materials would appear to have been furnished on November 24, 1913—or at least it is not contended that any materials were furnished at any later date.

In my opinion this appeal, upon the facts admitted and the evidence adduced at the trial, must be determined upon the footing that the plaintiffs were material men—not being the lien of a contractor or sub-contractor. It will be observed that the

notice advising that a lien would be claimed reads in part, "which said material was ordered by Carver & Carver, contractors, Vancouver," yet, as above pointed out, it is manifest that the order was given by the America Can Co., Ltd.

The contractors, John Carver & Co., would appear to have fully completed their contract in the construction of the building by January 26, 1914. The lien was not filed until February 20, 1914. The lien, not being filed within 31 days of the furnishing of the last materials, *i.e.*, within 31 days after November 24, 1913, in my opinion was too late.

The Mechanics' Lien Act must be read as a whole, and the intention of the Legislature, in my opinion, is plain, and that is that the furnishing of materials is separately dealt with, when it is the furnishing of materials *simply*, and not the furnishing of materials connected with a contract or sub-contract which in its terms may involve the supplying of materials, the rendering of services, the payment of wages and generally all that it is usual and customary to provide in the carrying out of the whole work. I am not prepared, as at present advised, however, to hold that even were the plaintiffs in the position of sub-contractors, within the meaning of the Mechanics' Lien Act, that the lien was filed in time, only being filed within 31 days after the completion of the contract by John A. Carver & Co. However, in view of the way I look at the facts of the case, it is unnecessary to decide the point.

McCormick v. *Bullivant* (1877), 25 Gr. 273, and *Hall* v. *Hogg* (1890), 20 O.R. 13, are authorities which appear to me to sustain the opinion at which I have arrived, coupled with the construction which, in my opinion, should be placed upon the Mechanics' Lien Act. It follows that in my view the appeals should be allowed and the mechanics' lien set aside, with costs to the appellants both here and below.

ROBINSON v. VILLAGE OF HAVELOCK.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. September 21, 1914.

1. NEGLIGENCE (§ I C—55)—INJURIES TO CHILDREN—MUNICIPAL GROUNDS—GRAVEL-PIT.

A finding by the jury that previous to the accident whereby children playing in a municipally owned gravel-pit were smothered, the municipal corporation had no knowledge, nor should it have reasonably known, that there was a likelihood of children being injured by the

ONT.

S. C.

ROBINSON v. VILLAGE OF HAVELOCK.

falling of earth, sand or gravel while playing in the pit where the case was not based upon the maintenance of a nuisance.

[*Cooke* v. *Midland, etc., Ry.*, [1909] A.C. 229, distinguished; *Latham* v. *Johnson*, [1913] 1 K.B. 398, approved; *Pedlar* v. *Toronto Power Co.*, 15 D.L.R. 684, 29 O.L.R. 527, 19 D.L.R. 441, 30 O.L.R. 581, referred to.]

2. NEGLIGENCE (§ I C—55)—INJURIES TO CHILDREN—DANGEROUS ATTRACTIONS—TRESPASSERS.

A child will still be a trespasser if he goes on private ground without leave or right, however natural it may have been for him to do so; but the presence in a frequented place of some object of attraction tempting the child to meddle where he ought to abstain may well constitute a trap, and, in the case of a child too young to be capable of contributory negligence, it may impose full liability on the owner or occupier, if he ought as a reasonable man to have anticipated the presence of the child and the attractiveness and peril of the object.

[*Latham* v. *Johnson*, [1913] 1 K.B. 398, approved.]

Statement.

APPEAL by defendants from Kelly, J., in an action under the Fatal Accidents Act to recover damages for the death of the plaintiff's three children.

F. D. Kerr, for the appellant corporation.

D. O'Connell, for the respondent.

Meredith, C.J.O.

September 21. The judgment of the Court was delivered by MEREDITH, C.J.O. (after stating the facts):—There is no doubt that the excavation made by the appellant constituted a nuisance, but no case is made on the pleadings, and there is no finding of the jury, that the nuisance was the cause of the accident, and there is no evidence that would warrant such a finding.

The right of the respondent to recover must, therefore, depend on his having established that, in the circumstances, the appellant owed a duty to the children which it failed to perform, and that their death was occasioned by that failure.

The respondent's counsel relied on *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; but, assuming that the finding of the jury that the appellant invited the children to use the gravel-pit is warranted by the evidence—and I think it is not—the answer to the second question is fatal to the respondent's case. In the *Cooke* case the plaintiff would have failed but for the conclusion that was reached that the defendant knew that it was placing or leaving in the way of boys and children, a temptation alluring to them and dangerous in its nature, and with which it was not improbable that they would come in contact. It was upon this knowledge that, in the opinion of Lord Atkinson, "the liability of the owner is at bottom based" (pp. 238-9).

The *Cooke* case has been considered by the Court of Appeal in *Latham* v. *R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, and the Court there came to the conclusion that no new law was laid down or intended to be laid down in the earlier case, and pointed out that all that was decided in that case was that the defendants had put in a place open to their licensees a thing dangerous *in itself*, and that there was, therefore, cast upon the defendants a duty to take precautions for the protection of others who would certainly come into its proximity: *per* Farwell, L.J., at p. 408. Hamilton, L.J., at p. 416, says: "A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, *if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object.*" Again, at p. 417, the same Lord Justice says that there was no evidence "that the defendants knew that there was anything dangerous about any stones in general or these stones recently shot there in particular," referring to the heap of stones which had or was supposed to have caused the injury to the child.

Besides the answer of the jury to the second question, there was, as I have said, no evidence of knowledge by the appellant that children were in the habit of resorting to the gravel-pit to play there. Leeson's knowledge of the fact was not notice to the appellant. He was not an officer or servant of the defendant, but, as has been said, a teamster employed to haul sand or gravel from the pit whenever occasion required that it should be hauled for the purposes of the appellant, and he had neither oversight nor care of the pit intrusted to him.

These difficulties in the way of the respondent's success are, in my opinion, insuperable; and there are, I think, other formidable difficulties in the way of it, to which it is not necessary to refer.

ONT.

S. C.

ROBINSON v. VILLAGE OF HAVELOCK.

Meredith, C.J.O.

Even if knowledge by the appellant that children were accustomed to resort to the gravel-pit to play had been proved, we could not uphold the judgment without running counter to *Pedlar* v. *Toronto Power Co.*, 15 D.L.R. 684, affirmed by a Divisional Court (1914), 30 O.L.R. 581.

The appeal must be allowed and the judgment of the trial Judge reversed, and, in lieu of it, judgment be entered dismissing the action, the whole with costs, if costs are asked by the appellant.

B. C.

S. C.

HOPE v. SURREY.

British Columbia Supreme Court, Clement, J. September 24, 1914.

1. MUNICIPAL CORPORATIONS (§ II B—34)—MUNICIPALITY—PUBLIC WRONG—REDRESS—ACTION FOR BY ATTORNEY-GENERAL—BRITISH COLUMBIA.

A municipality in British Columbia is not entitled to bring action to redress the public wrong done by obstructing a highway; such an action can be brought only by the Attorney-General.

[*Delta* v. *V.V. & E.R. Co.*, 14 B.C.R. 83, followed.]

2. MUNICIPAL CORPORATIONS (§ II B—34)—MUNICIPALITY—PUBLIC NUISANCE—ABATEMENT OF VI ET ARMIS—BRITISH COLUMBIA.

A municipality in British Columbia has no right to abate *vi et armis* the public nuisance resulting from the encroachment of fence upon the highway.

[*Waddell* v. *Richardson*, 17 B.C.R. 19, referred to.]

ACTION for trespass.

M. A. Macdonald, for plaintiffs.

A. H. Macneill, K.C., for defendant.

Clement, J.

CLEMENT, J.:—I agree with Mr. Macdonald that the road in question, as it exists on the ground, did not become a public highway by dedication in the sense in which that term is used in English law. Nevertheless the road as it exists was brought into existence by the combined action of the defendant railway, the defendant municipality, and the land owners, including the plaintiffs' predecessor in title, Nettie A. Carncross. All were consenting parties. I must assume that Mrs. Carncross was a party to some bargain fixing the price or compensation which she was to receive for the land required for the road. Apparently there were no expropriation proceedings necessary, the whole matter being amicably arranged, so far, at all events, as Mrs. Carncross was concerned. As such a road so brought into actual existence it is hardly necessary to invoke sec. 1 of our Highway Act, for it was deliberately and intentionally brought into being

as a highway for the public. Gazetting was in such case, in my opinion, superfluous. A by-law and notice thereof in the Gazette are necessary to ground compulsory expropriation; they are not essential in all cases to the establishment of a public highway.

The only question open on this part of the case is whether the northern boundary of the road has been sufficiently fixed by what was done. The road was laid out by the defendant railway (as part of the arrangement with the defendant municipality). The southern boundary was marked by the fence erected along the northern boundary of the defendant railway's right-of-way, or of what, without objection by Mrs. Carncross, they took to be their right-of-way as acquired from her. And on the easterly boundary of the Carncross property a stake was planted to indicate the point where the northern boundary of the road would intersect the said easterly of the Carncross property. Between these road boundaries the ground was roughly graded for a width of from 12 to 14 feet, with a ditch on the north side, at least. This, with the surrounding circumstances, was, in my opinion, sufficient to fix the road as a public highway, 33 feet in width, lying north of the defendant railway's fence. Upon this highway the plaintiffs, in my view, encroached when they built the fence, the tearing down of which by the defendant municipality is complained of in this action.

Nevertheless, the defendant municipality had no right, as I understand the law, to take upon themselves the abatement of this nuisance. I must follow and apply *Delta* v. *V. V. & E. Ry.*, 14 B.C.R. 83, in which it was held that a municipality is not entitled to bring action to redress the public wrong done by obstructing a highway. Such an action can be brought only by the Attorney-General. It must equally follow that a municipality cannot undertake to abate such a nuisance *vi et armis*. Such a proceeding is, in my judgment, lawless and reprehensible, as calculated to cause a breach of the peace. The fence in question had stood, as I gather from the evidence, for about a year, and the dispute as to the plaintiffs' right to maintain it in its then position was the subject of correspondence and debate with the engineers of the defendant railway. While I have no sympathy for these plaintiffs, whose claims I think quite out of the question (as will appear later), the defendant municipality is much to

B. C.
S. C.
HOPE
v.
SURREY.
Clement, J.

blame in resorting to lawless force. See *Waddell* v. *Richardson*, 17 B.C.R. 19.

The difficulties which it is suggested have arisen by reason of the erroneous description of this highway in the by-law passed by the council of the defendant municipality seem to me more apparent than real. That by-law has never, in fact, been acted on, except that, apparently, it has been registered in the Land Registry Office. That registration should be vacated and the by-law itself be repealed. This will remove any possible cloud upon the plaintiffs' title.

With regard to the plaintiffs' claim against the defendant railway, what I have said above reduces to about 8 feet the strip which the plaintiffs claim as their property lying between the highway and the northern limit of the land conveyed to the defendant railway by Mrs. Carncross. Of this strip the defendant railway took possession (without objection from Mrs. Carncross), as being covered by the conveyance from Mrs. Carncross. I do not think it is; but on the evidence I think there is little doubt that as between the defendant railway and Mrs. Carncross rectification would be ordered. Mrs. Carncross, however, is not a party to this record, so that I cannot so adjudicate. The plaintiffs' only claim as put forward is under two agreements for sale, the one made by Mrs. Carncross with one Sands, the second made by Sands with the plaintiffs. It seems clear to me that on the proper construction of those agreements the plaintiffs acquired no interest in any part of the property formerly owned by Mrs. Carncross lying south of the highway. If so, the plaintiffs have no status to attack the defendant railway's title or to question their possession of the strip in question.

The result is that the plaintiffs fail as to all their claims other than the claim to damages for trespass. On that there will be judgment against the defendant municipality for $200, with such costs only as would have been incurred had their claim been limited to that head. As between the plaintiffs and the defendant municipality there will be no further order as to costs. The defendant railway are entitled to their costs against the plaintiffs.

Judgment accordingly.

JOHN DEERE PLOW CO. v. TOWN OF SCOTT.

SASK.

S. C.

Saskatchewan Supreme Court, Lamont, J. September 11, 1914.

1. TAXES (§ III E—142)—DISTRESS OF GOODS FOR—CONDITIONAL SALE—VENDEE'S INTEREST UNDER—VENDOR'S RIGHTS, HOW LIMITED—ONUS.

Under the Town Act, R.S.S. 1909, ch. 85, the municipality has the right to distrain for tax arrears upon the interest of the person taxed in any goods to the possession of which he is entitled under a conditional sale contract, as well as upon goods which are his absolute property; so where goods seized for taxes against the person rightfully in possession are claimed by the conditional vendor, who fails on demand to produce to the municipality proofs of his title, he will be deprived of his costs of an action in which his title was established.

Statement

ACTION for detention of goods.

Judgment for plaintiff, but on terms and without costs.

J. D. Munro, for plaintiff.

T. Lynd, for defendant.

Lamont, J.

LAMONT, J.:—In this action the plaintiffs seek to recover damages for unlawful seizure and detention of certain goods and chattels which they claim to be their property, and which, they allege, the defendants unlawfully seized and still unlawfully detain. The goods in question were sold by the plaintiffs to the firm of Street, Whitlam Bros., Ltd., in 1910, under a contract by which the said firm was at liberty to re-sell them, but the property in and title to all the goods supplied by the plaintiffs to the firm, except those so sold, were to remain in the plaintiffs until all the obligations given therefor should be satisfied. The firm was to have the right to the possession of the goods until default was made in payment of any note or notes or other obligations given to the company for goods shipped. Upon default, the plaintiffs had the right to resume possession of the goods. In 1911 the firm of Street, Whitlam Bros., Ltd., ceased doing business as a firm, but the business was carried on personally by R. H. Street, who had been a member of the firm. In 1911 and 1912 the premises upon which the business was carried on was assessed by the defendants to R. H. Street. In 1911 a business tax amounting to $131.43 was levied against Street in respect of the premises, and in 1912 a further business tax was levied of $257.95. These taxes not being paid, the defendants, on March 31, 1913, made a seizure of certain goods and chattels then upon the said premises in the possession of R. H. Street. Among the goods seized were ten fanning mills and some repairs, which the plaintiffs claim to be their property and in respect of which they have brought this action.

SASK.

S. C.

JOHN DEERE PLOW CO. v. TOWN OF SCOTT.

Lamont, J.

Under the Town Act, R.S.S. 1909, ch. 85, the defendants have the right to distrain upon the interest of the person taxed in any goods to the possession of which he is entitled under a contract for purchase or a contract by which he may or is to become the owner thereof by the performance of any condition. At the time the defendants distrained, R. H. Street had an interest in the goods seized and a right to their possession, as up to that time the plaintiffs had not resumed possession of them. Evidence was submitted to shew that in June, 1911, the plaintiffs resumed possession, and it was argued that therefore the goods were held by Street as the plaintiffs' warehouseman. I cannot give effect to this contention. At the time the plaintiffs claim to have resumed possession they were not entitled to do so, as at that time the notes for the purchase price were not due, and did not become due until November of that year. The document purporting to be a warehouse receipt was signed by Street merely as an acknowledgment of the quantity of goods on hand. Had he been a warehouseman, all the property in the goods would have been in the plaintiffs. Their credit manager, however, testified that after the date they claim to have resumed possession Street was entitled to sell the goods as before, accounting to the plaintiffs for the wholesale price and keeping the difference between that and the price at which he sold. I therefore find that in 1911 and 1912, Street, as between himself and the plaintiffs, carried on the business under the terms of the contracts signed by the Street, Whitlam Bros., Ltd. Street having an interest in the goods and the right of possession, the defendants were within their rights in seizing them for taxes. Having made a seizure, they stood in the same position, so far as the plaintiffs were concerned, as Street. They could only seize the interest he had, and the possession which Street had was the only possession they acquired. Street's interest in the goods amounted to this, that he had a right to the property only upon paying the balance of the plaintiffs' account. His right to possession existed only until default was made in the payment of the notes given by Street, Whitlam Bros., Ltd., and such further time as the plaintiffs refrained from resuming possession. Under their distress the defendants could obtain no greater interest than Street had. If the plaintiffs had not been entitled to resume possession at once, the defendants probably would have had the right to sell the goods subject to the plaintiffs' claim.

This, however, would in this case have been a barren right, as the balance of the plaintiffs' claim amounted to more than the value of the goods seized. The plaintiffs, however, were entitled to resume possession forthwith, as the notes given to them were at the time of the seizure overdue. The defendants could therefore retain possession only by paying off the plaintiffs' lien, which they have not done. The plaintiffs are therefore entitled to the possession of the goods seized upon which they have a lien. The damages, however, which they have suffered by the defendants' detention of the goods are only nominal.

As to the costs: On April 8, 1913, the plaintiffs' solicitors wrote a letter to the defendants, in which, after claiming that the goods seized were the property of the plaintiff and not liable to seizure, they said:—

> We may add that if, in order to satisfy yourselves of the validity of our clients' lien, you wish any affidavits or other evidence filed, we shall be pleased to approach our clients with a view to satisfying you on such a point.

This letter the defendants handed to their solicitor, who, on April 18, wrote the solicitors of the plaintiff as follows—

> I have your letter of the 8th instant addressed to the town of Scott, which has been handed to me for attention. I note your contention herein, and may state that the town will be glad to take advantage of your offer of having you submit evidence on which you base your argument that the goods and chattels in question are not liable to seizure by the town of Scott for taxes. The town thinks the goods are liable; but if you can submit any evidence which would shew the goods are not liable, the town would be, indeed, glad to have you do so.

Instead of adopting the very reasonable course suggested by their solicitors, the plaintiffs did not furnish any affidavits or other evidence of their title to the goods. All they had to do was to produce their contract and evidence that the notes were overdue and unpaid. Had they done this, I am satisfied that this litigation would not have been necessary. Instead, however, they sent a representative to Scott to take away the goods. As the defendants had rightfully seized the goods, and had them in their possession, it was not unreasonable that they should require some evidence of the plaintiffs' lien before giving up possession. While the plaintiffs' failure to act reasonably in this matter does not entitle the defendants to retain possession of the goods, it is a matter to be considered in the awarding of costs; and under the

SASK.

JOHN DEERE PLOW CO. v. TOWN OF SCOTT.

circumstances I think the plaintiffs are not entitled to their costs. The defendants will withdraw from possession of the plaintiffs' goods.

Judgment for plaintiff.

Re KNOX; A SOLICITOR.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 30, 1914.

1. SOLICITORS (§ I B—12)—DISBARMENT—MISAPPROPRIATION OF MONEY—RESTITUTION.

On a motion to strike a solicitor's name from the rolls in Alberta, alleged misconduct in another country where he had previously practiced may be shewn in proof that he was not a fit and proper person to be admitted in Alberta, and if the evidence warrants it, the court may direct that he appear before it within a specified time and satisfy the court that he is doing what is reasonable and within his ability to satisfy the foreign claims and in default that he be struck off.

[*Bunny v. Supreme Court of New Zealand*, 16 Moo. P.C. 164, 15 E.R. 455, *Re Blaylock*, 16 D.L.R. 487; *Re Hopper*, 34 Sol. J., 568, applied.]

Statement

APPLICATION by the Law Society of Alberta to strike the defendant, a barrister and solicitor, off the rolls.

Charles F. Adams, for the Law Society of Alberta.

A. Stuart, K.C., for the solicitor.

Harvey, C.J.

June 30, 1914. HARVEY, C.J.:—This is an application by the Law Society to strike the solicitor off the rolls.

The solicitor was a Scotch solicitor and was admitted here in the fall of 1910, by virtue of his standing in Scotland, and the misconduct complained of took place before his admission here, while he was a solicitor in Scotland. Objection is taken that such misconduct cannot support this application.

The application was first made in March, 1913, to Mr. Justice Walsh, who granted a summons, and upon its return referred the application to this Court. When the application came before this Court an application was made by the Law Society for a commission to take the *viva voce* evidence of witnesses in Scotland touching the matters of complaint. Although the application was opposed it was granted, all the members of the Court except Mr. Justice Stuart, being present.

I am of opinion that the order then made in effect, if not in form, decided this point against the solicitor. Moreover, the same point was expressly decided in the same way by the Privy

Council in *Bunny* v. *The Judges of the Supreme Court of New Zealand* (1862), 15 Moore, P.C. 164, 15 E.R. 455. If the question were simply one of discipline or punishment of the solicitor, it might have been argued with some reason that the Court would have no right to concern itself with anything except the conduct of the solicitor as an officer of the Court, but as was pointed out in *Re Blaylock*, 16 D.L.R. 487, decided by this Court earlier this year, that is not what is to be considered. The important consideration is the solicitor's fitness. The duties of a solicitor are such that he must necessarily be entrusted with his client's property and secrets. The Court's concern, therefore, must be to see that he is a person of such character that the confidence which must be reposed in him will not likely be betrayed. *In re Hopper* (1890), 34 Sol. Jr. 568, a case before the Court of Appeal, the objection was taken that the acts complained of were not committed by the solicitor while acting as such. The Court declined to give any effect to the objection. Lord Esher said, "The only question for the Court in such cases was, whether there was that found against the solicitor which, in the careful and deliberate judgment of the Court, shewed that he was no lawyer fit to be trusted to the almost infinite extent to which a solicitor was trusted by his clients." Lindley, L.J., "said he was convinced by the evidence that the solicitor was incapable of resisting the temptation of misappropriating other people's money over which he had control. He was, therefore, unfit to be trusted," and Lopes, L.J., "said that the very fact of a man being admitted to practice as a solicitor was a guarantee to the public that he was fit to be trusted." In the case last referred to the charge against the solicitor was not made by any person injured, but was made by the official receiver in bankruptcy and was founded on three cases of the borrowing or otherwise using client's money without their authority, and in the course of his remarks, Lord Esher said, "it was a most alarming thing for it even to be contended that a solicitor, knowing that he was on the verge of bankruptcy was justified in spending money belonging to his clients." In the *Bunny* case the application was made by a local barrister though the misconduct alleged was in connection with the solicitor's practice

ALTA.

S.C.

RE KNOX; A SOLICITOR.

Harvey, C.J.

in England. Observations appear to have been made with respect to the local barrister's position, but the Judicial Committee considered that he had done no more than his duty.

I refer to these facts here because of their similarity in some respects to the case at bar. Comments have been made because this application is brought forward by reason of complaints made, not by the persons who have been injured, but by a local and rival solicitor, and that information was obtained through the efforts of another rival solicitor. I do not wish to pass judgment upon the conduct of these solicitors because it is not in issue here, and they have had no opportunity of explaining, but the cases cited shew that this is not the first case that has been brought before the courts through the agency of others than the persons injured. Any Judge who has had any experience in the enforcement of the criminal law, also knows that the criminal proceedings are often begun from motives other than the mere desire to see the law observed, and finds it necessary frequently to impose punishment though he may have no sympathy with the motives that put the machinery of the law into motion. [The learned Judge here discussed the evidence in detail.]

The case presents so many points of similarity to the *Bunny* case above referred to that it seems to me we might well adopt a conclusion similar to the one adopted there.

In that case, as in the present, the solicitor, after his departure was declared bankrupt. It differs from this case, however, in that the solicitor returned to England and gave himself up to the Bankruptcy Court, and received a second-class certificate, whatever that may be. Sometime after his admission as a solicitor in New Zealand an application was made to strike him off the rolls on the grounds that he had secured his admission by fraud, and that he had been guilty of fraud in connection with a suit in England as alleged by an affidavit of a former clerk of his in England, who swore that a material alteration had been made by him. He denied the allegations by the former clerk. The Judge made an order suspending him for one year to enable him to prosecute for perjury the persons who had charged him with the misconduct, or by other means to

make out to the satisfaction of the Court that the charges were unfounded, and providing that in default he might be struck off the rolls. He did make default and was struck off. The Privy Council in delivering judgment on the appeal stated that the Judge had delivered a judgment marked with fairness and good sense, and a knowledge of the principles by which his decision ought to be guided.

In this view it becomes necessary to determine between the conflicting statements of the solicitor, and the various persons who have given evidence against him. There is, however, sufficient to shew that the solicitor is far from free from blame in connection with some of the transactions, and he ought to free himself from the stigma which attaches to himself thereby. I would suspend him for one year in order to enable him to settle the matters for which he is liable, and to obtain a proper determination of his liability where he maintains he is not liable. Upon his satisfying the Court within the year, that he has done this, the suspension might be raised. Upon his failure to do so, or his failure to apply for an extension of the time, and such extension being granted, he should be struck off the rolls, the order to strike him off to go without further order in default of any order being made to the contrary before the commencement of the long vacation of 1915.

As my brother Simmons is of the opinion that the solicitor should not be suspended, but agrees with me in other respects as to the order to be made. I will agree with him with respect to the suspension, in order that an order of the Court may be made.

Stuart, J. (dissenting)

STUART, J. (dissented), being in favour of dismissing the application.

Simmons, J.

SIMMONS, J., after setting out the facts:—A large amount of evidence was taken in Scotland under commission, and several parties came forward with evidence of alleged misconduct on the part of Knox. Some of these were, in my opinion, frivolous. The complaints are, in my opinion, however, somewhat serious. I refer to the undertaking given to W. G. Reid and the discount of A. L. Sheppard Brew-

ALTA.
S. C.
RE KNOX; A SOLICITOR.
SIMMONS, J.

ster's bills, particulars of which are set out in the judgment of the learned Chief Justice and which I need not repeat. There is no evidence that the moneys derived from the first transaction went otherwise than into the general funds of the partnership law firm, but there were transactions occurring when Knox must have known the firm was hopelessly bankrupt and such that a solicitor with a proper regard for the relations between solicitor and client would not entertain. However, there is no charge against Knox of this character since he began practice of his profession here. I do not think that we are entitled to assume that he had no intentions of making an attempt in a new country to rehabilitate himself and to make good the losses of his unfortunate clients in Scotland, and I am of the opinion that he should be still allowed this opportunity. I conclude, therefore, that a proper disposition of this matter at the present is an order that said Knox appears before this Court within twelve months and satisfies the Court that he is doing what is reasonably within his ability to satisfy the two claims above referred to and in default he should then be struck from the rolls.

ONT.
S. C.

CILLIS v. OAKLEY.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Leitch, JJ. June 15, 1914.

1. AUTOMOBILES (§ III C—300)—COLLISION—CAR OPERATED BY ANOTHER—LIABILITY OF OWNER—STOLEN CAR.

The Motor Vehicles Act, 2 Geo. V. ch. 48, did not make the owner of a stolen automobile responsible for damages sustained when it collided with another vehicle through the negligence and furious driving of the person who had stolen it a short time previously, if the owner was himself guilty of no negligence in the manner in which he left the automobile and had taken away the spark-plug so that the thief could not have operated the car without supplying a similar spark-plug.

[*Wynne* v. *Dalby*, 16 D.L.R. 710, 30 O.L.R. 67, applied; *Lowry* v. *Thompson*, 15 D.L.R. 463, 29 O.L.R. 478, distinguished; and see amending statute, 4 Geo. V. ch. 36, sec. 3.]

Statement

APPEAL by the plaintiff from the judgment of WINCHESTER, Co. C.J., dismissing an action brought in the County Court of the County of York to recover damages for injury caused to the plaintiff's horse and buggy by a collision with an automobile owned by the defendant, which was, as the plaintiff alleged, at the time of the collision being negligently driven by a man who, as it appeared, had stolen it.

ONT.

S. C.

CILLIS v. OAKLEY.

Clute, J.

T. J. W. O'Connor, for the plaintiff.

T. S. Elmore, for the defendant.

June 15. CLUTE, J. (after stating the facts):—The case, as it was argued before the Court, was, whether or not the defendant was liable for the negligence of the thief, there being no negligence upon his part. The section under which it is sought to make the defendant liable, sec. 19 of 2 Geo. V. ch. 48, is as follows: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council." It is argued that this means that the owner of a motor vehicle is responsible for all damage caused by such motor vehicle. The section does not say so, nor is that, I think, the meaning of the section. The Act is to regulate the speed and operation of motor vehicles on highways. It provides for a registration fee and a license to paid drivers; for a certain equipment of bell or gong, etc., to be sounded on certain occasions; for lamps; for a number on the front and back of the motor; against search lights; for rate of speed; and sec. 11 is a provision against reckless and negligent driving, notwithstanding the section as to speed, and having regard to all the circumstances. It provides against racing on highways; that persons under 18, or intoxicated persons, shall not drive a motor vehicle; not to pass a standing car; to use reasonable precaution not to frighten horses; and to stop on signal and on meeting a funeral and in case of accident. Then follows sec. 19. Thus far it is nowhere declared that the owner is at all hazards to be responsible where his motor does injury. If the case falls within any of the preceding sections, it must be sec. 11, which provides against reckless and negligent driving, but that section must be read in connection with sec. 10, which gives the rate of speed; and sec. 11 points out that, notwithstanding sec. 10, the person who drives 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, shall be guilty of an offence under the Act. Section 11 certainly was not intended, I think, to create a liability where a person neither drives in the reckless manner mentioned nor is in any way responsible

ONT.

S. C.

CILLIS v. OAKLEY.

Clute, J.

at common law for such reckless and careless driving, as in the case of a thief.

The meaning, I think, of the preceding sections is, that it was necessary to indicate some person who would be responsible for the violation of the Act, and the owner is named as such person —not to create a liability against such owner, for the act of one over whom he had no control, and who, in order to be in a position to perpetrate the act causing the injury, had committed a crime against the owner by stealing his motor. Nor do I think that sec. 23 in any way creates such liability. It may, indeed, impose upon the owner the duty of shifting the burden of proof by throwing upon him the onus of shewing that the loss or damage did not arise from any negligence or improper conduct upon his part or on the part of any one for whom he is responsible.

I agree with what my brother Riddell says in this respect in *Lowry* v. *Thompson*, 15 D.L.R. at p. 470: "All that the section does is to shift the onus, not impose a liability." It is unnecessary to consider whether or not the owner may be held liable where he has been guilty of negligence in not taking reasonable care so as to prevent the motor falling into the hands of a person not competent to drive it. It may be that in such case the motor might be regarded as something dangerous which the owner is bound to guard, as in the case of a dangerous animal or other dangerous thing upon his premises.

But it is said this case is governed by *Lowry* v. *Thompson*, and that we are bound to hold, owing to the decision in that case, that the owner of a motor is liable for damages done by the motor when in the hands of a thief without negligence on the part of the owner. I should not have thought that case decides the point here involved. Referring to the Judges who sat in that case, as I may in case of doubt as to what they intended—see *Nuttall* v. *Bracewell*, L.R. 2 Ex. at p. 11—the Chief Justice informs me that he did not intend to dispose of that point; Mr. Justice Riddell, that he did. Mr. Justice Sutherland gave no written opinion, but agreed that the case should be sent back for a new trial. Mr. Justice Leitch concurred with Mr. Justice Riddell.

I do not think, therefore, that the *Lowry* case precludes this Court now from expressing an opinion upon the question involved.

ONT.

S. C.

CILLIS v. OAKLEY.

Clute, J.

Since writing the above, the judgment of the First Divisional Court of the Appellate Division in *Wynne* v. *Dalby* (1913), 16 D.L.R. 710, has come to hand. It is there said by Meredith, C.J.O. (p. 715), that the purpose of sec. 19 is to avoid any question being raised as to whether a servant of the owner, who was driving a motor vehicle when the violation of the Act or regulation took place, was acting within the scope of his employment, and to render any person having the dominion over the vehicle, and in that sense the owner of it, answerable for any violation in the commission of which the vehicle was the instrument, by whomsoever it might be driven. He does not think that it could have been the intention to fix the serious responsibility which the section imposes upon one who, at the time the accident happened, had neither the possession of nor the dominion over the vehicle, although he may have been technically the owner of it. "The word 'owner' is an elastic term, and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve" (p. 714).

The facts in the *Wynne* case differ from the present. The question of the liability of the owner for the negligence of a thief was not raised, but the judgment, as far as it goes, tends to support the view here taken that the owner in such case, at all events where there is no negligence upon his part in permitting the motor to fall into the hands of the thief, is not liable for injuries caused by the motor while in the thief's possession.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agree with CLUTE, J.

Mulock, C.J.Ex.

Sutherland, J.

RIDDELL and LEITCH, JJ., dissented.

Riddell, J.

Leitch, J.

Appeal dismissed.

WALLICH v. GREAT WEST CONSTRUCTION CO.

MAN.

K. B.

Manitoba King's Bench, Macdonald, J. July 6, 1914.

1. MASTER AND SERVANT (§ III B 2—300)—EMPLOYER—DUTY INCUMBENT ON—INDEPENDENT CONTRACTOR—DUTY ENTRUSTED TO—INJURIES—DAMAGES.

The rule by which a person is absolved from liability for the negligence of an independent contractor doing work for him, does not apply where the neglect which occasioned the injury was of a duty which was incumbent upon the employer and which duty he intrusted to the contractor to perform for him.

[*Pickard* v. *Smith*, 10 C.B.N.S. 470, applied.]

MAN.

K. B.

WALLICH v. GREAT WEST CONSTRUCTION CO.

2. LANDLORD AND TENANT (§ III C—55)—APARTMENT HOUSE—TENANTS—RIGHT TO USER OF HALLWAY—MEANS OF ACCESS FOR FRIENDS AND GUESTS—DANGEROUS OPENINGS—LIABILITY OF LANDLORD.

The tenants of suites in an apartment house have the right of user of the hallway leading to their apartments not as mere licensees but as a right appurtenant to their tenancy; and their friends and guests using the same as a means of access are entitled to the same protection from dangerous openings left in the floor of the hallway insufficiently protected.

Statement

ACTION for damages for personal injuries.

Judgment for plaintiff.

W. H. Curle and *A. H. J. Andrews*, for plaintiff.

H. Phillipps and *C. S. A. Rogers*, for defendants.

Macdonald, J.

MACDONALD, J.:—This action is brought claiming damages for injuries sustained by the plaintiff Mary I. Wallich in the building owned by the defendant company and known as the Turraine Block and although the husband joins as co-plaintiff, there are no damages claimed on his part, and as to him the action is dismissed without costs. The Turraine is an apartment block where suites of rooms are rented and one of these suites, a basement suite, was occupied by Miss Bryan, a friend of the plaintiff.

On October 8, 1913, the plaintiff went to call upon Miss Bryan, who was ill in her suite, and in going along a hallway to Miss Bryan's suite, she fell into a trap hole in the hallway fracturing the fibula, injuring her shoulder and otherwise causing her injury and pain. The hall is a narrow one, a little over 4 feet in width, and it would be almost impossible, and at least very improbable that any one walking along this passageway with this trap-door open could do so without falling into it. This trap-door leads to an underground passage through which the main gas pipes pass connecting with all parts of the building, and a plumber was working on these gas pipes about the time of the accident. This trap-door is but a few feet from the stairway on which the plaintiff descended to the hallway, and the hallway itself is badly lighted and a stranger to the building having no knowledge of a trap-door being so placed, would most naturally fall into it, if open.

The defence endeavour to put the blame entirely on the plaintiff. The evidence for the defence, however, does not im-

press me favourably. Jeffries, the plumber, who was the workman engaged on the premises at the time of the accident, says that he heard the front door open and waited to see if the person opening it was coming his way. He says he was at the opening of the trap-door, that he saw the plaintiff coming and that he called out to her, "mind this hole is open," that he was at the time standing at the west end of the hole and stepped forward and put up his hand and again said, "mind the hole," and then pointed to it, and that she stopped and looked down and then turned and slipped in and he immediately caught her and pulled her out. After pulling her out, he says he asked her if she did not hear him say the hole is open, and she said she did not understand him. After looking into the hole, as this witness says she did, why ask her if she did not hear him say the hole is open? Had she looked into the hole before falling into it, why such a senseless question? But the fact is that he did ask her if she had heard him call and that she replied that she did not know it was a warning.

This witness heard the footsteps and called out a warning which was not understood by the plaintiff. He was not at the hole at the time and was doubtless a little distance away, and when the plaintiff fell into the hole he was almost instantly at her assistance. The rest of the defence evidence is on a par with this witness.

The defendants engaged one Jones, a detective, to work on the case with the object of securing from the plaintiff damaging evidence, if possible. He went to her house, introducing himself as Mr. Thompson, in the guise of the father of a little girl whom he wished to put into the plaintiff's school and after the imaginary child being discussed, the subject of the accident was cunningly led up to. She told him that she heard the workman shout, but did not know what was said, and that she was suing for damages, but that it was all her own fault. That she would make such a startling admission to a stranger, I do not believe, nor do I believe that she made any such admission to any one. Stress is laid upon the fact that she does not positively deny some of the statements made by the defence witnesses. Instead of a denial she says she has no recollection of anything of the

MAN.
K. B.
WALLICH v. GREAT WEST CONSTRUCTION CO.
Macdonald, J.

kind. It must be remembered that she was considerably shaken up and the manner of her answers is but indicative of her character. She will not swear to things alleged to have been said of which she has no recollection. I find as a fact that the plaintiff was injured in the manner and under the circumstances as stated in her evidence.

Now, as to the question of liability: Counsel for the defendants contends that the plaintiff was a mere licensee and defendants under no duty to her. This is, to my mind, not a case of a licensee. The tenants of the suites have a right to the user of the hallway leading to their suites, not as a licensee but as a right appurtenant to their occupation, and their friends and guests have the same rights and are entitled to the same protection. It is further submitted on behalf of the defendants that the action is improperly brought against the present defendants, and that, if maintained at all, it could only be against the employers of, and the workman doing the repairs at the time of the accident; that is if negligence it was the negligence of an independent contractor for which defendants are not liable.

If an independent contractor is employed to do a lawful act and in the course of the work he or his servants commit some casual act of wrong or negligence the employer is not answerable.

That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer and neglects its fulfilment whereby an injury is occasioned: *Pickard* v. *Smith*, 10 C.B.N.S. 470. Now, in the present case, the defendants engaged the plumbers to do repairs to their gas pipes, which would not, it seems to me, make them independent contractors any more than any ordinary mechanic being called to do some little repairs. In doing these repairs the trap-door must be used and the defendants trusted the plumbers to guard it whilst open and to close it when not using it, and, in this duty they failed, causing injury to the plaintiff, the damages arising from such I place at $750 and for this amount there will be judgment for the plaintiff with costs.

CANADIAN NORTHERN ONTARIO R. CO. v. HOLDITCH.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. October 13, 1914.

1. STATUTES (§ II A—95)—CONSTRUCTION—SUBDIVISION OF LAND—SALE OF LOTS—NO COMPACT PIECE—SEVERENCE OF ENTIRE BLOCK—DAMAGES—ARBITRATION—RAILWAY ACT (CAN.).

Where many of the lots in a registered subdivision have been sold and the remainder owned by the subdivider do not form a connected compact piece of land, he may be treated as having himself made a severance of the entire block as shewn on the plan so as to disentitle him to damages for injurious affection of lots no part of which are taken for the railway in an arbitration under the Railway Act, Can., in addition to compensation for entire lots taken, where there is no severance of any one lot.

[Railway Act, Can., sec. 155 considered; *Cowper-Essex* v. *Local Board*, 14 A.C. 153, distinguished.]

2. DAMAGES (§ III A—265)—LAND ABUTTING ON RAILWAY — COMPENSATION—RAILWAY ACT (CAN.).

The owner of land adjacent to or abutting upon the street over which a railway subject to the Railway Act, Can., is to be constructed may be awarded compensation by the Railway Commission, Can., under the statute 1 and 2 Geo. V., ch. 22, sec. 6, for consequent injury to such land, although damages of that character cannot be awarded in an arbitration under the Railway Act.

[*G.T.P.* v. *Fort William*, [1912] A.C. 224, referred to.]

Statement

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario varying an award of arbitrators appointed to fix the value of land expropriated and remitting the case to them for further consideration and assessment on one branch of damages as to which they had held that they had no jurisdiction.

Appeal allowed.

Armour & Mickle, for the appellants.

Joseph Fowler, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK:—I would allow this appeal with costs. I agree with MR. JUSTICE IDINGTON.

Idington, J.

IDINGTON, J.:—This appeal raises the questions of whether an owner of land expropriated under and by virtue of the Railway Act has as an incident to such expropriation the right to claim damages for injury done to his other lands beyond the bounds of the lot so expropriated by reason either of the railway crossing the street or highway leading to such other lands and rendering them thereby less easily accessible and hence less marketable, or of the smoke, noise and vibration incidental to the use of the railway when constructed.

CAN.

S. C.

CANADIAN NORTHERN ONTARIO R. CO. v. HOLDITCH.

Idington, J.

The lands expropriated and those other lands alleged to be so injuriously affected formed part of the same subdivision according to a registered plan, or registered plans which I assume harmonized with the first plan of subdivision.

It is not made quite clear in the evidence whether the major part of such subdivisions had been made by the respondent or his father through whom I infer he claims. No importance seems to have been attached at the trial to any such distinction and possibly in law nothing in question herein can be made to depend on any distinction such as I suggest.

In considering the opinion judgments delivered by some of their Lordships in the case of *Cowper-Essex* v. *Local Board for Acton*, 14 App. Cas. 153, if this case had to be governed thereby a good deal might be made to turn upon such distinction in the origin of the subdivisions made, though in appearance constituting now one scheme of subdivision.

In the view I take of this case it is not necessary I should dwell upon such considerations or in detail upon the facts of the numerous sales of lots in such survey which render those lots in question remaining anything but a connected compact piece of land. They can be joined only by the imagination to those actually taken.

The respondent's contentions herein were discarded, by the arbitrators who made the award, because in their opinion the Railway Act under which they acted did not authorize them to make any allowance in respect of injurious affection suffered in respect of those other lands.

The appellant expropriated the entire lots touched by the railway allowance according to the route plan approved by the Board of Railway Commissioners, and thus there is no question raised as to the severance of any such lot injuriously affecting the land of which part has been taken.

The *Cowper-Essex case*, 14 App. Cas. 153, referred to and which is relied upon by respondent, and no doubt that upon which the judgment appealed from was rested, though we have no written reasons given therefor, was dependent upon the peculiar facts there in evidence and the construction of the

Lands Clauses Consolidation Act, 1845, secs. 49 and 63, which are as follows:—

49. Where such inquiry shall relate to the value of lands to be purchased, and also the compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which under the provisions herein contained he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.

63. In estimating the purchase-money or compensation to be paid by the promotors of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promotors of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.

I cannot think that sec. 155 of our Railway Act and the sections therein provided for giving it effect, especially as interpreted and construed in many other cases, can be said to have contemplated any such results as that decision upon said sections.

The said sec. 155 is as follows:—

155. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

Let any one carefully read and compare the language of this section and the said two sections and then observe and consider the reasoning of the judgments in that case, and if that does not lead to the conviction that the decision should not govern this case, I fear I cannot hope to convince.

The sec. 155 of our Railway Act was taken I rather think from sec. 16 of the English Railway Clauses Consolidation Act, though the word "compensation" is used where the word "satisfaction" was placed in sec. 16.

Then the case of *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L.

CAN.
S. C.
CANADIAN NORTHERN ONTARIO R. CO. v. HOLDITCH.
Idington, J.

171, decided that said sec. 16 of the English Act would not give relief to any one whose lands or part thereof had not been taken. When the matter is thus reduced by judicial construction, from which Lord Cairns dissented, to a question of the taking of such lands then we must read the section accordingly and turn to the specific provisions of secs. 192, 193, and 194 of the Railway Act upon which the jurisdiction of the arbitrators rests.

The second of these sections, 193, is as follows:—

193. The notice served upon the party shall contain,—

(*a*) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described; and,

(*b*) a declaration of readiness to pay a certain sum or rent, as the case may be, as compensation for such lands or for such damages.

Read this as if both lands and power were combined though apparently disjoined, and whence can we draw the power of the arbitrators to assess and award damages in respect of other lands? Each lot taken by appellant is an independent, separate and complete property in itself. It is easily conceivable that a number of such properties might be so united together as to render them one compact whole, but that is not what in fact exists here.

In the Act upon which the *Cowper-Essex case*, 14 App. Cas. 153 turned, it will be observed that the injuries to "lands held therewith" and "other lands" than taken and the "severing" of those from lands taken, are expressly provided for as subjects of compensation.

I may repeat what I have said in the case of *Canadian Northern* v. *Billings*, heard this term, that if the views probably held by Lord Cairns when forming part of the Court which decided the *Hammersmith case*, L.R. 4 H.L. 171, and expressly so by Lord Westbury in *Ricket* v. *Metropolitan Railway Co.*, L.R. 2 H.L. 175, relative to the meaning of sec. 16, had prevailed, then the language of sec. 155 might have been held as wide enough to cover what is claimed herein.

Hammersmith Railway Co. v. *Brand*, L.R. 4 H.L. 171, is decisive of any claim founded upon the crossing of streets *per se* being a ground of claim under our Railway Act. Indeed, it so restricts the operation of that Act that the only sensible

meaning to be given it must relate, so far as injurious affection of any kind is concerned, to those lands physically connected with the part taken and not even then as in cases of subdivision for general sale to the public where the owner is thereby treating each parcel as a special lot.

With the claim, for injuries to other lands than those taken or directly interfered with, thus failing, as I hold it must, falls also the claim relative to what might arise herein from smoke, noise or vibration, even if such claims founded on the use of the works can ever found a claim for compensation. And with these claims failing there is no need to consider the question of the power to refer back to arbitrators.

And the right given by recent legislation amending the Railway Act so as to modify the injustice often done heretofore to owners of properties abutting upon streets over which railways ran without touching such lands must be pursued before the tribunal empowered by such remedial legislation to deal therewith.

This appeal should be allowed with costs.

DUFF and ANGLIN, JJ., dissented.

Duff, J.
Anglin, J.

HEDGE v. MORROW.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A. November 27, 1914.

1. MARRIAGE (§ II A—5)—FORM OF—CELEBRATION DE FACTO—VALIDITY.

Except in cases of bigamy and actions for criminal conversation there is a strong presumption in favour of the validity of a marriage proved to have been celebrated *de facto*.

[*Hunt* v. *Trusts & Guarantee Co.*, 10 O.L.R. 147; *De Thorn* v. *Atty.-Gen.*, 1 A.C. 686, referred to.]

2. EVIDENCE (§ II 3—155)—PRESUMPTION OF DEATH—HOW ARISEN.

The presumption of death not as a matter of law, but as a matter of fact may arise on the particular facts of a case, although the seven years required for a presumption as a matter of law have not expired.

[*Re Matthews*, [1898] P. 17; *Re Winstone*, [1898] P. 143, referred to.]

3. EVIDENCE (§II K—314)—PRESUMPTIONS—DEEDS—ALTERATIONS IN.

It is to be presumed that alterations appearing in a deed were made before it was executed, but where that presumption has been rebutted by proof to the contrary, there is no presumption that the alterations were made with the assent of the grantor.

APPEAL from the judgment of LENNOX, J.

ONT.

S. C.

HEDGE v. MORROW.

Meredith, C.J.O.

G. A. Stiles, for the appellant.

D. B. Maclennan, K.C., for the defendant, the respondent.

November 27. The judgment of the Court was delivered by MEREDITH, C.J.O.:—The testatrix, Isabella Margaret Gilchrist, by her will, which is dated the 15th January, 1897, devised her lands in Manitoba and all her real and personal estate in Ontario to the appellant, whom she appointed her executrix.

The will was admitted to probate by the Surrogate Court of the Central Judicial District of the Province of Manitoba on the 18th November, 1911, and administration of the estate and effects, rights and credits of the testatrix, in any way concerning the will, was granted to the appellant.

The probate states that the testatrix died on the 31st October, 1905, at Cape Nome, in the district of Alaska, and that at the time of her death she had a fixed place of abode at the township of Roxborough, in the Province of Ontario. This Manitoba probate was on the 2nd March, 1912, sealed with the seal of the Surrogate Court of the United Counties of Stormont, Dundas, and Glengarry, under the authority of sec. 74 of the Surrogate Courts Act (10 Edw. VII. ch. 31), and thereupon became of the like force and effect in Ontario as if it had been originally granted by that Court.

Many questions of law and fact were discussed upon the argument before us.

It was contended by counsel for the respondent that the will under which the appellant claims was revoked by the subsequent marriage of the testatrix with Johnston, and it was answered by counsel for the appellant that that was no marriage, because Johnston had a wife living when he went through the form of marriage with the testatrix; to this the respondent's counsel replied that there was no evidence to prove the former marriage; and that is the first question with which I shall deal.

It was proved by the testimony of Cora M. Johnston that she had gone through a ceremony of marriage with Johnston at Omaha, in the State of Nebraska, on the 28th January, 1903, and that she and Johnston, after this ceremony, lived together and believed themselves to be man and wife. She also testified that she had been informed that no marriage license was ever issued

for the marriage, and that no trace could be found in Omaha of a minister bearing the name of Peterson, which was the name claimed by the man by whom the marriage ceremony was performed, and who professed to be a minister.

I am of opinion that this evidence is sufficient to prove the previous marriage of Johnston, and, if it be, the contention of the respondent that the will of the testatrix was revoked by her marriage to Johnston falls to the ground, there being no question that his first wife was living when he went through the form of marriage with the testatrix. It is well established that except in cases of bigamy and actions for criminal conversation there is a strong presumption in favour of the validity of a marriage proved to have been celebrated *de facto:* Phipson on Evidence, 5th ed., p. 644, and cases there cited, which fully support the statement of the text-writer, and to these cases may be added *O'Connor* v. *Kennedy* (1887), 15 O.R. 20, *Hunt* v. *Trusts and Guarantee Co.* (1905), 10 O.L.R. 147, and *DeThorn* v. *Attorney-General* (1876), 1 App. Cas. 686, which, though the case of a Scotch marriage, is applicable upon the question of this presumption.

The cases also establish that mere cohabitation may suffice to raise a presumption of valid marriage: Phipson, p. 644, and cases there cited, to which may be added *Regina* v. *Wilson* (1862), 3 F. & F. 119.

It was also contended by the respondent's counsel that there was no proof as to the date of the death of the testatrix, and that all the appellant was entitled to rely on to establish the fact of her death was the presumption that, not having been heard of for seven years, she was dead, and that, as the seven years did not elapse until the expiration of seven years from October, 1905, the action, which was begun on the 14th March, 1912, must fail for want of proof that the testatrix was then dead.

As I understand the case of *Allen* v. *Dundas,* 3 T.R. 125, it was there held that probate of a will is conclusive until revoked, and that no Court of Law can admit evidence to impeach it, though it was pointed out that, if probate was granted of a supposed will of a living person, it was otherwise, as the Ecclesiasti-

ONT.
S. C.
HEDGE
v.
MORROW.
Meredith, C.J.O.

cal Court has jurisdiction only to grant probate of the wills of deceased persons.

The onus of establishing want of jurisdiction on this ground rested upon the respondent; and, in order to shew want of jurisdiction, it was necessary to prove that the testatrix was living at the date of the grant of the probate; and in this he has failed.

There is no presumption of law as to the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time after, and it has been held that this inference might be drawn after the lapse of eleven or even seventeen years from the time at which it was shewn that the person was alive. Being an inference of fact, whether it ought to be drawn must depend upon the particular facts of the case in which the question arises; and the facts of this case, in my opinion, do not warrant the inference that the testatrix was alive at any time later than the beginning of 1906, but rather justify the inference being drawn that she was then dead. That the presumption of death, not as a matter of law but as a matter of fact, may arise, is undoubted, and it has frequently been held to have arisen, although the seven years had not elapsed, and of this the cases of *In the Goods of Matthews*, [1898] P. 17, and *In the Goods of Winstone*, *ib.* 143, are instances.

I am not unmindful of the fact that the proposition in *Allen* v. *Dundas* as to the powers of a Court of Law is not in its entirety applicable to this Province, because by the Judicature Act the Supreme Court of Ontario has jurisdiction to try the validity of last wills and testaments as to real and personal estate, whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud or undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.*

For these reasons, I am of opinion that the appellant proved her title to the lands in question, unless, as the respondent con-

*See the Judicature Act, R.S.O. 1897, ch. 51, sec. 38, and the Judicature Act, R.S.O. 1914, ch. 56, sec. 3.

tends, he is entitled to them by virtue of the conveyance under which he claims.

As I have said, the conveyance was executed by the testatrix, by Johnston purporting to act as her attorney under the power of attorney to which reference has been made. It is clearly established, as I have also said, that the power of attorney as drawn and executed by the testatrix did not contain any provision authorising Johnston to deal with lands in Canada, but expressly limited his authority to lands in the district of Alaska, and that the provision extending his authority to lands in Canada was subsequently added.

It was contended by counsel for the respondent that it must be presumed that the alterations which were made in the power of attorney were made before it was executed, and that it is also to be presumed that, if subsequently made, they were made with the assent of the appointor. I do not understand that the presumption has as wide a range as this. It is, no doubt, to be presumed that alterations appearing in a deed were made before it was executed, but it is not, in my opinion, the law that where that presumption has been rebutted by proof to the contrary there is still a presumption that the alterations were made with the assent of the grantor, and no authority was cited in support of the contention of the learned counsel in that regard.

Sections 45 and 46 of the Evidence Act, R.S.O. 1914, ch. 76, do not help the respondent, as the *primâ facie* evidence of the original which is afforded by the production of a copy of the instrument certified as sec. 46 provides, if indeed the section has any application to a case in which not the original but a copy of it has been registered, is rebutted by the evidence which, as I have said, rebuts the presumption with which I have just dealt.

The appellant is, in my opinion, entitled to judgment for the recovery of possession of the land in question, but I would not allow anything for mesne profits or for damages for the cutting of wood and timber, as these claims may be fairly set off against the value of the improvements which the respondent has made.

The appeal will, therefore, be allowed, and the judgment of the trial Judge vacated, and judgment entered for the appellant for the recovery of possession of the lands in question, with a

ONT.

S. C.

HEDGE v. MORROW.

Meredith, C.J.O.

declaration that as against the respondent she is the owner of them.

Under the very exceptional circumstances of the case, and there being no doubt that the respondent bought the lands and paid for them in good faith, believing that Johnston had authority to sell and convey them to him, there should be no costs to either party of the action or of the appeal.

Appeal allowed.

QUE.

C. R.

DESAULNIERS v. "L'ACTION SOCIALE."

Quebec Court of Review, Archibald, Greenshields and Beaudin, JJ. June 23, 1914.

1. LIBEL AND SLANDER (§ II B—15)—WHAT ACTIONABLE — PERSONS DEFAMED — CHARGING TENDENCY TO PUBLISH "PRETENDED CLERICAL SCANDALS."

To publish falsely in a newspaper that a named contributor to another newspaper "never fails to make use of an occasion to reveal pretended clerical scandals" amongst the clergy of the Roman Catholic Church is libellous.

2. LIBEL AND SLANDER (§ III A—95)—NEWSPAPER—RETRACTION BY—DELAY IN RETRACTING—EFFECT AS TO DAMAGES.

A newspaper sued for libel is not entitled to a dismissal on publishing a retraction several weeks after action brought and offering to pay the costs; the plaintiff may thereupon inscribe for proof and have his damages assessed in default of further plea.

Statement

The judgment inscribed for review, which is confirmed, was rendered by the Superior Court, CHARBONNEAU, J., on April 17, 1914.

Appeal dismissed.

Desaulniers & Vallée, for the plaintiff.

Lamothe, Saint-Jacques & Lamothe, for the defendant.

Greenshields, J.

GREENSHIELDS, J.:—This is an action in damages for a libellous article published of, and concerning, the plaintiff, in a newspaper published in the city of Quebec, and known as "L'Action Sociale." The plaintiff is a member of the Bar of the province of Quebec, and is one of His Majesty's Counsel learned in the law. He complains of the newspaper, and alleges; that the newspaper in question is the organ of the Catholic Church, if not for the entire province of Quebec, at least for the city and district of Quebec, and is the special mouth-piece of the Catholic Archbishop of Quebec; and it is alleged and proved, that the paper has high authority among the members

of the Roman Catholic communion. On August 2, the plaintiff alleges, the newspaper in question published or reproduced in its columns an article which had appeared in a paper published in France, and known as "L'Univers de Paris," and in that article, says the plaintiff, in referring to a newspaper published in Montreal, and known as "Le Pays," the following appears:—

Il a pour collaborateurs, des politiciens comme l'avocat G. Desaulniers (également franc-macon), qui ne manquent pas une occasion de dévoiler les prétendus scandales cléricaux.

The plaintiff alleges that this article is grossly libellous, false, and is calculated to, and did seriously damage him, the plaintiff. He fixes his damage at $25,000 and concludes for a condemnation for that amount.

The action was issued on August 6, 1913, and was served on the same day. On August 14, the defendant appeared by counsel, but nothing was done until September 24, 1913,—when the defendant filed, through its attorneys, a declaration reading in part as follows:

TRANSLATION:

The defendant having published in its newspaper of the 18th September, instant, an article entitled "Loyale Explication," and withdrawing all imputation or accusation against the plaintiff which may have been contained in the article of the "Univers" reproduced in "L'Action Sociale" on August 2, 1913, which article "Loyale Explication" accompanies the present declaration as forming part thereof, and declares that it submits to justice, and declares its willingness to pay the costs.

Having made this declaration, of course no plea was filed, and the plaintiff inscribed for proof and judgment *ex parte*, and upon proof, judgment was rendered against the defendant for the sum of $250.

The defendant inscribed in review, and by its counsel urges that the condemnation is excessive, and seeing the complete withdrawal or retraction, no judgment should be rendered for more than the costs.

The article published on August 2, in effect, states:

That the plaintiff is a co-editor of "Le Pays"; that he is a free mason, although it would appear that the paper said he had withdrawn from the free mason lodge to which he belonged; that the newspaper, "Le Pays," has for its co-editors, politicians such as Mr. Desaulniers, who never fail to make use of an occasion to reveal pretended clerical scandals.

Mr. Desaulniers is a member of the Roman Catholic communion, and the newspaper holds high authority among the

QUE.
C. R.
DESAULNIERS
v.
"L'ACTION SOCIALE."
Greenshields, J.

members of the communion. The article charges the plaintiff with losing no opportunity, not only of revealing actual scandals among the clergy of the Catholic Church, if such indeed ever exist, but that he loses no opportunity or misses no opportunity of revealing pretended clerical scandals. I should say it would not be stretching the interpretation of the article too greatly, to say, that if Mr. Desaulniers could not find any actual scandals among the clergy, he sought means to manufacture them, and when manufactured from his imagination, to reveal them to the public. If that be the character of Mr. Desaulniers, as given to the public by the newspaper, then he is certainly pictured as a deadly enemy of the clergy of the church to which he belongs. The learned trial Judge characterized the article as "libellous and damaging." I should use a stronger characterization. I should term it "grossly libellous." As stated, the article appeared in the issue of August 2. On August 6, the defendant received the action from the plaintiff, disclosing his serious complaint. Not a move was made by the defendant to arrest the damaging effect of the statement; nothing was done to lighten the charge, but only six weeks afterwards, when the defendant was forced by the lapse of time and the operation of legal procedure to shew its hand, did it publish what it calls—"a complete repudiation of the article, and the complete exoneration of Mr. Desaulniers," and on September 24, it says—we have repaired all the damages that have been caused; we will pay a few dollars in costs; and before this Court the same pretension is urged. The learned counsel for the defendant asserts, that Mr. Desaulniers, in his testimony, states that he was willing to accept this apology or exoneration. We do not find this to be a correct statement of Mr. Desaulniers' testimony. The plaintiff submitting his own case before this Court did say, that, if, immediately upon the receipt of his action, the newspaper had fully and completely withdrawn the article, that he would have been satisfied to allow the whole matter to drop, and even to lose whatever costs he had incurred in his action: but he never said that he was satisfied, and he is not, and he is rightly dissatisfied with the long delayed publication of the article. An immediate withdrawal or retraction of a published libel does not always and cannot always, fully repair the damage caused by its publica-

QUE.
C. R.
DESAULNIERS v. "L'ACTION SOCIALE."
Greenshields, J.

tion, and much less can or does a delayed publication.—That the article caused damages, which cannot be assessed in dollars and cents, to Mr. Desaulniers, is without doubt. The learned trial Judge assessed these damages at $250. Whatever any member of this Court might have done, if first called upon to assess the damages, might be problematical, but no member of this Court sees any reason to disturb the assessment as made by the learned trial Judge, and that assessment is unanimously confirmed.

HAYNES v. WILSON.

SASK.
S. C.

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. July 15, 1914.

1. PLEADING (§ III B—305)—ESTOPPEL—SPECIAL PLEADING—WHEN NOT NECESSARY.
An estoppel must always be specially pleaded unless it appears on the face of the adverse pleading or unless there was no opportunity to plead it.
[Odgers on Pleading, 6th ed., 222, approved.]

2. BILLS AND NOTES (§ II C—15)—PROMISSORY NOTE—SIGNATURE—INTENTION—WITNESS—CONSIDERATION.
Apart from any question of estoppel, no liability is created by affixing a signature to a note intending to sign merely as a witness to the signature of the real maker who had already signed and who alone dealt with the payee and got the chattels for which it was given; there is no *consensus ad idem*, as there was no intention of promising to pay.

Statement

APPEAL from a District Court.

Appeal dismissed.

J. F. Frame, K.C., and *A. S. Sibbald*, for appellant, plaintiff.

T. D. Brown, for respondent, Richardson.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an appeal from the judgment of the Judge of the District Court for the judicial district of Saskatoon dismissing the plaintiff's action. The action was brought upon the two lien agreements or notes given for the price of certain horses and cattle purchased by the defendant Wilson at an auction sale held by the plaintiff. The defence of the defendant Richardson was that he had signed the notes merely as a witness, to the signature of Wilson and not as maker thereof. The learned trial Judge upon the evidence found this to be the fact. Counsel for the appellant admitted on the argument before us that he could not contravert this finding of the trial Judge, but he contended that as Richardson had affixed his signature to the note and the plaintiff had parted with his animals on

SASK.

S. C.

HAYNES v. WILSON.

Lamont, J.

the strength of the signature of both defendants he was entitled to recover.

In order to succeed against the defendant Richardson, the plaintiff must establish either that Richardson promised to pay the notes sued on or else that he is now estopped from denying his liability thereon. As he put his name on the notes believing that he was simply witnessing Wilson's signature, he had no intention of becoming a maker of the notes, and therefore no intention of promising to pay the same. There being no *consensus ad idem*, there was no agreement on Richardson's part to pay.

The next question, then, is, is Richardson estopped from denying that his signature on the notes was a promise by him to pay? An estoppel must always be specially pleaded unless it appears on the face of the adverse pleading or unless there was no opportunity to plead it. Odgers, 6th ed. p. 222. In Hals. Laws of England, vol. 13, at p. 350, the learned author upon this point says:

> Under the modern practice the facts relied on to establish an estoppel of any kind (including estoppels *in pais*) should be pleaded in any case in which it is intended to rely upon it, except in answer to a claim in ejectment, and in the cases, (if any), in which "not guilty by statute" may still be pleaded.

See also *Mackenzie* v. *Gray*, 17 D.L.R. 769. In this case no estoppel was pleaded, nor was it alleged that the plaintiff in any way relied upon the signature of Richardson as a maker of the notes, or that he had changed his position on the faith of Richardson's signature being a valid promise to pay. There was no reply at all filed to Richardson's defence. The plaintiff simply sued Richardson on his promise to pay, and Richardson successfully established that he never so promised. That being so the plaintiff cannot succeed. It is therefore unnecessary to review the cases in which a person may not repudiate his signature and set up the true facts. On this point the following authorities are instructive: *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704; *Hewatson* v. *Webb*, [1908] 1 Ch. 1; *Carlisle & Cumberland Banking Co.* v. *Bragg*, [1911] 1 K.B. 489; *Scriven* v. *Hindley*, [1913] 3 K.B. 564.

The appeal should be dismissed with costs.

ST. DENIS v. CITY OF MONTREAL.

QUE
C. R.

Quebec Court of Review, Archibald, Saint-Pierre and Mercier, JJ. March 7, 1914.

1. ARREST (§ I A—4*a*)—MALICE—WHEN INFERRED—TECHNICAL OBJECTION—WRONG OFFENCE CHARGED—RESISTING OFFICER.

Malice is not to be inferred merely from a technical objection such as that the party suing for false arrest had been charged with crossing a certain street at an immoderate speed whereas he was not on that street but had been forcibly stopped on a connecting street on disobeying the signal of the traffic officer to stop, and on disputing the latter's authority had been arrested by the officer in good faith and uninfluenced by any desire to injure the plaintiff in making the arrest in question; the plaintiff was merely charged with the wrong offence and might properly have been charged with resisting a police officer in the execution of his duty.

Statement

APPEAL from the judgment of Demers, J.

Appeal allowed.

Geoffrion & Goyette, for the plaintiff.

Archambault, Lavallée, Damphousse, Jarry & Butler, for the defendant.

Archibald, J.

ARCHIBALD, J.:—This is an action by which the plaintiff claims $185 of damages against the city of Montreal, alleging that, on December 17, 1910, he was arrested while he was passing in a carriage upon St. James St., Montreal, by a policeman who afterwards laid against him a charge before the recorder, alleging that he had crossed Windsor St. at an unlawful speed contrary to the by-laws of the city of Montreal, which complaint, after having been heard on December 19, was dismissed by the recorder; and the plaintiff alleged that the arrest was made maliciously and without reasonable or probable cause, and that he was caused damages in the sum of $185.

The defendant pleaded, denying the allegations of the declaration. The judgment gave the plaintiff a verdict for the sum of $50, and from that judgment the defendant comes into review, and among other grounds for the review, he alleges that, even supposing the constable, on the occasion in question, acted in a malicious and illegal manner, the city was not responsible in consequence of that action; and the defendant, further, denied that there was any proof of malice or want of probable cause on the part of the policeman who made the arrest.

QUE.

C. R.

ST. DENIS v. CITY OF MONTREAL.

Archibald, J.

The arrest was made in consequence of the by-law of the city which forbids the crossing of the street, in a vehicle, at a pace faster than a horse's walk, and the scene occurred at the point where Windsor St. opens into St. James St. It is very probably correct to say that Windsor St. terminates on the line of St. James St., and that the horse in question, which was coming from east to west along St. James St., could not be said to have been crossing Windsor St., on that occasion, as he was indeed only preceding along St. James St., and it may be doubtful whether the by-law may be applied. It would indeed appear as if this point had much influence with the recorder, in causing an acquittal of the present plaintiff before him upon the charge in question. It was, however, at an important corner, and the whole reason of the by-law applied to it. There was, at the moment, a car coming down Windsor St., approaching the turn. The constable swears that the circumstances under which the arrest was made were as follows: that the plaintiff was coming, in a vehicle along St. James St., on the north side going west, on the occasion in question, that he, the constable, was stationed there for the government of the traffic at that point;—that the car was coming down Windsor St. and so near the turn as to render it impossible for the plaintiff to cross in front of it; that when the plaintiff approached the junction of Windsor St. at St. James, at a distance of about 20 feet the constable raised his hand as a sign for him to stop; that he refused to stop; that the constable went forward and seized his horse by the bridle! that some sharp language took place between the plaintiff and the constable, in which the plaintiff declared that he was not going to be stopped; that he would cross the street as he liked, and so on, and the constable was more or less angered by this language. The constable admits that it is probable he would not have arrested the man, had he not felt angered and insulted by the language of the plaintiff, although he had a right to arrest him, as the plaintiff was resisting him in the execution of his duty. Of course, the man was charged by the constable with an offence which was probably not the one he had actually committed. He might have been charged with resistance to the constable in the exercise of his

QUE.

C. R.

ST. DENIS v. CITY OF MONTREAL.

Archibald, J.

duty, in controlling the traffic at that point. The question for the Court is this: Is there proof that the constable was influenced by malicious desire to injure the plaintiff in making the arrest in question? I do not think that there is any proof sufficient to overcome the evidence of the defendant and its witnesses, that the constable acted without any malice towards the plaintiff. People in authority, will sometimes, more or less, abuse their authority, but if the authority be reasonably exercised, it is of the utmost importance that they should be protected. I do not think that any technical objections, such as that the plaintiff was charged with having crossed Windsor St., at an immoderate pace, when the plaintiff was not on Windsor St. at all, at the time, should be allowed to be decisive proof of malice on the defendant's part.

I remember a case, the name of which has escaped me, but I know the defendant was one Bark. Bark had been arrested and brought before the criminal Court charged with acts which were in themselves flagitious enough, but were subsequently decided by the Court not to amount to an indictable offence, and Bark was discharged. He took an action for $10,000 of damages, which action came before the late Chief Justice Johnson and was dismissed, the Judge holding that whether the offence for which Bark was arrested was, in law, punishable or not, it was not decisive evidence of malice or want of probable cause on the part of the person causing his arrest.

It appears to me that one of the best by-laws for the security of the citizens which has ever been enacted, is that by which, at important crossing of street, constables are placed to regulate the traffic and by which the citizens are obliged to obey the indication of these constables. I think that, in the present case, the constable who arrested the plaintiff was exercising his office, in that respect, in good faith, and it would be a serious thing that our constables should feel that, as long as they are acting in good faith, they are subject to condemnation for having arrested a person defying their authority, in case some legal quibble should be discovered for the purpose.

We are to reverse and to dismiss the plaintiff's action, with costs of both Courts.

ONT.

S. C.

MARTIN v. SHAPIRO.

Ontario Supreme Court, Middleton, J. December 24, 1914.

1. CHATTEL MORTGAGE (§ II A—7) — VALIDITY — DEFECTIVE AFFIDAVIT — FAILURE TO STATE DAY OF EXECUTION—R.S.O. 1914, CH. 135, SEC. 5.

The purpose of that part of sec. 5 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, which requires that the affidavit of the attesting witness shall state the date of the execution of the chattel mortgage is to insure the registration of a chattel mortgage within the statutory period from its actual execution and to prevent the execution of chattel mortgages with the dates left blank to be post-dated at the discretion of the mortgagee, whereby a mortgage actually too late and therefore invalid might appear to be in regular form when registered.

[*Parsons* v. *Brand*, 25 Q.B.D. 110; *Archibald* v. *Hubley*, 18 Can. S.C.R. 116, referred to.]

2. CHATTEL MORTGAGE (§ IV B—45)—PRIORITIES—DEFECTIVE REGISTRATION —FAILURE TO STATE DATE—R.S.O. 1914, CH. 135, *sec.* 5.

A chattel mortgage, although registered within five days from the date shewn thereon, is invalid against the mortgagor's assignee for creditors if the affidavit of execution does not state the date of execution as required by the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch.135, sec. 5.

[*Cole* v. *Racine*, 11 D.L.R. 322, 4 O.W.N. 1327, followed.]

Statement

CASE stated by the parties upon a question arising in the action as to the validity of a chattel mortgage.

A. C. McMaster, for the plaintiff.

W. J. McWhinney, K.C., for the defendant.

Middleton, J.

December 24. MIDDLETON, J.:—The sole question is the validity of a chattel mortgage dated the 18th May, 1914, made by one Edward Herman to the defendant. The plaintiff, as the assignee for the benefit of Herman's creditors, contends that the mortgage is invalid, as the date of execution of the mortgage is not stated in the affidavit of the attesting witness. The mortgage purports to bear date the 18th May, 1914, and the affidavit of execution is sworn on the 19th May, 1914. The day of the month has not been filled in, in the printed form, although the month itself is stated.

The precise point is determined adversely to the mortgagee by my brother Kelly in the case of *Cole* v. *Racine* (1913), 11 D.L.R. 322. There the day of the week and the day of the month were duly stated but the year was left blank. My learned brother said (p. 1329): "This requirement of the statute is imperative, and it must be construed strictly. Failure to mention the year in which it was executed is, in my opinion, a fatal

omission, and such a non-compliance with the requirements of the Act as renders the mortgage void."

The principle applicable to cases of this kind is indicated in *Parsons* v. *Brand* (1890), 25 Q.B.D. 110, where Lord Justice Cotton says: "With the policy of the Act we have nothing to do, we have only to carry out the intention of the Legislature as appearing in the terms of the Act." And Lopes, L.J., says: "It has been said to be imperious and tyrannical; but with that we have nothing to do. . . . This is not a mere technicality, but a matter of substance."

The clause introduced into the statute requiring the date of the execution of the mortgage to be given* was introduced of fixed purpose, to insure the registration of a chattel mortgage within five days from the date on which it was actually executed, and so to prevent the holding of chattel mortgages undated so that the date might be filled in and registration completed at any time the mortgagee thought it necessary for his protection. A mortgage so registered was of course invalid, but those interested were compelled to ascertain that the facts were not as they appeared, and to attack the transaction at their peril. The Courts cannot dispense with that which the Legislature has prescribed.

None of the English cases cited are in any way in conflict with this. The English statute in some respects differs from ours; and in all the cases in which the mortgage has been upheld the Court has been able to find that there was a substantial compliance with the statutory requirements. No tendency can be found in any of our own decisions to indicate that this rule should be relaxed. See *Re Andrews* (1877), 2 A.R. 24; *Nisbet* v. *Cock* (1879), 4 A.R. 200; and *Archibald* v. *Hubley* (1890), 18 S.C.R. 116.

I, therefore, find in favour of the plaintiff upon the stated case; and there is no reason why costs should not follow the event.

*The clause referred to is to be found in the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 5: "Every mortgage of goods and chattels in Ontario . . . shall be registered . . . together with (*a*) the affidavit of an attesting witness thereto of the due execution of such mortgage . . . which affidavit shall also state the date of the execution of the mortgage. . . ."

SASK.

S. C.

HOWLETT v. BRODER.

Saskatchewan Supreme Court, Newlands, J. October 21, 1914.

1. FORFEITURE (§ I—4)—REMISSION OF—ABSENCE OF LACHES—REALTY SALE—SUB-PURCHASER.

Relief may be granted the plaintiff as assignee of the original purchaser's interest against the cancellation of the agreement of sale if the plaintiff, as sub-purchaser, used reasonable diligence in getting his title in such a condition as would entitle him to demand a transfer from the vendor defendant, and had, as soon as he found that his assignor was in default, offered to make the payments due the defendant.

[*Drinkle* v. *Steedman*, 14 D.L.R. 835, followed.]

Statement

ACTION by a sub-purchaser for relief against the cancellation by the vendor of an agreement of sale upon the original purchaser's default in payment and for specific performance of the agreement.

Judgment was given for the plaintiff, but without costs.

A. R. Tingley, for plaintiff.

Balfour & Co., for defendant.

Newlands, J.

NEWLANDS, J.:—On October 23, 1911, the defendant sold to one Thomas B. Murray lots 29 and 30, block 24, Broder's Annex, Regina, and executed in his favour an agreement of sale for the same. The purchase price was $550, payable $30 on January 3, 1912, and $25 each month thereafter until paid, with interest at 8%. Murray paid the first instalment of $30, but never paid anything more. On January 3, 1912, said Murray agreed to sell said lots to the plaintiff. On February 24, 1912, the plaintiff registered a caveat against said lots, claiming an interest as purchaser from Murray. A notice of this caveat being filed was sent by the registrar to the defendant. Shortly after purchasing these lots the plaintiff sold them again, but, not being able to give a title to his purchaser, this agreement was cancelled. On or about May 2, 1912, all payments being in arrear since the first payment, the defendant sent a notice of cancellation of his agreement of sale to Murray. There is some dispute as to when the plaintiff offered to pay up the arrears due on the agreement of sale to Murray, but at least this offer was made by both plaintiff and his solicitor in June, 1912. The defendant would not accept same. Immediately after selling these lots to the plaintiff, Murray left the city, and it was not until February, 1914, that the plaintiff ascertained his whereabouts. He then obtained from him, on February 3, 1914, an assignment of the agreement of sale from the defendant to Murray, notice of which he sent to the defendant,

SASK.
S. C.
HOWLETT v. BRODER.
Newlands, J.

and offered to pay up the amount due, which the defendant refused; and the plaintiff then brought this action for specific performance.

The last-mentioned agreement, being an absolute one, the plaintiff, as assignee of Murray's interest in the contract, is entitled, under the Act Respecting Choses in Action (ch. 146, R.S.S., 1909), to sue the defendant in his own name: Williams on Vendors and Purchasers, o. 499. The Supreme Court *en banc*, in *Drinkle* v. *Steedman*, 14 D.L.R. 835, decided that this Court had jurisdiction to relieve against the cancellation of an agreement of sale for default in payment. It, therefore, only remains to decide whether this is a case where the plaintiff is entitled to relief, and if so, on what terms it should be granted. The plaintiff used every diligence he could to find Murray and get his title in such a condition as would entitle him to demand a transfer from the defendant on paying the amount due. He offered, as soon as he found out that Murray was not making his payments, to do so himself, so that, I think, he shewed as much diligence as he could under the circumstances.

I therefore relieve against the cancellation of the agreement of sale to Murray, and decree specific performance of the agreement of sale to Murray assigned to the plaintiff. The plaintiff paid into Court $450. This sum is not sufficient to satisfy the claim of Broder under the agreement, as only $30 has been paid on a consideration of $550, leaving $520, with interest at 8% due on same. As to the rents received by Broder, amounting to the sum of $200, I find he paid out on account of these lots in mechanics' liens, taxes, etc., $236.54, leaving due him the sum of $36.54, which the plaintiff will also have to pay to him. Under these circumstances the plaintiff must pay the costs of the action.

HOLMESTED v. CANADIAN NORTHERN R. CO.

SASK.
S. C.

Saskatchewan Supreme Court, Newlands, J. July 25, 1914.

1. DAMAGES (§ III L 1—230)—RAILWAY BUILDING AND OPERATING LINE ACROSS LAND—DEPRECIATION IN VALUE—EQUITABLE OWNER—RIGHT TO BRING ACTION.

The equitable title of the purchaser of lands of which his vendor is the registered owner and in respect of which the purchaser has registered a caveat, is sufficient to sustain an action by him for damages against a railway company for building and operating its line across his land.

[*Johnson* v. *Ontario S. & H. R. Co.*, 11 U.C.R. 246, applied.]

SASK.

S. C.

HOLMESTED v. CANADIAN NORTHERN R. CO.

Newlands, J.

ACTION for damages.

Judgment for plaintiff.

N. R. Craig, for the plaintiff.

A. Fraser, for the defendant.

J. E. Chisholm, for third party.

NEWLANDS, J.:—This is an action for damages against the railway company for building and operating a railway across the plaintiff's land. The plaintiff has shewn that he has legal title to most of the lands in question and is entitled in equity to the actual land upon which the railway is built. This piece of land was sold by G. M. Annable to defendants for $2,000, of which $1,500 was paid in cash. At that time Annable was the registered owner of the land, but had agreed to sell same to plaintiff, and plaintiff had registered a caveat against it to protect his interest. That this plaintiff under these circumstances has a right of action for damages against the defendants was decided in *Johnson* v. *Ontario Simcoe and Huron R. Co.*, 11 U.C.Q.B. 246. This was a case where the railway company purchased their right-of-way from the owner and paid him the value of the land, but did not get from the tenant of the land his interest and the tenant brought an action for trespass against the company. Robinson, C.J., at p. 248, says:—

> They have no authority to enter for the purpose of making their railway, and permanently occupying the land, till they have paid to the tenant a sum mutually agreed upon, or paid into Court (when they have not so agreed) what they think fit to offer as a fair compensation; wherefore I think here a trespass was committed.

The statute under which this case was decided is similar to the Railway Act, and the facts are similar, the railway company in this case not having paid to the plaintiff a sum mutually agreed upon nor paid into Court what they think fit to offer as a fair compensation. That case is, therefore, an authority that the plaintiff has a right of action.

The only other question is the assessment of damages. The plaintiff is the owner of a large piece of land, some 90 odd acres, which he intended to make into a high class residential district. He started to carry out this intention by having the same surveyed before he knew of the defendant's intention to build a railway across his land, but it was after the filing of their plan of location and giving public notice of the same that he had the plan of sub-

SASK.

S. C.

HOLMESTED v. CANADIAN NORTHERN R. CO.

Newlands, J.

division prepared and registered. The land of the plaintiff's is divided into two parts by the Moose Jaw Creek, and I have come to the conclusion that that part of his land which lies to the east of the Moose Jaw Creek is not damaged by the railway. The railway does not touch this land, nor in my opinion does it affect the approaches to it, the natural approach being by Park Drive.

The other portion of the land is, however, damaged by the railway. The natural approach to this land from the city of Moose Jaw was by Eleventh Avenue, and the railway cuts that off entirely. They have built a road into the property by Tenth Avenue, but it has a very steep grade, and, as it has to cross the railway and the cutting made for the line, it can never be as good an approach as the old road at Eleventh Avenue. In the part of the property affected there are 138 lots. I have not taken into consideration lots 5 to 10, block 17, as they are for school purposes. These 138 lots are, in my opinion, damaged to the extent of $100 each, on the average. The actual selling price of these lots has not decreased to that extent, as the evidence shews that the lots have been sold at the same price since the railway has been built as before. This has been caused by the natural increase of values resulting from the increased population of Moose Jaw, and not from the building of the railway, and this increase would have been on the average at least $100 per lot greater if the railway had not been build where it is. The property in question is located in a valley, and the railway is located along the side of the hill which confines the valley on the north where the business and main portion of Moose Jaw lies. The railway cuts into this side hill, making a perpendicular wall all around the north side of the property, and the only entrance in that direction being the road they have graded over the railway at Tenth Avenue, and which, as I have stated, is too steep for convenient use, the property is therefore permanently injured.

I allow the plaintiff $13,800 damages and costs. I also dismiss defendant's claim against the third party with costs.

Judgment for plaintiff.

ONT.

S. C.

RICHARDSON v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Britton, J. December 11, 1914.

1. NEGLIGENCE (§ I A—4*a*)—SHIPPING COMPANY—NOTICE OF ARRIVAL OF GOODS—ELEVATOR—STORAGE—LOSS—INSURANCE—DAMAGES.

A shipping company is liable in damages for negligence in not sending notice of arrival of the ship and of her unloading at destination in accordance with the statute 9 & 10 Edw. VII. Can. ch. 61, sec. 11; and where a grain cargo was stored in an elevator without the knowledge of the cargo owners, due to failure to give such notice and was lost on the destruction of the elevator by fire, the net loss which the owners sustained after deducting the marine insurance and which would have been protected against by placing a fire insurance policy to the full value had notice of unloading been given, is not too remote as damages.

Statement

ACTION for damages for the loss by fire of a large quantity of oats shipped by the plaintiffs at Fort William for Owen Sound.

The action was tried without a jury at Kingston.

J. L. Whiting, K.C., *Glyn Osler*, and *A. B. Cunningham*, for the plaintiffs.

I. F. Hellmuth, K.C., and *J. D. Spence*, for the defendants.

Britton, J.

BRITTON, J.:—The plaintiffs are dealers in grain, having their head office at Kingston. On or about the 4th December, 1911, they shipped on the defendants' steamer "Kewatin," at Fort William, 90,000 bushels of oats for carriage to Owen Sound. These oats were classified as 30,000 bushels of extra No. 1 feed oats, 30,000 bushels of No. 3 Canada Western oats, and 30,000 bushels of No. 1 feed oats. These oats were safely carried by the "Kewatin" to Owen Sound, arriving there on the 16th November, and they were transferred by the defendants from their steamer to their elevator "B" on the 9th December, 1911.

On the 11th December, before the defendants had notified the plaintiffs of the arrival of the ship or of the transfer of the oats, an accidental fire occurred, destroying elevators "A" and "B" of the defendants, and a large quantity of these oats.

At the time of placing the oats in elevator "B" the plaintiffs had other grain there; and, should it be deemed of any importance in any view of this case, I find that these oats were placed in compartments of the elevator with other oats of the same grade.

The plaintiffs' claim is that the defendants were guilty of negligence in not notifying the plaintiffs of the arrival of the

steamer at Owen Sound and of her unloading and of the oats being placed in elevator "B."

The plaintiffs already, and before any of the cargo of the "Kewatin" was placed in the elevator, had an insurance upon their grain that might from time to time be stored there, up to a limit of $200,000. The value of the plaintiffs' grain, including the cargo of the "Kewatin," was $228,098.45. Had notice been given to the plaintiffs, they would have increased the amount of their insurance to the full value of their grain, and so would not have sustained loss.

There is very little in dispute between the parties upon questions of fact. . . .

The defendants state their position to be this. The only damages the plaintiffs seek to recover are those arising from alleged short insurance, and the defendants say that the plaintiffs at the time of the fire already were fully protected by insurance, and they should have collected from the insurers up to the full amount of the loss.

The policy in favour of the plaintiffs was one issued by Lloyds, and it was in the main a marine policy, covering grain afloat, shipments to be valued at amount of invoice until otherwise declared, and then at the amount declared. The policy contained the clause, "To pay average irrespective of percentages." The word "average" is, no doubt, used as meaning loss or damage. It is a word used in marine insurance; and, so used, the clause means that, even if the charge upon the property insured was only a small percentage, the insurers would pay the loss. The word is not used in connection with fire losses on land. See Chalmers and Owen on Marine Insurance, 2nd ed., pp. 92, 146, 164.

The policy provided very carefully in reference to loss by "perils of the sea," and then contains the following:—

"We further certify that this policy covers, with London Lloyds underwriters and or companies the fire risk on grain in any Canadian elevator excepting it being understood and agreed that the underwriters hereunder shall not be liable for more than $200,000 at any one time in any one elevator.

"It is understood and agreed that any losses arising on trans-

ONT.

S. C.

RICHARDSON v. CANADIAN PACIFIC R. CO.

Britton, J.

lake or river risks shall be settled according to the rules and usages of the Lake Underwriters Association, but any loss which may arise or occur in any elevator shall be settled in conformity with the rules and usages of companies . . . comprising the Canadian Fire Underwriters Association."

The loss in question arose by fire in an elevator not excepted, and the risk attached.

The plaintiffs settled with the insurance companies, and accepted the adjustment as if it was a loss that happened at sea and by reason of perils of the sea insured against. The defendants say that the plaintiffs were fully covered, and therefore should not have accepted such a settlement, and that therefore the loss was not in any way due to the defendants' negligence, but to the plaintiffs accepting less than the amount to which they were entitled.

The total value of the plaintiffs' grain in elevator "B," after placing therein the cargo of the "Kewatin" was..$228,098.45

The amount of salvage was 40,603.12

Amount of the plaintiffs' loss $187,495.33

The amount of insurance was $200,000, enough to pay in full and $12,904.67 over.

The assurers asserted the right to adjust and pay, adopting the usage in settlement of losses under marine policies, viz., that of applying the doctrine of co-insurance, which is, that where the total value of the property exceeds the amount of insurance, and where the total loss is less than the amount of insurance, the amount payable by the insurers is found by the following proportion: as the total value of property is to the total insurance, so is the total amount of loss to the amount payable by the insurers.

Upon this adjustment the insurers admitted a liability for $164,196.93, and no more.

This resulted in net loss to the plaintiffs of $23,068.40, made up in this way:—

The plaintiffs' total loss $187,265.33

Less paid by insurers 164,196.93

As above .....$ 23,068.40

Total value, $228,098.45; total insurance, $200,000; total loss, $187,365.33 = $164.196.93, as above.

No evidence was given of rules and usages of companies comprising the Canadian Fire Underwriters Association. It does not appear that any such association exists, much less any rules or usages that may be relied upon as to mode of settlement of fire losses binding upon the parties; but, even if there were such rules, they would not preclude a settlement between the parties to the contract of insurance according to the real understanding and agreement between them. There was a settlement in good faith and in the honest belief of the parties that such settlement was all that the plaintiffs were entitled to get under their policy, and all that the insurance companies were liable to pay. No doubt, the plaintiffs' solicitor was at one time of opinion that the companies were liable for the full amount of loss, and issued a writ upon the policy. The evidence, undisputed, was that the issue of the writ was not authorised by the plaintiffs. Even if the issue of the writ was authorised, the defendants are not, in my opinion, entitled to use that fact as in itself a defence to this action. The defendants were not hurt by the issue of this unserved writ. It was issued on the 19th September, 1913, whilst the writ in the present action was issued on the 24th day of July, 1912. It does not appear that the defendants in any way offered to pay, taking over the policy, or objected to the plaintiffs' settlement with the insurance companies.

It seems to me a very reasonable thing to treat this policy as marine, whatever liabilities might attach or whatever exemption from or limitation of liability may follow. In greater part it was marine, and placing the grain in elevator was without the consent or even knowledge of the plaintiffs.

A marine policy may cover a risk on land during part of the voyage: *Rodocanachi* v. *Elliott* (1873), L.R. 8 C.P. 649.

It was not the fault of the plaintiffs, and ought not to enure to the benefit of the defendants, that the plaintiffs became, if they did become, co-insurers of their property to the amount of the excess in value over $200,000. If the insurers had the right, as a matter of agreement with the plaintiffs, express or implied, upon the facts, to treat the plaintiffs as co-insurers, the defendants ought not to be allowed, in relief of their negligence, to

ONT.

S. C.

RICHARDSON v. CANADIAN PACIFIC R. CO.

Britton, J.

take advantage of a situation created by them, to the prejudice of the plaintiffs.

No doubt, it is a general rule that, in the absence of agreement, the insured should in case of loss recover that loss up to the full amount of it, if the amount of insurance is sufficient; but a different rule prevails under such circumstances as these. Wherever unconnected properties or perils of goods are insured under one sum, the rule of average is applied, by which the insured recovers only such proportion of his loss as the total sum insured bears to the total value of the property carried.

That is this case. Grain of different kinds was at different times placed in elevator "B." Even as to the cargo of the "Kewatin," it was of different grades of oats, shipped under different bills of lading, and this cargo was placed upon the grain of the plaintiffs already in the elevator.

The defendants did not comply with the bills under which they received and carried the grain of the plaintiffs. These bills contained the clause, "Advise James Richardson & Son Limited" (the plaintiffs) "at Kingston of the arrival at Owen Sound." The defendants were guilty of negligence in not complying with the Dominion statute of 1910, 9 & 10 Edw. VII. ch. 61, sec. 11.

The plaintiffs would have placed the further insurance had they been notified. The plaintiffs' loss is directly the result of want of notice. The damages are not, in my opinion, too remote.

The plaintiffs' loss is the amount they would have received in addition to the amount they did receive. The plaintiffs were not bound, as between them and the defendants, to go into protracted and costly litigation with the insurance companies before making their claims against the defendants.

The plaintiffs are entitled to judgment for $23,068.40, with interest at 5 per cent. per annum from the 24th July, 1912, and costs.

[New trial ordered, March 25, 1915.]

MAN.

K. B.

BROWN v. TOOTHILLS.

Manitoba King's Bench, Metcalfe, J. October 19, 1914.

1. LANDLORD AND TENANT (§ II E—38)—SUB-LETTING—CONSENT IN WRITING—COVENANT NOT TO ASSIGN—LETTER OF CONSENT BY AGENT.

A consent in writing by the lessor to a sub-letting for which such consent is necessary under a covenant not to sub-let without leave may be effectually shewn by a letter of consent written by the lessor's agent in his own name but stating that it is given on behalf of the principal.

W. H. Trueman, for defendant.
W. S. Morrissey, for plaintiff.

METCALFE, J.:—The plaintiff is the owner of a building in Winnipeg, called the Brown Block. Apparently he lives abroad and has left one Mitchell to manage his affairs in connection with the renting of that block.

In pursuance of the Act respecting Short Forms of Indentures, the plaintiff, on May 3, 1912, by his attorney Mitchell, executed a lease of all of the fifth floor of the Brown Block to the Western Importing & Manufacturing Co., Ltd., for a term of three years. The lease contained the following covenants:

And will not assign or sub-let without leave; And will not carry on on said premises any business or occupation which may be offensive or annoying to the said lessor or his assigns.

Proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants.

By a change of name the Western Importing Manufacturing Co., Ltd., became the defendants Toothills (Canada) Ltd. The Toothills Co., desiring to sub-let a portion only of the top flat to the defendants the Bragg Printing Co., interviewed Mitchell. They told Mitchell that the Bragg Printing Co. desired to instal their printing presses. There was some discussion as to whether the building was strong enough to carry the presses. Mitchell assured them that it was.

For the purpose of satisfying the Bragg Printing Co., that they might legally enter into possession, and for the purpose of consenting to the sub-letting, Mitchell, at the request of the Toothills Co., on May 6, 1913, signed a letter, as follows:—

Western Importing & Manufacturing Co., Ltd.
Winnipeg.

Dear Sirs:—

I, J. E. Mitchell, on behalf of Mr. J. Brown & Co. do hereby give you assurance that the sub-letting of part of the premises of the fifth floor in the Brown Block is satisfactory.

Yours faithfully,
J. E. MITCHELL.

The fourth floor of that block was already occupied by the Kingdon Printing Co. After the Bragg Printing Co. had installed their presses and started operations, the tenants complained of a vibration which interrupted the heretofore peace-

MAN.

K. B.

BROWN v. TOOTHILLS.

Metcalfe, J.

ful enjoyment of the premises. While the vibration previously caused by the Kingdon Printing Co. had been perceptible, it was not annoying. The tenants complained that the vibration was now annoying. After considerable altercation between Mitchell on the one side and Toothills and the Bragg Co. on the other side, the action is now brought, alleging the covenants and claiming a breach thereof; further alleging that the vibration is offensive and disturbing to such an extent as to cause a nuisance; that the operation of the machinery has injured and will continue to injure the building; that the plaintiff has suffered damage thereby, and will continue to suffer greater damage; and also claiming damage by reason of other occupants taking proceedings against the plaintiff or by vacating portions of the said building. On these allegations the plaintiff claims: (1) Possession; (2) An injunction; (3) Damages for injury to the building.

Notwithstanding the argument of counsel for the plaintiff that the extended form of the covenant not to sub-let without leave requires the consent in writing to be signed by the lessor, and that this writing is signed by Mitchell only, I think that the written consent above set forth is sufficient.

Counsel for the plaintiff urges that because it is not signed by Brown himself, it is not binding. It is true the document is signed by Mitchell, but on its face it purports to be signed by him on behalf of Brown. The lease was executed by Mitchell as attorney for Brown. I think the evidence is conclusive to shew that Mitchell executed this document as attorney for Brown. In any event, I do not think, in view of the evidence and all the circumstances, that Brown ought now to be heard to complain that the document was not signed by himself personally.

Mitchell frankly admits in the witness box that the building has not been damaged in so far as he can see. He brings no evidence to support his claim for past damage or for future possible damage. The business in itself is not offensive or annoying, and especially so in view of the fact that the Kingdon Printing Co. were already tenants and of full disclosure to Mitchell of the nature of the business, and of the class of presses to be installed.

MAN.

K. B.

BROWN v. TOOTHILLS.

Metcalfe, J

It is suggested an action will lie if the machinery is so operated as to cause vibration greater than necessary under the circumstances. No tenants have brought action against the plaintiff, neither have any of them moved out because of the vibration. Although practically all of the tenants have given evidence as to the vibration, and as to its being annoying, and although I may have a suspicion that the vibration could be somewhat abated, still I am not satisfied. It may well be that a printing plant on the fifth floor of this block, even if properly operated, will cause greater vibration than one situated on the fourth floor, or it may be that while the vibration caused by the Kingdon Printing Co. only on the fourth floor was not annoying to the other tenants, that the working of both these plants caused a greater vibration. After careful consideration, I cannot find as a fact that the machinery is operated so as to cause unnecessary vibration. There is no proof of loss to the plaintiff.

The plaintiff will be nonsuited without costs. In view of further possible actions, however, the nonsuit is not to have the effect of a verdict.

Nonsuit entered.

LACHINE, JACQUES-CARTIER, ETC., R. CO. v. KELLY.

QUE.

S. C.

Quebec Superior Court, Archer, J. March 4, 1914.

1. ARBITRATION (§ III—17)—CONCLUSIVENESS—MEMORANDUM OF ADJUDICATION—FORMAL AWARDS—PREPARATION OF—ADJOURNED MEETING—CHANGING ADJUDICATION—SETTING ASIDE.

On a majority of the arbitrators signing a memorandum of their adjudication under the Railway Act, R.S.C. ch. 37, and adjourning the arbitrators' meeting pending the preparation of a formal award as an authentic notarial document, it is too late for one of the majority to have the adjudication varied at the adjourned meeting if notice of such adjudication has been given to the parties; a notarial document passed on the later date with a lesser sum awarded than that first decided upon and notified to the parties, will be set aside.

2. APPEAL (§ IV F—135)—PRACTICE—ADDING NEW EVIDENCE ON—EXPROPRIATION.

It not being the practice in the Superior Court of Quebec on an appeal from an inferior court to permit further evidence to be given on the appeal and no general rule having been made to that end, new evidence is not admissible on an appeal under sec. 209 to the Superior Court from the award of arbitrators in an expropriation under the Railway Act, R.S.C. 1906, ch. 37.

3. STATUTES (§ II A—95)—APPEAL—ARBITRATOR'S AWARD—QUESTION OF LAW OR FACT—WRITTEN NOTICE—RAILWAY ACT, (CAN.).

An appeal from the arbitrators' award under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, upon any question of law or fact, as

QUE.

S. C.

LACHINE, JACQUES-CARTIER, ETC., R. CO. v. KELLY.

distinguished from a motion to set aside an award, is too late if taken more than one month after the other party to the proceedings had served a writ and petition in appeal therefrom under the Quebec law, although no "written notice" had been given by any of the arbitrators of the making of the award.

APPEAL from an award of arbitrators.

Appeal dismissed.

H. Jodoin, K.C., for the appellants.

Dussault, Mercier & Dupuis, for the respondent.

Brodeur & Bérard, for the mis-en-cause.

Archer, J.

ARCHER, J.:—The Court, having heard the parties by their counsel upon the merits of his appeal served on May 29, and filed on June 4, 1913; examined the proceedings of record and deliberated:

The petitioner in expropriation, now appellant, alleges that the location of the line referred to has been approved under sec. 159 of the Railway Act, and that it has complied with the requirements of the Railway Act to bring about the expropriation of the respondent's property which is described as follows:—

By the notice of expropriation in conformity with sec. 193 of the Railway Act, the sum of $1,431 has been offered to the defendant as full compensation for all the right, title, estate and interest of every kind and nature whatsoever in the said lands above described and for any and all damages caused by the exercise of its powers.

In conformity with sec. 194 of the Railway Act, a certificate of a provincial land surveyor was duly attached to said notice of expropriation and was duly served upon the proprietor-respondent, said certificate being signed in conformity with said sec. 194 and this by a disinterested party.

The parties not agreeing as to the amount, arbitrators were appointed, the company selecting L. A. Bédard, the owner, T. Gauthier and George Beausoleil was selected as a third arbitrator.

Considerable evidence was taken before the arbitrators and on June 5, 1912, the arbitrators met and, as appears by the minute book of the said deliberations, after having received factums of both parties, and deliberated, the majority of the said arbitrators being composed of George Beausoleil and T.

QUE.
S. C.
LACHINE, JACQUES-CARTIER, ETC., R. CO. v. KELLY.
Archer, J.

Gauthier granted the sum of $1,717.20 to the said Patrick Kelly, the lands expropriated and they also decided to require the services of the notaries Leclerc and Faribault to prepare the award, and after having passed such a resolution, the arbitrators adjourned the meeting to the next day, June 6, 1912, at 4 o'clock in the afternoon, at room 31, to sign the award. The minute book of June 5, 1912, reads as follows:—

Les arbitres prennent connaissance du dossier, délibèrent et la majorité des arbitres décident d'accorder la somme de $1,717.20 pour le terrain, dommages et intérêts, et les arbitres décident de prendre MM. Leclerc & Faribault pour préparer la sentence arbitrale et les arbitres ajournement la séance au 6 juin 1912, à 4 heures, p.m., pour signer la sentence. L. A. Bédard dissident. (Signé) L. A. Bédard, dissident, Thos. Gauthier, Geo. Beausoleil.

On June 6, 1912, the arbitrators met again and at the demand of the third arbitrator the meeting was adjourned to June 7, 1912, at 3.30 in the afternoon, one of the arbitrators, T. Gauthier, not signing the deliberations of the meeting.

On June 7, 1912, the arbitrators did meet again and the deliberations of the meeting reads as follows:—

Le tiers-arbitre ayant reconsidéré ses chiffres, déclare qu'il a fait erreur dans le chiffre qu'il a donné à la séance due 5 juin, 1912, et déclare qu'il est prêt à accorder la somme de $1,431 pour le terrain, dommages et intérêts:

L. A. Bédard, arbitre de la requérante, déclare qu'il concourre avec le tiers-arbitre;

M. Thomas Gauthier refuse de concourir avec la majorité des arbitres ce jour, pour la somme de $1,431 vu que le chiffre de $1,717.20, accordé par la majorité des arbitres Thomas Gauthier et George Beausoleil, le 5 Juin, 1912, est la sentence arbitrale, laquelle a été préparée par le notaire C. E. Leclerc, lequel, était présent à l'assemblée du 6 juin, 1912, tel que l'ajournement du 5 courant le comporte et qu'il était prêt à signer la dite sentence le 6 juin, 1912, comme il est prêt à le faire ce jour, et déclare qu'il entend rendre responsable qui de droit de tous les dommages et des frais des présentes, vu que cette procédure est illégale et que la reconsidération du tiers-arbitre est aussi illégale;

M. René Faribault, notaire, ayant préparé la sentence de ce jour, comparait devant les arbitres et la majorité des arbitres signe la sentence arbitrale. M. Thomas Gauthier refuse de signer les présentes et la sentence arbitrale. (Signé) L. A. Bédard, Geo. Beausoleil.

Thomas Gauthier refused to coeur with the majority of the arbitrators for the sum of $1,431 because the figures of $1,717.20 granted by the majority of the arbitrators, T. Gauthier and Geo. Beausoleil, on June 5, 1912, is the award which had

QUE.

S. C.

LACHINE, JACQUES-CARTIER, ETC., R. CO. v. KELLY.

Archer, J.

been prepared by the notary R. Faribault who was present at the meeting of June 6, 1912, in conformity with the adjournment of June 5, and that he was ready to sign the award on June 6, just as well as he is ready to sign on this day and declare that he intends to render responsible *qui de droit* of all the damages and costs as this procedure is illegal and that the consideration of the third arbitrator is also illegal.

On June 7, 1912, the said award was rendered, and an authentic document was prepared containing the said award which was duly served the next day upon the interested parties by said R. Faribault.

It is contended by the appellant that the arbitrators' deliberations of June 5, 1912, were never written in authentic form and the written notice positively prescribed by sec. 209 of the Railway Act has never been served upon the company by one of the arbitrators.

On July 5, 1912, the said respondent Patrick Kelly did cause a writ of appeal to be served upon the appellant in this case to which said writ was attached a petition containing all the grounds of appeal taken by the said Patrick Kelly, said grounds being taken not only on the award served upon the parties interested and duly rendered by the arbitrators in authentic form on June 7, but also against the deliberations of the arbitrators of June 5, 1912, asking for the setting aside of the two awards and asking the Superior Court to increase the award that should have been rendered by the arbitrators, to $4,470.

The grounds of appeal then raised were that the award as rendered on June 7, is arbitrary, illegal, irregular, null and contrary to the evidence legally made. The same grounds were also raised against the arbitrators' deliberations of June 5, 1912.

This appeal of Patrick Kelly was heard by the Honourable Mr. Justice Martineau, who delivered a judgment holding that the deliberations of June 5, 1912, was the award duly rendered by the arbitrators and the sole award binding in law, setting aside at the same time the award as rendered on June 7, 1912. The Court refused to increase the amount mentioned in the award of June 5.

The appellant claims that it appears clearly in the minute book containing the deliberations of the arbitrators that in the said deliberations of June 5, 1912, which in the opinion of the Superior Court was the award rendered, there is an error and this being clearly shewn in the said minute book in the deliberation of June 7, 1912, which deliberations were written in authentic form and duly served upon the parties interested and that the plaintiff-appellant is seriously aggrieved by the award of June 5, 1912; that the right to appeal from awards under sec. 209 of the Railway Act belong to both parties interested, and as in the actual case, no written notice has been served so far, the first intimation received by the Lachine Jacques-Cartier and Maisonneuve R. Co. concerning the rendering of the said award being by the judgment rendered by His Lordship Judge Martineau, on May 15, 1913, the appellant, expropriating party, in conformity with sec. 209 of the Railway Act is within to take an appeal against said award of June 5, 1912, and this because said award is erroneous, irregular, arbitrary, illegal, unjust and should be set aside.

The conclusions of the petition to appeal read as follows:—

Wherefore your petitioners appellants declare that they appeal from the said award and pray acte be given of its said declaration, and Patrick Kelly is summoned to appear together the said *mis-en-cause* before this honourable Court, and that the said *mis-en-cause* are requested in conformity with sec. 203 of the Railway Act to produce before this Court the record of proceedings in connection with the said arbitrators, and all the depositions together with the exhibits referred to and all papers and documents connected with the plan, including the statements filed by the arbitrators, and that they should be summoned to appear and hear the judgment of this honourable Court, and that the award rendered by the majority of the said arbitrators on June 5, 1912, be declared irregular, unjust, unfair and illegal and that this Court, after hearing your petitioners upon its said appeal to proceed to render the award which should have been rendered herein and decide the issues of law and facts between the parties, and do fix and determine the amount of compensation which should be paid to the propri-

QUE.
S. C.
LACHINE, JACQUES-CARTIER, ETC., R. CO. v. KELLY.
Archer, J.

etors according to law, and that your petitioners are condemned to pay to the said proprietor the sum of $1,431 as compensation. That the award as rendered by the majority of the arbitrators on June 5, 1912, shall be set aside with costs against said proprietor and with costs against the *mis-en-cause* in the event of their contesting the present demand, your petitioner reserving the right to take other and what proceedings it may be entitled to take under law.

In answer to this petition the respondent says that any proceedings after June 5, 1912, are irregular and null, that the meeting of June 5, 1912, the *mis-en-cause* Bédard who was appellant's arbitrator was present and that the appellant was duly notified of the award through him. Moreover the appellant was duly notified of this award by the petition filed in Court, asking permission to appeal from the award; and subsequently by the petition in appeal which was attached to the writ in that case, the same having been served on the 3rd. and 5th of July, 1913.

The present appeal, says the respondent, was not taken within the delays prescribed by law; the award of June 5, 1912, was confirmed by the judgment of the Superior Court, and said judgment was final and without appeal.

The case came up before me in appeal on February 16, 1914, the appellant asked to be permitted to put evidence before the Court so as to explain more thoroughly the reasons of the change of award of June 5, 1912, and June 7, 1912, as appears by the minute book. The Court allowed such evidence under reserve. I am of opinion that such evidence should not have been allowed.

The appeal in question is taken under sec. 209 of the Railway Act.

> And upon the hearing of the appeal such Court shall decide any question upon the evidence taken before the arbitrators, as in a case of original jurisdiction.
>
> (2) Upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior Court to the said Superior Court, subject to any general rules or orders from time to time made by the said last mentioned Court, in respect to such appeals.

I may say that no rules or orders have been made by the Court in respect of such appeals. Sitting in appeal this Court cannot allow any evidence to be adduced. There is no such practice known in this province. This is the opinion which is expressed by Mr. Justice Martineau, in the case of *Ontario & Quebec R. Co. & Vallière, R. J. Q.*, 36 Que. S.C. 349.

This judgment was confirmed in appeal. *R. J. Q.*, 19 Que. K.B. 521.

The same opinion has been expressed by the Hon. Mr. Justice Archibald, in the case of *Pontiac Pacific Jct. R. & The Community General Hospital, Etc.*, 20 R.J.Q., 567.

I am of opinion that this evidence should not have been received.

It is clear in reading the petition that this is an appeal under sec. 209 and is not an action to set aside the award as provided by sub-sec. 4 of sec. 209 of the Railway Act which reads as follows:—

4. The right of appeal hereby given shall not affect the existing law or practice in any province as to setting aside awards.

See *Brunet & St. Lawrence & Adirondack R. Co.*, R.J.Q., 6 Que. K.B. 136.

The second question that I have to consider is as to whether or not this appeal was taken within the delays mentioned in sec. 209 of the Railway Act.

Sec. 209 reads as follows:—

Whenever the award exceeds six hundred dollars, any party to the arbitration may *within one month* after receiving a written notice from any one of the arbitrators or sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a superior Court; and upon the hearing of the appeal such Court shall decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

The appellant claims that it is within the delays specified by law inasmuch as no written notice has been served so far, the first intimation received by the Lachine, Jacques-Cartier & Maisonneuve R. Co., concerning the rendering of the said award being by the judgment rendered by His Lordship Judge Martineau, on May 15, 1913.

True it is that sec. 209 says that any party to an arbitration may, within one month after receiving a written notice from

QUE.

S. C.

LACHINE, JACQUES-CARTIER, ETC., R. CO. v. KELLY.

Archer, J.

any one of the arbitrators or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a Superior Court. Does this mean that notice must necessarily be given by one of the arbitrators? If the arbitrators neglect for one reason or another to serve such notice cannot the owner or the company serve an effective notice?

In the present case it clearly appears by the record that the company was duly notified of the award of June 5. The company was notified by the petition served on it for right of appeal and subsequently by the writ and petition in appeal. I would refer to the conclusion of this petition where it clearly appears that the present respondent appealed from the award given on June 5. The question as to the validity of the first and second awards is discussed in the contestation.

Moreover in looking over the present appellant's factum in the other appeal we see that this question was discussed thoroughly.

The minute book is produced to form part of the record and in the contestation the company discusses to a certain extent the value of such an award.

The company appellant contends that the first legal notice given is by the judgment delivered on May 15, 1913. How can it now contend that it was not as well duly notified by the petition for appeal ?

The judgment declaring the award of June 5, 1912, as sole and only legal award has a retroactive effect.

The appeal, in my opinion, was not taken within the delays specified by law. The notice given by the proceedings in the first appeal was sufficient. Under our civil law the service of a writ with accompanying petition would be sufficient to put a party in default. Article 1067.

I have now to consider the effect of the judgment rendered by Mr. Justice Martineau, on May 15, 1913.

See *Rolland* v. *G.T.R.*, 7 D.L.R. 441, 14 Can. Ry. Cas. 21, 21 Que. K.B. 389; *Vallières* v. *Ontario & Quebec R. Co.*, 19 Que. K.B. 521.

The *dispositif* of the judgment reads as follows:—

Renvoie la défense de la défenderesse; déclare illégale, nulle et de nul effet la sentence du 7 juin, 1912;

Déclare la sentence rendue par la majorité des arbitres le 5 juin, 1912, la véritable sentence en cette affaire;

Déclare l'indemnité y mentionnée, savoir: la somme de $1,717.20 est celle que doit payer la défenderesse au demandeur pour la valeur en compensation de l'expropriation du terrain exproprié par la défenderesse, et étant le lot de subdivision no. 2685 du lot 148, des plan et livre de renvoi officiels du village incorporé d'Hochelaga, dans le comté d'Hochelaga, et maintenant partie de la cité de Montréal, tel que le dit lot apparait aux plan profile et livre de renvoi de la compagnie défenderesse, sanctionnés et approuvés par jugement de la commission des chemins de fer du Canada, sous le No. 15776, le 2 janvier, 1912, dont copie a été déposée au bureau d'enregistrement des comtés d'Hochelaga et Jacques-Cartier, le 19 janvier, 1912, ainsi que pour tous dommages causés au demandeur par la défenderesse dans l'exercice de ses pouvoirs sur le dit lot; condamne la défenderesse à payer les frais de cet appel.

It appears by the judgment of the Court that the appellant in that cause, now respondent in this case was awarded the sum of $1,717.20 and that the present appellant was condemned to pay that amount.

As I said the judgment rendered by Hon. Mr. Justice Martineau is a final judgment. No counter-appeal was taken within the time specified by law. I do not see how this Court could possibly interfere with the judgment which is now binding on both parties. I am therefore of opinion that this appeal should be dismissed with costs and the formal judgment of the Court is as follows:—

Considering that the evidence received under reserve should be rejected for the reasons above mentiond.

Considering that due notice was given of the award of June 5, 1912, and that the appeal was not filed within the delays specified by law.

Considering that the judgment delivered by His Lordship Mr. Justice Martineau, on May 15, 1913, has the authority of a final judgment and is binding on the parties in this case.

Doth dismiss said appeal with costs.

ONT.

S. C.

SHIPMAN v. PHINN.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. November 30, 1914.

1. COURTS (§ IV D—274)—JURISDICTION—ADMIRALTY — INLAND WATER — PROVINCIAL SUPREME COURT.

The Supreme Court of Ontario has jurisdiction to entertain a personal action by the owner of a ship against the owner of a scow with which his own came into collision for damages for the negligent navigation of defendant's scow and of a tug-boat employed by the defendant to tow the same, where the collision occurred in the inland waters of Ontario; the jurisdiction in this respect is concurrent with that of the Exchequer Court of Canada.

[*Shipman* v. *Phinn*, 19 D.L.R. 305, 31 O.L.R. 113, reversed.]

2. COLLISION (§ I—3)—NEGLIGENT NAVIGATION—FIXING LIABILITY.

In a personal action for damages for negligent collision of the boats of the plaintiff and defendant operating in Ontario inland waters brought in the Supreme Court of Ontario, if it appear that both parties were guilty of acts of negligent navigation contributing to the collision, the action is not to be dismissed, but the damages are to be apportioned in conformity with sec. 918 of the Canada Shipping Act, R.S.C. 1906, ch. 113.

Statement

APPEAL by the plaintiff from the judgment of BOYD, C., at the trial; and cross-appeal by the defendant from that judgment and from the judgment of MIDDLETON, J., 19 D.L.R. 305, affirming the jurisdiction of the Supreme Court of Ontario to entertain the action.

F. King, for the plaintiff.

H. A. Burbidge, for the defendant.

Clute, J.

November 30. The judgment of the Court was delivered by CLUTE, J.:—This is an action for damages arising out of a collision between the plaintiff's schooner and the defendant's mud-scow, at a bend in the Napanee river. The plaintiff's schooner, loaded with coal, was being towed from Deseronto to Napanee by the steam-tug "Ray Stanton," and, while proceeding up the Napanee river, met the defendant's scow, which was being towed down the river by a tug "Maggie R. King," in the employ of the defendant. The plaintiff charges that the defendant "so improperly and negligently navigated his tug and mud-scow that the said mud-scow came in collision with the plaintiff's said schooner, the corner of the said mud-scow striking the schooner on the port-bow with such force as to cut the said schooner down from below the rail to a point in her hull below the water, so that she shortly afterwards sank." The defendant denied the jurisdiction of this Court over the subject-matter of the action, and that

question was decided by Middleton, J., 19 D.L.R. 305, in favour of the plaintiff prior to the trial of the action, the order providing for an appeal to be taken with any appeal from the judgment at the trial of the action.

The Chancellor, who tried the case, found that both parties were equally to blame, and dismissed the claim and counter-claim without costs. From this judgment both parties appeal.

The plaintiff claims that where both vessels are found in fault, as they were by the judgment in question, the rule applicable by virtue of the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 918, requires that the damages shall be borne equally by the two vessels. The defendant's cross-appeal is both upon the facts and upon the law, his contention being that the Exchequer Court alone has jurisdiction in the premises: and that the defendant's vessel was in no way in fault; and, if it were, such fault did not in any way contribute to the collision; that the plaintiff's vessel was alone at fault, and that sec. 918 has no application to this case.

All questions of law were disposed of upon the argument, the Court holding that it had jurisdiction to try the case, and that sec. 918 applied. The only question reserved was one of fact.

Upon the argument it was conceded by the plaintiff that there was negligence on his part. The defendant contended, however, that, although the captain did not blow the first blast, as required by article 29, yet that neglect was not the cause of the accident.

An examination of the evidence makes it clear that the finding of the Chancellor on the question of negligence on the part of the defendant is well supported by the evidence.

As there is ample evidence to support the findings of the Chancellor as to the negligence of the defendant, aside from the omission to blow a long blast, as required by law, on approaching the point of danger, it is unnecessary to decide the question as to the effect of the defendant's default in that regard, or whether the plaintiff had made out a *primâ facie* case of negligence on the part of the defendant so as to shift the burden of proof, unless he was able to prove that *that* negligence in no way contributed to the loss. See Marsden's Collisions at Sea, 6th ed., p. 29; *Inman* v. *Reck, The "City of Antwerp" and The "Friedrich,"* L.R. 2

ONT.
S. C.
SHIPMAN v. PHINN.
Clute, J.

P.C. 25; *Cayzer Irvine & Co.* v. *Carron Co., The Margaret*, 9 App. Cas. 73; *Ayles* v. *South Eastern R.W. Co.* (1868), L.R. 3 Ex. 146. The Chancellor states that there is no evidence that the plaintiff would have changed his course in any way if the whistle had been sounded. It might have been necessary to consider whether, the defendant being admittedly in default in respect of a statutory duty, it did not devolve upon him to satisfy the Court that, had the whistle been blown, it would have made no difference; but consideration of this question becomes unnecessary owing to the other findings, upon sufficient evidence, of the defendant's negligence.

The result is, that the plaintiff's appeal is allowed with costs, and the defendant's appeal is dismissed with costs.

As the parties have agreed upon the place of reference, it is referred to the Master at Kingston to assess and apportion the damages having regard to sec. 918 of the Canada Shipping Act, with power to deal with the costs of the reference.

CAN.
S. C.

HALPARIN v. BULLING.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. December 29, 1914.

1. AUTOMOBILES (§ III C—310)—NEGLIGENCE OF CHAUFFEUR—SCOPE OF EMPLOYMENT—SERVANT'S OWN BUSINESS — CAR FURNISHED BY MASTER—DAMAGES—LIABILITY.

The master is not liable at common law for the negligence of his servant while the latter is engaged in some act beyond the scope of his employment for his own purpose though he may be using the instrumentalities furnished by the master to perform his duties as servant; and a chauffeur who takes his master's automobile out of a garage in contravention of his master's orders and proceeds with it to make a call of his own before the time appointed for taking the car out for his master's use is not to be considered as acting within the course of his employment so as to make the master liable at common law for injuries resulting to another whom he negligently runs down.

[*Halparin* v. *Bulling*, 17 D.L.R. 150, 24 Man. L.R. 235, affirmed; *Storey* v. *Ashton*, L.R. 4 Q.B. 476, followed.]

Statement

APPEAL from the judgment of the Court of Appeal for Manitoba, 17 D.L.R. 150, 24 Man. L.R. 235, reversing the judgment of Prendergast, J., at the trial, and dismissing the plaintiff's action with costs.

Phillips, Rogers & Scarth, for the appellant.

Moran, Anderson & Guy, for respondent.

Davies, J.

DAVIES, J.:—I think this appeal should be dismissed and the judgment below affirmed on the ground which was clearly estab-

lished that the chauffeur from the time he took the motor car out of the garage until the accident occurred was on his own business and pleasure and not on any business of his master's.

He was not acting within the scope of his duty as his master's chauffeur, but outside of and beyond that scope.

IDINGTON, J.:—In this case the learned trial Judge finds that the respondent's chauffeur in driving his automobile was guilty of negligence and respondent liable to answer for the damages consequent therefrom suffered by appellant.

I assume the facts to be as reported by the learned trial Judge, that respondent had in engaging the chauffeur bound him never to use the automobile without leave, and on such occasions as the night in question when he took the wife and some of respondent's family to the theatre, that the automobile should be at once returned to a neighbouring garage and left there till the time had approached to take it out and go and bring the family home.

On the night in question the automobile, after respondent's people had been duly left at the theatre, was taken to the neighbouring garage and left there by the chauffeur, but in a very short time thereafter taken out and used by him for purposes of his own in course of which the appellant was very seriously injured.

It would seem to me idle to contend that when this respondent's servant took his automobile out of the garage from which it was not to be taken until at least two hours later, he was not a trespasser and liable as such to instant dismissal for doing so. It seems he was not dismissed but retained in respondent's service despite such gross disobedience and the suffering caused thereby. I quite agree this is a state of things which in a well ordered state ought not to be suffered.

I regret to be compelled to hold that the common law relative to the ordinary relations of master and servant, and the responsibility of the former for the latter, under such circumstances, does not enable the Courts to do absolute justice and that the statutory amendments thereto do not reach far enough to cover such a case as this.

CAN.

S. C.

HALPARIN v. BULLING.

Davies, J.

Let us hope the law will be changed so far at least that the master who thus flaunts his support of such a wrongdoer in the face of one of those he has grossly injured, shall be made liable for all damages done by him whilst in such service.

Indeed, I think the legislation needed might go further, but to this extent at least it would be a deterrent for both master and man.

If this man had, as in the case of *Venables* v. *Smith*, 2 Q.B.D. 279, relied upon by appellant's counsel, after leaving the theatre and before placing the automobile in the garage, gone upon some brief errand of his own, something might have been said for the case made.

Unfortunately for the appellant it seems to have been such a departure from the course of the chauffeur's employment that in law the master cannot be held bound to answer therefor.

The appeal should be dismissed with costs if the respondent claims them as it is to be hoped he will not.

DUFF, J.:—The principle of law by which our decision in this appeal must be governed is stated in these words by Cockburn, C.J., in *Storey* v. *Ashton*, L.R. 4 Q.B. 476, at 479:—

> The true rule is that the master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment as servant.

The question in controversy is this question of fact:—Was the chauffeur, Stapleton, about his master's business when he ran down the unfortunate victim of his carelessness or was he making use of the respondent's car in an independent excursion of his own? I think the conclusion at which the Court of Appeal arrived was right and that the question must be answered in the sense in which they answered it, namely, that Stapleton was not then engaged in the doing of anything appertaining to the course of his employment as the respondent's servant.

I think the provisions of the Motor Vehicles Act of Manitoba to which our attention was called have no relevance to any point arising on the appeal.

Anglin, J.

ANGLIN, J.:—I concur with Mr. Justice Duff.

CAN.

S. C.

HALPARIN v. BULLING.

Brodeur, J.

BRODEUR, J.:—It is with a great deal of hesitation that I have come to the conclusion that this appeal should be dismissed, though it is true that when the accident occurred the respondent's chauffeur was not acting within the scope of his duty. His instructions were to have the automobile at a certain garage or at the respondent's residence, and instead he took the motor car and used it for his own purpose and pleasure. During that errand of his own he struck the appellant.

A local Act of Manitoba, in which province the accident occurred, was invoked by the appellant; but it has no bearing upon the issues in this case.

The jurisprudence under the English common law is that the master is not liable for the negligence of his servant while the latter is engaged in some act beyond the scope of his employment for his own purpose, though he may be using the instrumentalities furnished by the master to perform his duties as servant. *Mitchell* v. *Crasweller*, 13 C.B. 237, in 1853; *Storey* v. *Ashton* L.R. 4 Q.B. 476, in 1869; *Rayner* v. *Mitchell*, 2 C.P.D. 357, in 1877; *Dowling* v. *Robinson*, 43 Ir. L.T.R. 210, in 1909.

I may add that the decision in this case should not be considered as a precedent in Quebec, where the liability of the master rests on different principles. Sainctelette, Responsabilité des propriétaires d'automobiles, p. 216, No. 188; Dalloz, 1908-1-351; Gazette du Palais, 1904-1-140; Le Droit, 22 Oct., 1914, Cour de Cassation.

GREAT NORTHERN FILM CO. v. CONSOLIDATED FILM CO.

QUE.

S. C.

Quebec Superior Court, Charbonneau, J. March 19, 1914.

1. INJUNCTIONS (§ II—130)—INTERLOCUTORY — IRREPARABLE DAMAGE — NO CASE — REFUSAL OF.

An interlocutory injunction should be refused where the plaintiff makes out no case for irreparable damage stronger than that made out for damage which the defendant would suffer by the injunction if he should establish his defence.

Statement

PETITION for an interlocutory injunction.

Cotton & Westover, for the plaintiffs.

Duff & Merrill, for the defendants.

Charbonneau, J.

CHARBONNEAU, J.:—This is a petition of the plaintiffs for an interlocutory injunction forbidding the defendants, their officers and servants from exhibiting a film entitled:—"Acquitted," revendicated in this case and of which they (the

QUE.

S. C.

GREAT NORTHERN FILM CO. v. CONSOLIDATED FILM CO.

Charbonneau, J.

defendants) were allowed to retain possession by a judgment of this Court of March 4. As I read the facts stated in the declaration of the plaintiffs and in the present petition, the object of the latter is to prevent the defendants from using the film in Canada now. It is stated and not denied by the defendants that the plaintiffs are the authors and makers of the film. It is stated in both documents that, if the film revendicated from the defendants is not a spurious imitation, it was sold by the plaintiffs, in Europe, to parties who agreed to use it for a certain period of time, in Europe only. Of course, this is denied by the defendants who pretend that they bought the film in question in good faith from one Henry Howse, a dealer in such articles, in the city of London, without any restriction as to place and time where and when such film could be exhibited. They claim, therefore, that they have the right to use it and dispose of it, as they please, without any interference by the plaintiffs.

It is not within the province of this judgment to appreciate the value of the conclusions taken by the main action, but I may observe incidentally that the premises put forward in the declaration would have warranted more naturally an action in the nature of an injunction or a conservatory attachment putting the object in judicial custody, so that it might not be used in the prohibited territory, during the prohibited time. Instead of that, the plaintiffs have taken a revendication pure and simple, asking to be declared the true owners of this film in particular. What will be the ultimate judgment on this action? I am not in the position nor bound to foresee now. Nevertheless I had to refer to it, in order to find out what the effect of the possession given to defendant by the judgment of March 4 might be. The plaintiffs contend that the provisional possession given to the defendants by that judgment, during the pendency of the suit, will enable it to exhibit the film and frustrate the very object of their action. It is clear that it will have this effect, if such possession carries with it the right to use the object revendicated, pending the case. If, by the final judgment, the plaintiffs are declared to be the true owners of the film, the defendants would be bound to produce it in the same condition as they received it, which would be easily done, as I understand

from the proof made and, from the uncontested facts put before the Court by both parties, the use of those films do not deteriorate them to any appreciable extent. In the meantime, the plaintiffs will have been frustrated from their real rights, if they have any, that is to say, the right to prevent the exhibition of the film in this country for a certain period of time, although the literal meaning of the conclusions would have been allowed.

Art. 951 C.P. would seem at first sight to indicate that provisional possession does not entitle to user as it provides that if the effects seized are of a nature to produce fruits, the Court may order them to be sequestrated, evidently for the purpose of leasing them. In this case, it is clear that the films are of a nature to produce fruits; in fact they are all fruits and would be worthless, except for their leasing power, so that the proper remedy would have been to appoint a sequestrator, if this were an ordinary revendication. But comparing the article in question with the preceding one shews plainly that this provision is only a subsidiary one, and, perhaps, may be applied only when none of the parties have asked to be put in possession. It would therefore follow that this injunction, taken as an incident to the revendication and to the order putting the defendant in possession might be granted, if a *primâ facie* case was made out by the plaintiffs, because the final judgment would be rendered ineffectual by the provisional user. The same conclusion should be arrived at, if we take this case as a conservatory attachment to prevent the use of the film, within a certain district, and for a certain time, and the injunction were asked for under sub-secs. *a* & *b* of par. 1 of art. 957, as in that case the commission of the act would produce an irreparable damage.

The question therefore I have to decide is whether the plaintiffs have the right, under art. 957 C.P., to the relief demanded, that is to say, to restrain the defendants from exhibiting the film in question for a limited period and within a limited territory, and whether this user would produce an irreparable injury and render the final judgment ineffectual. This inquiry must be made in view of the ground put forth by the defence that these proceedings are taken under the name of the plaintiffs by a third party of the name of Lubin, who is the manager of competing firm in Montreal, and who has resorted to these proceedings to

QUE.
S. C.
GREAT NORTHERN FILM CO. v. CONSOLIDATED FILM CO.
Charbonneau, J.

prevent the defendants from using their property, in order that he may himself put forward duplicates to their detriment and loss.

The right of ownership and immediate user, in Canada, of both copies of the same pictures, by the two parties, appears at first sight to be the same. It is true that the plaintiffs allege and make a *prima facie* proof of the fact that the film, now in the hands of the defendants, was sold, if sold at all, with a restriction that it must be used only in Europe, at the present time, but, on the other hand, there is the fact that the series of moving pictures in question is not actually copyrighted, that the film now in the hands of the defendants, which is a copy, bears no indication that there is any restriction as to time or place attached to it. There is also the fact that the defendants bought it from a dealer in the open market. The Court is therefore called on to pronounce on two equal rights and the danger of irreparable damage from the infringement of either of them. On the one hand, if it refuses the injunction, the parties to whom the plaintiffs have sold the same film for use in Canada, from a certain date, say first of April, will be injured by the exhibition of the same film before they can; on the other hand, if the injunction is granted, the defendants and their assigns will be deprived of the advantage of using the same film before their competitors, a right which they have acquired by their exertions and perhaps their good extra money to get the film first. The nature of the damages in both cases is the same, they are equally irreparable and they may be equally difficult to establish.

What is the right and proper thing to do in such a state of things? The most expedient way is not to do anything, and I must conclude that it is also the most logical way out of the difficulty. The plaintiffs cannot get their conclusions unless they prove their case, and they cannot be said to have made out a case, when they are faced with another case equally as good. Moreover, if this injunction is treated as an intended remedy to the order of March 4, which it is evidently, I do not think that I would be justified in interfering with it, by another interlocutory judgment. The demand for an injunction is therefore dismissed, each party paying its own costs.

Petition dismissed.

STEPHENSON v. COWAN.

MAN.

K. B.

Manitoba King's Bench, Metcalfe, J. December 11, 1914.

1. INJUNCTION (§ I G—61)—LOCAL OPTION BY-LAW—SUBMISSION OF—INJUNCTION TO RESTRAIN.

Where an injunction is sought by a ratepayer to restrain the submission of a local option by-law on the ground of a defective affidavit of execution of the petition for the by-law, he must shew something more than the incidental and comparatively trifling expense by the municipality for taking a public vote to establish his individual status to sue in a matter affecting the public generally—where no special damage to himself more than to other citizens is shewn.

[*Shrimpton* v. *Winnipeg*, 13 Man. L.R. 219, and *Davis* v. *Winnipeg*, 17 D.L.R. 406, 24 Man. L.R. 480, followed.]

Statement

MOTION for injunction restraining submission of local option by-law.

Injunction refused.

F. M. Burbidge, for plaintiff.

Hudson and *Swift*, for defendants.

Metcalfe, J.

METCALFE, J.:—The plaintiff, who is a farmer, is an elector and ratepayer residing in the municipality of Louise. The council, having received a petition, are about to submit a local option by-law to the electors. The plaintiff, on his own behalf and on behalf of all the other ratepayers (excepting the defendant councillors) moves for an interim injunction. The ground relied on is that the affidavit of execution of the petition does not comply with the requirements of the statute. The objections are similar to those urged in the Sifton Case. Were the circumstances similar I should follow that case.

The plaintiff swears that he is the owner of the east half of section 5-3-11 west of the first principal meridian, that the value of his lands has been greatly depreciated by reason of the first and second readings of the proposed by-law and that if the defendants proceed to submit the by-law to the people, the value of his lands will be further greatly depreciated. He says that he estimates such depreciation to be 25 per cent. of the land value and that unless the defendants are restrained he will suffer irreparable loss and damage. He further states that unless the defendants are restrained as aforesaid they will spend the money of the defendant corporation in printing, ballots, publishing advertisements and for other matters and things connected with the submission of the said proposed by-law.

MAN.

K. B.

STEPHENSON v. COWAN.

Metcalfe, J.

Stephenson is a farmer and is not engaged in any other business than that of farming: the lands mentioned in the affidavit of Stephenson are used solely for the purpose of farming; and there is no prospect of their being used for any other purpose.

This is a matter which affects the public generally. The plaintiff has shewn no special damage. In view of *Shrimpton* v. *Winnipeg*, 13 Man. L.R. 211 at 219, followed in *Davis* v. *Winnipeg*, 17 D.L.R. 406, 24 Man. L.R. 478 at 480, I can hardly hold that the Attorney-General should be a party. In England it is the uniform practice that the Attorney-General should be a party to such proceedings, but in Ontario and in the United States the opposite rule prevails.

In *Shrimpton* v. *Winnipeg*, Mr. Justice Killam says:

> The question of the right of a ratepayer to an injunction to prevent the conclusion of such an agreement has not been as carefully or fully argued on either side as I should have desired. . . I feel that under the circumstances I too may well be excused from giving to the question an exhaustive consideration.

He justifies his conclusion upon the reasoning advanced in par. 915 (now 1580) of Dillon's Municipal Corporations (5th ed., 1911), as follows:—

[The Judge here gave extracts from paragraphs 1580 and 1581.]

This rule, however, does not obtain in England. There the distinction is drawn between the rights of a shareholder and a ratepayer. The American rule having already been applied in this Court, I must also apply it. I do not think, however, that in every case, no matter how trivial, the plaintiff may as of right demand it. I do not take that to be the meaning of the extract from Dillon.

There is no licensed hotel in the municipality. If such state of things continues, I fail to see how the plaintiff's land will depreciate in value by reason thereof. In any event, I am not impressed with the argument that local option injures the value of farm lands.

I do not believe that the real complaint is because of the expenditure of money for the printing of ballots and the publishing of advertisements. I believe the real object is to prevent the voting. The case was argued before me on the 7th instant, the

plaintiff asking leave to file a further written argument, which I received on the 9th instant. The voting takes place in a few days. It is not shewn that the municipality is expending any considerable sum. I believe the expenditure will be trivial and the greater part, if not all, is no doubt already incurred.

I am not impressed with the sincerity of the motion. I think that under the special circumstances of this case I should not entertain the application. The motion is therefore dismissed with costs.

CANADIAN PACIFIC R. CO. v. WATTS.

Alberta Supreme Court, Scott, Stuart, Beck, and Simmons, JJ. December 18, 1914.

1. CARRIERS (§ III E—430)—FREIGHT—NON-PAYMENT OF—SHIPPER PRIMARILY LIABLE—MISTAKE—CONSIGNEE—ACTION AGAINST.

The person who is primarily liable for the payment of freight on a railway shipment is the shipper of the goods; a contract to pay freight is to be implied from the mere fact that he has placed the goods with the carrier for the purpose of being carried to their destination; and where by mistake of the railway the goods were delivered without collecting the freight indicated by the way-bill from the consignees who were agents holding the goods for sale as factors only and who by reason of the railway's mistake were led to suppose that the freight had been prepaid, the railway has no right of action against the latter for the freight.

Statement

APPEAL from the trial judgment in favour of plaintiffs.

Appeal allowed.

John Barnett, for appellant.

George A. Walker, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—The plaintiff sues for $373.76, the freight charges upon goods shipped by the International Harvester Co. at Hamilton, Ontario, to the defendant at Innisfail, Alberta, in April, 1911. The "way-bill" stated the freight charges to be $373.76 and indicated in the proper column that the sum was to be collected. On the arrival of the goods and the way-bill, the agent at Innisfail, following the usual custom, made out an "expense-bill." In doing so, he, by mistake, noted in the appropriate column that the freight had been prepaid. A drayman, in whose favour the railway company had a standing order authorising him to receive all goods shipped to the defendant, received the goods in question and receipted for them on April 27, 1911, and delivered them to the defendant. According to

ALTA.
S. C.
CANADIAN PACIFIC R. CO. v. WATTS.
Beck, J.

the usual custom, the defendant as consignee, would receive a copy of the expense-bill and apparently they did receive such a copy either directly or through the drayman. This is virtually everything of substantial importance established at the conclusion of the plaintiff's case. I think the plaintiff had made out no case against the defendant.

The evidence brought out during the case for the defence shewed some additional facts.

The defendants were "agents for the International Harvester Co." They were "just agents—holding them" (the goods) "as factors." The custom between the company and the agents appears to have been that the agents were expected to pay the freight. If they felt unable to do so, they would telegraph the company to that effect and the company would pay the freight charging the agents a straight 5 per cent. on the amount of the freight for doing so. The amount of the freight would be taken into account between the company and the agents on settlement between them whether the particular goods had actually been sold or not. A settlement—but not a final settlement—was arrived at between the company and the agents in the fall of 1911; a final settlement in the spring of 1913. The defendants did not act as agents or otherwise for the company during the selling season of 1912; they did so in 1913, but not since. The evidence does not shew how the item of freight in question was treated in the account relating to the settlement. I should suppose that neither having paid it, it did not appear in those accounts at all. On the occasion of the settlement in the spring of 1912, the company took over the goods, or such of them as remained on hand, comprised in the shipment in respect of which the claim for freight is now made.

I do not think that anything said by witnesses on behalf of the defendant assists the plaintiff's case. I think that the International Harvester Co. is clearly liable for the amount of freight in question, but that the defendants are not.

After examining a number of authorities I find that the law applicable to the case as stated in 26 Halsbury's Laws of England, tit: "Shipping & Navigation," pp. 291, *et seq.* 400-401

ALTA.

S. C.

CANADIAN PACIFIC R. CO. v. WATTS.

Beck, J.

and 404. [The learned Judge here cited the said sections at length and referred to the case of *Donett* v. *Beckford* (1833), 5 Bam. & Adol. 521.]

. . . The defendants are not shewn to have been the purchasers of the goods or otherwise the owners of them. The evidence is to the contrary. It appears too that the defendants, by reason of the plaintiffs' mistake supposed that the freight charges had been prepaid. There could, therefore, have been no intention on the part of either the railway company or the defendants which could properly found any inference that the defendants were, by receiving the goods, undertaking a liability to pay the freight or that the railway company was consciously releasing their lien. There is no evidence beyond what I have noted on which to ground any new contract on the part of the defendants either express or implied.

In the Court below the judgment was given for the plaintiff. For the reasons I have indicated, I think the appeal should be allowed with costs and the judgment entered dismissing the action with costs.

SWANSON v. THOMAS.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 30, 1914.

1. PRINCIPAL AND AGENT (§ II B—17)—AGENT'S INTENTION—UNDISCLOSED PRINCIPAL—NO AUTHORITY—RATIFICATION.

A contract made by a person intending to contract on behalf of a third party but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

[*Keighley* v. *Durant*, [1901] A.C. 240 followed; *Davidson* v. *McLelland*, 32 O.R. 382, referred to.]

Statement

APPEAL from an action allowing commission for sale of land.

Appeal allowed.

Graham & Co., for defendant, appellant.

H. A. Bergman, for plaintiff, respondent.

Howell, C.J.M. (dissenting)

HOWELL, C.J.M. (dissenting):—I have read the judgment of my brother Cameron in this matter and I come to the same conclusion. The husband, acting really for his wife, desired the assistance of the plaintiff in carrying out the transaction and admits saying to him: "If you help me make this deal I will pay

MAN.

C. A.

SWANSON v. THOMAS.

Howell, C.J.M. (dissenting)

you off-side." Perhaps he meant by this "off-side" that the plaintiff should get commission on the exchange as if agent for each of the parties. The plaintiff swears he did not know that the wife was the owner of the property and apparently the Judge believed him. The wife conveyed her property in part payment of the livery stable property of which she, through these negotiations, became the owner. The husband, when acting as a principal, but really as agent for his wife, promised the plaintiff to pay a commission for his assistance in carrying the transaction through. The plaintiff, thinking the husband was the principal took his note and afterwards claimed against the wife. I think he had a right to claim against her and that the principles laid down in *Thomson* v. *Davenport*, 9 B. & C. 78, apply—Also *Calder* v. *Dobell*, L.R. 6 C.P. 486.

The plaintiff, however, has no right of action against both parties and if the husband had appealed the judgment against him would have been set aside as was done in *Davidson* v. *McLelland*, 32 O.R. 382, a case in many respects resembling this one.

I would dismiss the appeal.

Richards, J.A.

RICHARDS, J.A.:—The plaintiffs, being employed by parties named Johnson, to procure a purchaser for a livery stable and business at Arborg in Manitoba, advertised it for sale.

The defendant, Luther Thomas, saw the advertisement and negotiated with the plaintiffs to buy. On March 4, 1913, he entered, in his own name, into a written agreement with the Johnsons to buy the property for $7,800 "payable . . . by transferring to the parties of the first part" (the Johnsons), a named quarter section of land, "at five thousand six hundred dollars ($5,600) . . . and the balance or twenty-two hundred dollars ($2,200) as follows," stating amounts and times of instalments making up the $2,200 with interest.

On March 10, 1913, the agreement was carried out by the Johnsons delivering possession and entering into a formal agreement to convey the livery stable and business to Luther Thomas' wife, Nellie Thomas, who was the real owner of the quarter section, and she conveyed the quarter section to the Johnsons, and secured to them the postponed payments, making up the balance of $2,200 and interest.

Swanson claimed from the Johnsons a commission on the sale of the livery stable and business, and was given, and accepted, their promissory note for $600 in settlement. During the preliminary negotiations the plaintiff, Swanson, claimed from Luther Thomas a commission on the transfer of the quarter section, as if he were selling it as Thomas' agent. Thomas agreed to pay one, and the amount was fixed at $200, for which Luther Thomas, on March 8, 1913, gave the plaintiff's his promissory note, payable 3 months after date.

When Swanson took that note he did not know that Nellie Thomas owned the quarter section, or was the intended purchaser. But a day or so later, when the final agreement was being made, or had just been made, he learned that fact.

On July 17, 1913, Luther Thomas paid $50 on the note, the balance of which is still unpaid. Swanson made no claim against Nellie Thomas for payment of the commission till after January, 1914.

Mrs. Thomas took no part in the negotiations, but left the matter entirely in her husband's hands. She knew that he, as her agent, was bargaining for the livery stable and business, and that he was agreeing to transfer her quarter section in part payment. She did not agree, or authorize him to agree, to pay a commission, and she had no notice or knowledge, till after January, 1914, that he had been asked, or had agreed, to pay one.

This action was brought to recover from both Luther and Nellie Thomas $150, the unpaid balance of the $200 that Luther had so agreed to pay. Luther did not defend the action but Mrs. Thomas did.

The learned trial Judge gave judgment against both defendants for the amount claimed, holding that the husband had absolute authority from the wife to do anything that he did. From that decision Nellie Thomas has appealed.

In stating the facts of the case, I have, for the purposes of this judgment, credited the plaintiff's story as against that of the defendants, wherever there has been a conflict of testimony, and have done so because of the learned trial Judge's finding, though I can not say that a perusal of the evidence would, but for his finding, have led me to that conclusion as to all matters in dispute.

MAN.

C. A.

SWANSON v. THOMAS.

Richards, J.A.

Assuming that it is a case where it would be open to the plaintiff, in spite of his having taken the $200 note, to proceed against the undisclosed principal, and further assuming the facts to be as mentioned above, the question, I think, may be shortly stated thus:

Does the bare fact that a woman empowers her husband to buy property for her, and to agree to transfer her land in part payment therefore, imply authority to him to agree, on her behalf, to pay to the person, that she knows only as the agent of the other party, a commission, as if he were her agent selling her land. Such implied authority can go no further than to give him power to do what would ordinarily be expected as an incident of such a transaction. I cannot see anything in this case that should suggest to her that a commission would be claimed from her. She knew that the plaintiffs were the Johnsons' agents. She had no reason to suppose that they would claim to have been hers.

With deference, I cannot agree with the learned trial Judge that there was an implied authority, from Nellie Thomas to Luther Thomas, to agree to pay a commission. In the absence of an express authority, which is not suggested by anything in the evidence, I think the implication is that there was no authority to him to so agree.

I would allow the appeal with costs, and amend the entry of judgment in the County Court by making it a judgment against Luther Thomas only, and by entering judgment of nonsuit in favour of the defendant, Nellie Thomas, against the plaintiff's, with costs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiffs, who are real estate agents, sue Nellie B. Thomas for commission for finding a purchaser of a quarter section of land belonging to her. She is a married woman and her husband, the defendant, Lou Thomas, conducted certain negotiations with parties named Johnson, and with the plaintiff, who was their agent. These negotiations resulted in an agreement which was reduced to writing, whereby the Johnsons agreed to sell their livery business to Lou Thomas for a certain sum of money, payable by Lou Thomas transferring to the Johnsons the above-mentioned quarter section of land and pay-

ing the balance of the purchase money by instalments. This agreement was executed under seal by the Johnsons and by Thomas. It was not disclosed at the time that the defendant, Nellie B. Thomas, was the owner of the quarter section, or that she had any interest in the agreement. The transaction was, however, carried out by Mrs. Thomas conveying her land to the Johnsons and receiving a conveyance to her of the livery stable, etc., mentioned in the agreement.

Swanson states that Lou Thomas agreed to pay commission on the sale of the quarter section, and Thomas says he agreed to pay personally a commission of $200. Some days after the preliminary agreement had been executed Lou Thomas signed a promissory note in favour of the plaintiffs for $200 as their commission, and he afterwards paid $50 on account of this note. J. J. Swanson, the member of the plaintiffs' firm who brought Thomas and the Johnsons together, states positively that Mrs. Thomas' name was not mentioned in connection with the commission or in connection with the note prior to the signing of the note. Thomas, on the other hand, says he told Swanson that his wife owned the land and would not pay a commission. Swanson's evidence shews that the agreement as to commission was made by Lou Thomas, who personally agreed to pay it, no mention being made of his wife. Thomas apparently agreed to pay a commission himself as a concession to Swanson, Thomas being anxious to see the transaction go through. Both defendants state that the husband had no authority from the wife to agree on her behalf to pay commission. No claim for commission was made against the wife until a considerable time had elapsed after the dishonour of the note given by the husband.

Upon the note being dishonoured the plaintiffs brought this action to recover the balance of the commission from Nellie B. Thomas or from both defendants. A claim is also made against Lou Thomas upon the promissory note. The learned County Court Judge entered a verdict against Nellie B. Thomas on the ground that the husband had authority from his wife "and that he did it practically on his own behalf, presumably for his wife."

In considering this case one must bear in mind that there

MAN.

C. A.

SWANSON v. THOMAS.

Perdue, J.A.

are two separate and distinct contracts indicated in the evidence: first, the contract with the Johnsons involving a sale or exchange of Nellie B. Thomas' land; secondly, the contract to pay a commission to the plaintiff. Ratification, or rather adoption of the first contract by Mrs. Thomas was not a ratification of the second contract which was one made between her husband and a third party, the plaintiffs. The plaintiffs were the agents of the Johnsons who advertised the livery business for sale. Lou Thomas went to them to purchase it. The transaction that resulted involved the transfer of the wife's quarter section to the Johnsons at a stated value. The plaintiffs, although they were receiving a commission from their own principals, sought also to obtain a commission on the sale of the quarter section of land. There cannot be any contract that she would pay a commission to the plaintiffs implied from the circumstances. It rests upon the plaintiffs to prove a contract to pay. The argument advanced for the purpose of inferring such a contract is that the husband was authorized by the wife to enter into and carry through the transaction with the Johnsons, and that therefore, it must be inferred that, as incident to that authority, he had power to bind her to an agreement to pay commission to the plaintiffs. But if we take Swanson's own evidence as expressing the true facts (a position to which the plaintiffs cannot reasonably object), Mrs. Thomas' name was not mentioned in connection with the transaction prior to the signing of the note, and the agreement as to commission was that the husband would personally pay it. Thomas did not say to Swanson that he agreed on behalf of his wife or on behalf of the owner of the land to pay commission. Swanson dealt with Thomas as the principal, and had no reason to believe that Thomas was acting for anyone else. It is positively denied by both the defendants that Mrs. Thomas was ever consulted or gave any authority to her husband to bind her to pay commission, and there is no evidence to the contrary.

Further, I think that the contract, made as it was and under the facts as shewn, was not capable of ratification by Mrs. Thomas so as to make her liable to be sued upon it, even if there were evidence of an attempt at ratification. As authority for

this, I would refer to the decision of the House of Lords in *Keighley, Maxsted & Co.* v. *Durant*, [1901] A.C. 240, in which the doctrine of ratification is dealt with fully and it is laid down that a contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

Under no aspect of this case can I find that Nellie B. Thomas, either by agreement or by her conduct, made herself liable to the plaintiffs for the commission claimed. I would allow the appeal with costs and enter a nonsuit with costs in the County Court as against Nellie B. Thomas.

Cameron, J.A. (dissenting)

CAMERON, J.A. (dissenting):—The plaintiffs sue the defendants, husband and wife, for a commission on the sale of a quarter section of land in Saskatchewan, owned by Nellie Thomas, the wife. The action is against the defendants jointly, against each of them separately and, lastly, against the husband on a promissory note for $200 given for the amount of commission agreed upon. The plaintiffs published an advertisement for the sale of a livery business at Arborg owned by three persons named Johnson. Lou Thomas saw this and came to Winnipeg to see the plaintiffs and, after John J. Swanson, one of the plaintiffs, and he had made two trips to Arborg, they completed an agreement which Swanson drew up, March 4, 1913, and had signed by the Johnsons and L. Thomas. The agreement was signed on its date. This agreement was entered into subject to an inspection of the farm which was made by one of the Johnsons, accompanied by Lou Thomas. They returned March 8, the parties discussed the agreement and certain alterations were made in it, including an increase in the amount of the expressed consideration from $7,300 to $7,800. The land was taken at $5,600, and the balance, $2,200, was made payable $550 on March 4, 1914, $500 September 4, 1914, $600 March 4, 1915, with interest at 7 per cent. Swanson made an agreement with Lou Thomas as to the amount of commission which was fixed at

MAN.

C. A.

SWANSON v. THOMAS.

Cameron, J.A. (dissenting)

$200 for which Thomas gave the promissory note sued upon, dated March 8, on which $50 was paid July 17, 1913.

In carrying out the agreement a conveyance of the quarter section was made by Mrs. Thomas and a bill of sale of the livery stable property made to her. At the time of the giving the note Swanson says he did not know who was the owner of the quarter section. It appears that the Johnsons agreed to pay a commission and paid it in part. Of this fact Thomas was aware, pp. 9, and 17. Swanson says a commission was discussed between Thomas and himself before he gave the note. Mrs. Thomas explicitly denies authorizing her husband to agree to pay any commission, and says she never heard of the commission until after the payment of the $50, and that no demand was made on her for it until the commencement of the action. She says she left the matter in her husband's hands and had him act for her throughout. Lou Thomas states that he told Swanson the farm belonged to his wife "from the start," also that he promised to pay the commission "off-side." "I gave him the note and told him I would pay him." "I told him that my wife wouldn't pay him a cent. I said it was her property; I was making the deal and I would pay him off side," and this before he gave the note.

Swanson, on being recalled, gave a definite denial to these statements.

The learned County Judge held that the husband had authority from the wife and gave judgment for the plaintiffs for $156.30.

It is argued that the plaintiffs having accepted the note of Lou Thomas for the commission and extended the time for the payment thereof have elected their remedy and cannot now hold the defendant Nellie B. Thomas. The husband was here clearly agent for his wife and no proceedings short of judgment against the agent are conclusive proof of election to charge the agent exclusively. I do not consider this case comes within the decisions referred to in Bowstead on Agency, p. 312 *et seq*, to several of which we were referred. I would not draw from the facts here that the plaintiffs had elected, with knowledge, to accept the liability of the husband to the exclusion of that of the wife. In view of the judgment of the trial Judge, we must accept the

MAN.

C. A.

SWANSON v. THOMAS.

Cameron, J.A. (dissenting)

plaintiffs' version of the facts. The promissory note is merely a conditional payment and their acceptance of, and dealing with, it does not necessarily preclude the plaintiffs from enforcing their claim against the wife.

In this matter the wife was represented by her husband throughout. She ratified the transaction and executed the necessary conveyance. The husband knew that the plaintiffs were representing the Johnsons and knew that they (the Johnsons), were liable to pay a commission. The trial Judge has found that the husband had full authority from the wife to do what he did in agreeing to pay a commission. It was certainly open to him to come to that conclusion, though, to do so, he had to reject their statements as to the husband's authority to pay or agree to pay a commission. The wife admitted that she had left the matter in the hands of her husband and that he had acted for her throughout. From this, and from the evidence generally, the learned County Court Judge held that the interests of the wife and husband were identical and that the husband had sufficient authority to bind his wife in the matter of a commission. In view of all the circumstances, I am not prepared to reverse his finding.

Haggart, J.A.

HAGGART, JJ.A. concurred with RICHARDS and PERDUE, JJ.A.

SASK.

S. C.

NEWTON v. HUSSON.

Saskatchewan Supreme Court, Haultain, C.J., Newlands and Lamont, JJ. November 28, 1914.

1. BILLS AND NOTES (§ IV A—87)—PROMISSORY NOTE—PRESENTMENT FOR PAYMENT—ORAL PROMISE TO MAKE PAYMENTS—WAIVER.

Waiver of presentment of a promissory note at the place of payment is shown by an oral promise made by the maker after the note fell due to make payments on it at specified times as admitted in his examination for discovery.

2. BILLS AND NOTES (§ V A—105)—PROMISSORY NOTE—TRANSFERRED AFTER MATURITY—SUBJECT TO EQUITIES ATTACHING—SOLICITOR'S FEES—TAXATION OF COSTS.

A promissory note given by the client for solicitor's fees is subject to the equities attaching to it in the hands of the original payees when transferred after maturity; and where the costs would be subject to taxation the transferee will be entitled to judgment only for the amount at which the costs will be taxed on a reference for taxation, but not exceeding the amount of the note.

Statement

APPEAL by plaintiff in action on a promissory note.

Appeal allowed.

SASK.

S. C.

NEWTON v. HUSSON.

Newlands, J.

T. P. Morton, for appellant (plaintiff).

A. A. Fisher, for respondent (defendant).

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action on a promissory note made by defendant in favour of Elliot & Elliot, and indorsed by them to the plaintiff after the same became due and was dishonoured. The defence was that the note was not presented for payment, and the learned trial Judge found that it had not been presented, and, following *Jones* v. *England*, 5 W.L.R. 83, he held that the plaintiff could not recover. On reading over the evidence I was of the opinion that there was evidence of presentment, but without considering that question further I am of the opinion that defendant waived presentment.

Section 92 of the Bills of Exchange Act (R.S.C. ch. 119) provides that

> Presentment for payment is dispensed with (*e*) by waiver of presentment, express or implied.

A large number of cases have decided that a promise to pay after the bill is due with knowledge of the facts is a waiver. These cases are collected in Maclaren on Bills and Notes, 4th ed., at p. 260. In his examination for discovery put in at the trial, defendant said that plaintiff asked him to pay the note after it was due, and he promised him to pay $100 on it, "$50 now, and $50 in the fall." This, I think waives presentment.

As the plaintiff took the note after it was due, he took it with the equities attaching to it in the hands of the payees, Elliot & Elliot, from whom he got it. The consideration for the note was legal services rendered by them to defendant, for which they sent him an account which was put in at the trial. Defendant disputes part of this account. It should therefore be taxed, and the defendant's liability on the note be restricted to the amount due by him to them. That is all Elliot & Elliot could collect on the note, and is therefore all plaintiff can recover, he having taken it from them after it became due.

The appeal should be allowed with costs. There should be a reference to the clerk of the Court to tax the bill of costs of Elliot & Elliot put in at the trial, and judgment entered for the plaintiff for the amount so found to be due, not exceeding the amount due on the note sued on, with costs.

UFFELMANN v. STECHER LITHOGRAPHIC CO.

IMP.

P. C.

Judicial Committee of the Privy Council, Lord Dunedin, Lord Moulton, and Sir Joshua Williams. November 9, 1914.

1. CHATTEL MORTGAGE (§ II A—7)—INSOLVENT COMPANY—CASH ADVANCE—MORTGAGEE NOMINEE OF COMPANY—COLLUSION—SECURED CREDITOR—PREJUDICING OTHER CREDITORS—ASSIGNMENTS AND PREFERENCES ACT (ONT.).

A chattel mortgage given by a company when insolvent will be set aside under the Assignments and Preferences Act, Ont., notwithstanding that the consideration was a cash advance where the chattel mortgage was made to a nominee of one of the company's officers and such officer provided the money and negotiated the transaction so as to pay off a company debt for which he was surety and so relieve himself from that liability by collusion with another executive officer of the company to give the officer furnishing the money under cover of his nominee and to the secured creditor who was paid the money an unjust preference and to defeat, hinder, delay, or prejudice other creditors both knowing the company to be insolvent.

[*Stecher Litho Co.* v. *Ontario Seed Co.*, 7 D.L.R. 148, 46 Can. S.C.R. 540, affirmed on appeal; *Middleton* v. *Pollock*, 2 Ch.D. 104, referred to.]

Statement

APPEAL from Supreme Court of Canada, *sub. nom. Stecher Lithographic Co.* v. *Ontario Seed Co.*, 7 D.L.R. 148.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—The Ontario Seed Co. was, in August, 1909, indebted to the Merchants Bank of Canada in the sum of $8,254. In respect of this sum Jacob Uffelmann, secretary-treasurer of the company, and brother of the appellant, was liable to the bank as surety under a bond and as indorser of notes discounted by the company to the extent of $7,700. The bank also held as security an assignment of the book debts of the company.

On August 12, 1909, the Ontario Seed Co. executed a chattel mortgage for $8,300 of all their effects, including book debts, in favour of the appellant, in return for which they got from him a cheque for $8,300, which was then paid by them to the Merchants Bank, thus paying off the debt of $8,254.

The respondents were as at that date, and are still creditors of the company, and in December, 1909, they, on behalf of themselves and other creditors raised this action to set aside the chattel mortgage in respect of the provisions of the Statute of Elizabeth and of the Act, ch. 147 of 1897 of Ontario respecting assignments and preferences of insolvent persons.

The action was tried by Mr. Justice Teetzel. It was proved that the whole of the money to honour the cheque given by the

IMP.

P.C

UFFELMANN v. STETCHER LITHOGRAPHIC CO.

Lord Dunedin

appellant was really found by his brother Jacob, and that the whole arrangements were made by him, the appellant being no more than a passive spectator who allowed his name to be used. It was also proved that at the time of the transaction the company was insolvent to the knowledge of Jacob.

In the circumstances the trial Judge, who saw the witnesses, found as follows:—

I find as a fact that, when the chattel mortgage was executed, the company, through its officers, Otto Herold, vice-president and Jacob Uffelmann, secretary-treasurer, knew that the company was insolvent, and that the company, through the said officers, when they executed the chattel mortgage in the name of the company, intended thereby to defeat, hinder, delay, or prejudice all the creditors of the company except the Merchants Bank and Jacob Uffelmann; and further, that it was the intention of the company, through the said officers, to defeat the objects of the said Act by raising the money advanced under the chattel mortgage to pay the claim of the Merchants Bank, and by paying the same to give an unjust preference to the bank and Jacob Uffelmann, as surety. (He also said:) I do not think under all the circumstances that the money could be said to have been given to the company in good faith.

He accordingly set aside the chattel mortgage but directed that allowance should be made to the amount of the book debts which the bank had as security at the time of the transaction.

Appeal was taken to the Divisional Court, which affirmed the judgment on the main question, but set aside the rider as to the allowance of book debts. Appeal was then taken to the Court of Appeal which took the same view as the trial Judge, and finally appeal was taken to the Supreme Court of Canada, which took the same view as the Divisional Court.

The case seems to their Lordships to turn upon a question of fact and of fact alone. Had the present appellant been a third party there can be no doubt that the transaction would have been unimpeachable in spite of the insolvency of the company. For it is the case that money actually passed; and any person, however insolvent, is entitled to give his property in security for money actually received. As Lord Mansfield said in the case of *Foxcroft* v. *Devonshire*, 2 Burr. 938, 942:—

A notion that lending money to traders, knowing them to be in dubious, tottering, or distressed circumstances, upon mortgages or liens is fraudulent, and consequently the contract, void in case a bankruptcy ensues, would throw all mercantile dealing into inextricable confusion.

But the moment it is found that the appellant Adam is truly

IMP.

P. C.

UFFELMANN v. STETCHER LITHOGRAPHIC CO.

Lord Dunedin.

Jacob under another name, a question of fact becomes open for solution; and that question is whether the advance was a *bonâ fide* payment (there is no doubt it was an *actual* payment), or whether it was not a mere device to secure a preference to Jacob (he getting rid of his old liability as surety, and getting hold of the whole assets of the company), and to hinder other creditors as in a question with the favoured creditor Adam who was merely Jacob under another name. Now, as to this question, the trial Judge had no doubt on the evidence as laid before him, and all the members of all the three Appellate Courts have agreed with him. In the face of such a consensus of opinion on a matter truly of fact their Lordships would require to be clearly convinced that the evidence could not possibly lead to that result before they came to the opposite conclusion. This seems to end the matter; for, in other words, it is a finding that the circumstances of the case do not bring it within any of the cases set forth in sec. 3, sub-sec. 1 of the Assignments and Preferences Act. That allows sec. 2, sub-secs. 1 and 2 to operate, and the learned Judges below have all held that the transaction falls within the words of both sub-sections.

Their Lordships do not wish to express any opinion as to whether had there not been proved insolvency the transaction could have been avoided under the Statute of Elizabeth. The essence of challenge under that statute has been held in England to be the possibility of shewing that to use the words of Jessel, M.R., in *Middleton* v. *Pollock*, 2 Ch.D. 104, the debtor retains a benefit for himself. The statute of Elizabeth as it exists in England has been altered so far as Ontario is concerned, by certain amendments. But it is matter for consideration whether the amendments have had the result of altering what has been just expressed as the criterion to be applied to transactions alleged to fall within the statutes.

In the present case their Lordships think, for the reasons given, that the transaction is impeachable under the Assignments and Preferences Statute; and they see no reason to doubt that the measure of relief is that given by the Supreme Court of Canada. They will therefore humbly advise His Majesty to dismiss the appeal with costs.

CAN.
S.C.

HYDE v. WEBSTER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. October 13, 1914.

1. PARTNERSHIP (§ VII—30)—EXPIRATION OF—RENEWAL OF LEASE BY ONE PARTNER—REPUDIATION—ACTION AGAINST CO-PARTNER—RIGHTS OF PARTIES.

Where a partnership would expire by effluxion of time some months before the expiration of its lease of premises occupied by the firm, one partner may repudiate on his own behalf and on behalf of the firm a renewal of the lease taken in the firm name by the other partner without his consent, and may, under Quebec law, maintain an action against his co-partner, with the lessor brought in as *mis-en-cause* to hear judgment, for a declaration that the lease is null and void.

[*Hyde* v. *Webster*, 13 D.L.R. 388, 23 Que. K.B. 1, reversed.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, 13 D.L.R. 388, 23 Que. K.B. 1, affirming the judgment of Lafontaine, J., in the Superior Court, District of Montreal, by which the plaintiff's action was dismissed with costs.

Greenshields, Greenshields & Languedoc, for the appellant.

Place & Stockwell, for the respondent.

Sir Charles Fitzpatrick, C.J. (dissenting)

SIR CHARLES FITZPATRICK, C.J. (dissenting):—This is an action to set aside a lease. The real point in issue is, in my opinion, largely one of practice and procedure; and, in that view, it is important, as we have the concurrent judgments of both Courts below, to carefully consider the relief which the plaintiff prayed for. The conclusions of the declaration are as follows:—

Wherefore the plaintiff brings suit and prays that *the said agreement* purporting to be a lease between the *defendant* acting on behalf of the firm of Hyde and Webster, and the *mis-en-cause*, be *declared null, void and of no effect, to all intents and purposes que de droit*, that the *mis-en-cause* be called in to hear the said judgment rendered to the same end, the plaintiff reserving his right to take such further action against the defendant as he may be advised in damages or otherwise.

This prayer of plaintiff's declaration by which he is bound contains a clear unambiguous statement of his position in this action. He asks that the lease entered into under the circumstances hereinafter set forth should be declared null for all purposes and there is no conclusion for a declaration that the lease is not binding upon the partnership or upon the plaintiff personally.

It is a settled rule of the Quebec law that the Court cannot adjudicate beyond the conclusions of the plaintiff's declaration (art. 113 C.P.Q.) and no amendment can be allowed even before judgment by the trial Court which changes the nature of the demand (art. 522 C.P.Q.).

The parties to the action (plaintiff and defendant) were partners under the firm name of Hyde & Webster, and as such occupied under a lease certain premises for the purposes of their business. During the existence of that partnership and before the expiration of the then current lease, the defendant obtained in the name of the firm a renewal of the lease for a further period of three years from the date of its expiration.

The partnership expired by lapse of time before the new lease began to run, and the defendant remained in possession of the leased premises. The plaintiff, as I have just said, brings this action not to be relieved of his obligations under the renewal lease, as was his right, but to have that lease declared "void, null and of no effect for all purposes," on the ground that the defendant without his consent took in the name of the firm a lease which would begin to run after the expiration of the partnership.

There is no doubt that the plaintiff was not bound to accept the benefit of the new lease and could not without his consent be made subject to its provisions. This is admitted by the defendant in the letter written by his attorneys before the institution of the present proceedings. But the plaintiff could not object to the defendant continuing in the possession of the premises in his own individual right after the expiration of the partnership if the landlord was content to keep him as a tenant. That was a matter which concerned the landlord and the defendant exclusively, and the plaintiff, relieved of all liability the moment he gave notice to the landlord that he repudiated the action of his partner, was without interest to interfere. The landlord only could complain and he is content to allow the defendant to remain in possession of the premises. The defendant was thereafter solely bound to the due fulfilment of all the obligations of the new lease when the plaintiff repudiated his authority to enter into it (art. 1855 C.C.). Planiol, in his commentary on the corresponding article of the C.N., art. 1764, states the law with his usual lucidity and accuracy in these words:—

L'engagement est pris au nom de la société par un seul des associés. Cet engagement ne lie pas les autres à moins qu'ils ne lui aient donné pouvoir à cet effet.

In view of what I understand is the opinion of the majority of this Court I deem it necessary to emphasize the fact that the defendant does not in his pleadings or in his factum say that the

CAN.
S. C.
HYDE
v.
WEBSTER.
Sir Charles Fitzpatrick, C.J. (dissenting)

lease is binding on the late firm or on his partner the plaintiff appellant, and no such contention was put forward by his counsel during the argument before this Court. His position throughout has been that his partner was free to accept or decline the benefit of the lease and that in the latter alternative he, the defendant, was entitled to remain in possession of the premises under the renewal.

I venture to insist upon the nature of this action because apparently some misconception exists as to it.

In the Quebec system of procedure, distinct and consistent pleading is held to be essential to the right administration of justice. As far back as 1810, Sewell, C.J., in *Forbes* v. *Atkinson*, Pyke K.B. 40, found it necessary to draw the attention of the bar to the difference in this respect between the French and English systems. The Chief Justice said:—

> In the law of England it is a general rule in pleading that a mere prayer for judgment without pointing out the appropriate remedy is sufficient, and that, the facts being shewn, the Court, *ex officio*, is bound to pronounce the proper judgment. But the reverse of this rule is the principle of the law in Canada. With us the conclusions are held to be essential to the proceedings, and must contain, *à peine de nullité*, all that the judgment of the Court must comprehend. For although the conclusions may by the Court be allowed or rejected *in toto*, or modified or allowed in part, and rejected in part, *still what is omitted in the conclusions cannot be supplied* by the Court, not even if it appears in substance in the body, or libel, of the pleading.

The rule in *Forbes* v. *Atkinson*, Pyke K.B. 40, is still followed in Quebec. See *Préfontaine* v. *Cie de Publication de La Patrie*, 6 Que. P.R. 183.

It did not occur to any one in the Quebec Court to ask for leave to amend because no effective amendment could be made except by substituting one form of remedy for another, which obviously could not be permitted.

This case affords an apt illustration of the necessity of adhering to the rule that this Court is bound by the issues raised in the Courts below. If this action had been brought to obtain relief of his obligation under the lease, different issues of fact would have been raised, the plaintiff would have been met by the offer of the defendant's solicitors to relieve him of all obligation under the lease to which I have already referred and the issue would have been limited to a mere question of costs.

As a result of this judgment the plaintiff gets what he did

not ask for and the defendant is mulcted in heavy costs on an issue which is not raised by the pleadings.

I agree entirely with the two Courts below and am of opinion that this appeal should be dismissed with costs.

IDINGTON, J.:—The appellant and respondent were partners in a firm holding a lease running three months beyond the terms of the existing partnership.

The respondent, without authority, secured in the name of the partnership a renewal of the lease for three years. It is admitted neither could by the law of Quebec acquire such an advantage to himself as to have acquired such an embarrassing renewal in his own interest.

When the renewal secured in the name of the firm came to the knowledge of appellant he made a protest against such dealing and by this suit sought to have it set aside. The lessors stand neutral and make no objection to the rescission.

It is, of course, admitted that under the circumstances they are entitled to hold respondent liable to them and to indemnify them against loss for his unauthorized conduct of the business in hand.

It is said appellant has no interest such as to entitle him to maintain this suit. It is pretended, notwithstanding that alleged want of interest, that to put himself in a position to obtain a new lease or deal with the lessors therefor, he must be held bound to treat with this quondam partner on the basis of said lease being a valid renewal for such purpose. I am, with deference, unable to assent to such impotent conclusions as existing in law. The interest seems to me self-evident. In applying the law to the practical affairs of life we must see that the consequence of our reading and interpretation of the law is not such as to defeat its very purpose by means of some illusory dialectical skill in the use of words.

I, therefore, submit that the appeal should be allowed with costs without prejudice to the lessors' right to insist, if necessary, upon respondent's liability to fully indemnify them. This latter it is quite clear, in view of the correspondence had with appellant, is a matter of no consequence in this case.

DUFF, J.:—The respondent (without authority as regards the appellant) professed in the name and on behalf of the appel-

Duff, J.

CAN.
S. C.
HYDE
v.
WEBSTER.
Anglin, J.

lant (as well as on his own behalf) to execute the lease in question. I think the appellant is entitled to come into Court to obtain a declaration that the instrument produced by this wrongful exercise of pretended authority is not binding on him.

I think the appeal should be allowed with costs in all Courts.

ANGLIN, J.:—The appellant and the respondent were engaged in business in the city of Montreal as partners. The partnership terminated by effluxion of time on December 31, 1912. The business was carried on in premises No. 43 Common street, leased from the Grey Nuns, the lease of which expired on April 30, 1913. In September, 1912, in the absence of the plaintiff Hyde, the defendant, Webster, approached St. Cyr, the agent for the Grey Nuns, seeking a renewal of the lease in his own name. Hyde had already spoken to the agent with a view to obtaining a lease for himself on the expiration of the partnership. When Webster saw St. Cyr the latter refused to give him a lease in his own name, but offered to give him a three years' lease from May 1, 1913, for the partnership. This Webster agreed to take. A formal agreement which bears date September 20, 1912, was accordingly prepared and executed.

On returning to Montreal, Hyde repudiated this action of his partner, Webster, on the ground that he had acted without authority, and he brought the present action on November 7, 1912. In the conclusion of his declaration he prays

that the said agreement purporting to be a lease between the defendant acting on behalf of the firm of Hyde & Webster and the *mis-en-cause* be declared null and void and of no effect to all intents and purposes *que de droit* that the *mis-en-cause* be called in to hear said judgment rendered to the same end, etc.

The Superior Court dismissed the action, holding that the defendant had not authority to make the lease in question, and that it did not bind the plaintiff or the partnership unless the plaintiff should choose to ratify and approve of it, and that, having repudiated the conduct of his partner, the lease *quoad* the plaintiff is *res inter alios acta*, and consequently does not affect him, and that he, therefore, has no interest to maintain this action. This judgment was confirmed on appeal, Lavergne and Gervais, JJ., dissenting.

I am, with respect, of the opinion that the plaintiff is entitled to the relief which he claims in his declaration, at least in part.

Article 1855 C.C., which appears to govern the rights of the parties, is as follows:—

1855. A stipulation that the obligation is contracted for the partnership binds only the party contracting when he acts without the authority, express or implied, of his co-partners, unless the partnership is benefited by his act, in which case all the partners are bound.

In the French version the concluding clause of the article reads as follows:—

A moins que la société n'ait profité de tel acte, et dans ce cas tous les associés en sont tenus.

In the corresponding article of the C.N., No. 1684, we find this similar provision:—

A moins que la chose n'ait tourné au profit de la société.

From the English version it might be deduced that the partnership would be bound by any advantageous contract made by one of the partners on its behalf; but, from the French version, and more particularly in the form which the excepting clause takes in the C.N., it seems reasonably clear that an unauthorized contract made in its behalf will bind the partnership, in the absence of ratification, only if it has in fact derived profit from it. Laurent, commenting on the article of the C.N., in vol. 26, at p. 353, says:—

Si cependant il agit et que l'acte soit profitable à la société, la loi valide l'acte, mais seulement dans une certaine mesure, en tant que la société a profité; elle donne donc action à l'associé; mais ce n'est pas l'action du mandat, c'est une action moins favorable, que l'on appelle l'action *de in rem verso;* nous en avons traité au chapitre des *quasi-contrats;* c'est une espèce de gestion d'affaires, donc un quasi contrat; il en nait une obligation fondée sur l'équité. L'associé a agi au nom de la société sans pouvoir, il ne l'oblige pas; mais l'équité s'oppose à ce que la société s'enrichisse à ses dépens; la loi la déclare obligée en tant qu'elle s'est enrichie.

In the present case it is clear that the lease was made for the partnership, and it has been properly found that, in making it, Webster acted without authority, express or implied, from his co-partner. It is also clear that the lease is upon advantageous terms and would be of value to the partnership if its business should be continued, and is an asset which can be profitably disposed of for the benefit of the partnership to one or other of the partners. On the other hand, it has not been shewn that the partnership had actually derived any benefit from the lease at the time the action was instituted, *i.e.*, nearly two months before the partnership expired and five months before the lease in question would become operative. In his plea the defendant says:—

CAN
S. C.
HYDE
v.
WEBSTER.
Anglin, J.

The extension of the said lease creates a valuable asset of the firm of Hyde & Webster.

Having regard to the following considerations:—

(1) That the defendant in professed exercise of his authority as a partner of the plaintiff undertook to bind the partnership by an instrument in writing evidencing a lease of real property;

(2) That such a lease subjects the lessee to obligations towards his lessor;

(3) That, although made without authority, the lease might become binding on the partnership by ratification, express or tacit (art. 1727 C.C.);

(4) That, although made without authority, the lease may be binding on the partners to the extent to which the partnership is benefited by it:—

the plaintiff, in my opinion, had a sufficient interest to enable him to maintain this action for a declaration that the lease is not binding upon the partnership. That is in substance the relief he asks.

We are not at present concerned as to the ultimate consequences of such a judgment—whether it will leave the lease binding upon the defendant or will open the door for the granting by the landlords of a new lease to either the plaintiff or the defendant. In his declaration the plaintiff states that

the *mis-en-cause* through their authorized agents have declared their willingness to lease the premises to the plaintiff alone from and after the 1st of May, 1913.

This allegation is not admitted in the plea of the defendant. The *mis-en-cause* are not made parties to the action for any other purpose than that they may be "called in to hear the judgment rendered." They have not pleaded or been represented in the action, and there is nothing before us to shew whether they are or are not willing that the lease, if binding only on the defendant, Webster, should stand as a lease to him individually. Without their assent, Webster cannot hold them bound to accept him as sole tenant. Neither is it clear that if the landlords should decline to accept Webster as their tenant and should execute a lease in favour of Hyde, he would not be bound to account for any profit made by him out of such lease on the ground that he had acquired it by reason of his having been a member of the firm of Hyde & Webster. That question is not before us for determination, and has not been tried.

CAN.

S. C.

HYDE v. WEBSTER.

Anglin, J.

Upon the findings that Webster made the lease without the authority, express or implied, of his partner Hyde, and that Hyde has not ratified, but on the contrary, has repudiated his act, and it not having been shewn that the partnership had profited (*a profite*) by the lease at the time this action was brought, I am of opinion that the plaintiff was entitled to have it declared that the lease was not binding on the firm of Hyde & Webster, or upon himself as a member of that firm. Beyond that nothing should or can be determined in this action.

I would, for these reasons, with respect, allow this appeal with costs throughout.

Brodeur, J. (dissenting)

BRODEUR, J., dissented. *Appeal allowed with costs.*

ONT.

S. C.

COLLIER v. CITY OF HAMILTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, and Hodgins, JJ.A., and Clute, J. November 27, 1914.

1. MASTER AND SERVANT (§ II A 4—65)—INJURY TO SERVANT—EXPLOSION—REASONABLE CARE—PROPER APPLIANCES—UNNECESSARY RISK.

The utmost duty of a municipal corporation as regards its employees operating its waterworks is to take reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on its operations as not to subject those employed by it to unnecessary risk.

[*Smith* v. *Baker*, [1891] A.C. 325, applied; *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72; and *Winnipeg Electric* v. *Schwartz*, 16 D.L.R. 681, 49 Can. S.C.R. 80, distinguished.]

Statement

APPEAL from the judgment of the Senior Judge of the County Court of the County of Wentworth.

C. W. Bell, for the appellant.

F. R. Waddell, K.C., for the defendant corporation, respondent.

S. F. Washington, K.C., for the third party, respondent.

Meredith, C.J.O.

November 27. The judgment of the Court was delivered by MEREDITH, C.J.O.:—The highest ground upon which the appellant's case can be rested is, that it was the duty of the respondent corporation to take reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on its operations as not to subject those employed by it to unnecessary risk: *per* Lord Herschell in *Smith* v. *Baker & Sons*, [1891] A.C. 325, 362; that the respondent corporation neglected that duty; and that his injuries were occasioned by the neglect of it.

No case was made which would warrant that conclusion being

ONT.

S. C.

COLLIER v. CITY OF HAMILTON.

Meredith, C.J.O.

reached; there was no evidence that this reasonable care was not taken. There was nothing to warrant the conclusion that the gas which escaped came from the mains of the third party, and, as I have said, it is now shewn that the nearest gas-main was a block distant from the concrete chamber; and there was, therefore, no reason to anticipate that gas from that source would or might enter the chamber; and, in addition to this, there was nothing to indicate that there was any opening in the walls or floor of the chamber through which, if gas were present in the soil owing to an escape from the main, it could enter.

Had it been shewn that there were gas-mains near the chamber, it may be that the jury might have drawn the inference that it was the escaping gas which was ignited, and possibly have inferred, in the absence of any evidence to the contrary, that it entered the chamber through some opening that had been left in its walls or floor.

The learned Judge here referred to *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, and *Winnipeg Electric R.W. Co.* v. *Schwartz*, 16 D.L.R. 681.

In the case at bar there was no evidence of any defect in the concrete chamber, and it was shewn that, although there were many of these chambers in the city's streets, no accident of the kind, or indeed of any kind, had happened in connection with any of them, nor was there anything to indicate the nature of the gas which exploded or to prove from whence it came.

The result is, that, in our opinion, the ruling complained of was right, and the appeal must be dismissed with costs.

N. S.

S. C.

VAIL v. BANK OF B.N.A.

Nova Scotia Supreme Court, Drysdale, J. August 10, 1914.

1. MASTER AND SERVANT (§ III B—300)—CONSTRUCTION WORK BY CONTRACTOR—EMPLOYER'S DUTY TO PROTECT PASSERS-BY—FOR WHAT ACTS OF CONTRACTOR EMPLOYER IS LIABLE—EMPLOYING COMPETENT CONTRACTOR; EFFECT OF.

Where a person employs another to do construction work which, in the natural course of things, will involve a duty towards passers-by on the adjacent street to reasonably protect them from material falling upon them during the work of erecting the building, the owner for whom the work is being done is not relieved from the responsibility for the performance of that duty by employing an independent contractor to perform it and to assume the whole responsibility for such protection, however competent the contractor may be.

[*Pickard* v. *Smith*, 10 C.B.N.S. 470, and *Tarry* v. *Ashton*, 1 Q.B.D. 314, considered.]

N. S.
S. C.
VAIL
v.
BANK OF
B.N.A.

ACTION against an owner by a passer-by for personal injury sustained by a window falling upon him from a building in course of construction where the owner had the work done by an independent contractor, involving the owner's alleged duty to protect the public in any event. Judgment was given for the plaintiff.

Statement

The statement of claim alleged that the defendant was constructing a building adjoining a public highway in the city of St. John, whereby it became the duty of the defendant to carry on the construction of the building with such care and skill that the public while using the said street should not be injured thereby, and to adopt means to prevent injuries arising therefrom to persons passing along the said street; and that the defendant, by its contractors, agents and workmen, conducted itself so negligently and unskilfully in and about the construction of the said building and in suffering the walls and timbers thereof to be insecure, and so wrongfully and improperly omitted to take means to prevent the walls and timbers thereof from falling upon persons passing along the said street or to give them warning in that behalf, that by reason of the premises a portion of the walls and timber of the said building fell upon the plaintiff and struck him as he was lawfully passing along the street, and by reason thereof the plaintiff was knocked down with great violence and one of his ribs was broken and other injuries were suffered. The defence denied liability, principally on the ground that it had employed a competent and independent contractor to do the work and was under no duty to the public to take care.

The plaintiff was struck by a window shutter about 6 feet wide and 10 feet high used to block a window until the sash should be put in when the building was finished.

Argument

H. Mellish, K.C., *J. A. Chisholm*, K.C., and *F. R. Taylor*, K.C., contended that the bank, whether under a duty or not to guard pedestrians from danger, had completely discharged that duty by the appointment of a competent and independent contractor, and was not, therefore, liable to the plaintiff. They cited *Pickard* v. *Smith*, 10 C.B. (N.S.) 470; *Tarry* v. *Ashton*, 1 Q.B.D. 314, 45 L.J.Q.B. 260; *Reedie* v. *L. & N.W. Ry. Co.*, 4 Exch. 244.

F. L. Milner, K.C., for the plaintiff.

N. S.
S. C.
VAIL
v.
BANK OF
B.N.A.
Drysdale, J.

DRYSDALE, J.:—The defendant bank, by contractors, were, in March, 1914, erecting a building on a lot of land fronting on Dock St., in the city of St. John, N.B. At that time the building was not complete, and the plaintiff, whilst lawfully using the sidewalk of Dock St., was injured by means of a temporary window in said building falling upon him. I think there was no extraordinary wind-storm on the occasion to cause the window to fall, and that it really fell as a result of faulty fastening. It is said here that the bank is not liable because the work was being done by an independent contractor, and that the fault or default is that of the contractor and not of the bank. The law on the subject in connection with such a contention is, I think, concisely stated in Halsbury as follows:—

> Where a person employs another to do work which does or in the natural course of things will involve or result in a duty on the employer either towards the community or towards a third party, the employer cannot escape the responsibility for the performance of that duty by employing someone else to perform it, however competent such person may be, even though such person is an independent contractor and has agreed to assume the whole responsibility.

I think the natural course of things here involved a duty on the bank, or on the part of any one building on the edge of a public street such as Dock St., to reasonably protect passers-by whilst the structure was in progress of building. Temporary windows were, no doubt, usual and necessary things in the course of the construction, and the mere fact that such window fell out on the street and injured a passer-by is in itself evidence of improper handling or fastening, and I am of opinion that it is a duty which the law casts upon the owner of such premises as is described in the evidence in this case to maintain such windows in a safe state so far as public passers-by are concerned. Numerous authorities were cited in support of this position, and I do not think that the cases cited for the defence, such as *Pickard* v. *Smith*, 10 C.B. (N.S.) 470, and *Tarry* v. *Ashton*, 1 Q.B.D. 314, and others, interfere with the proposition contended for by plaintiff here, but rather support it.

I find that the window or temporary stopping was so negligently put or held in place that plaintiff's injury was thereby caused, and that the defendant bank, as the owner of the land and engaged in putting up the building by its contractors or agents, must be held responsible for the damage. On the question of

damages I have some difficulty. The attempt to fasten defective eyesight as a consequence of this injury was, I thought, far fetched, such defect being obviously the result of age. I think permanent injury to the plaintiff was not established. However painful the accident was, I am convinced that he recovered therefrom. I assess the damages that I think ought to be considered as reasonable at $1,000.

Judgment for plaintiff.

N. S.
S. C.
VAIL
v.
BANK OF B.N.A.
Drysdale, J.

Re BRITISH COLUMBIA RAILWAY ACT AND C.N.P.R. CO.

B. C.
S. C.

British Columbia Supreme Court, Hunter, C.J.B.C. June 9, 1914.

1. ARBITRATION (§ III—17)—AWARD—CONCLUSIVENESS—APPEAL — RAILWAY ACT (B.C.)

An award in arbitration proceedings under the Railway Act R.S.B.C. 1911, is final and conclusive except for the statutory right of appeal (sec. 68); it cannot be altered except by the Court on the hearing of the appeal, and the power of remitting and setting aside an award upon motion is excluded.

[*Van Horne* v. *Winnipeg R. Co.*, 14 D.L.R. 897, and *Ontario and Quebec R. Co.* v. *Vallières*, 11 Can. Ry. Cas. 1, cited.]

Statement

APPLICATION by the land-owner to remit an award to arbitrators for them to specify the several items allowed in respect of compensation for lands taken and lands injuriously affected, heard by Hunter, C.J.B.C., at Victoria, B.C., June 9, 1914.

Application dismissed.

F. C. Elliott for the land-owner.

Argument

The award is ambiguous inasmuch as it awards a lump sum to the land-owner in respect of compensation for lands taken and lands injuriously affected. There should be separate items shewing what the arbitrators allowed for the land taken, for severance and for other heads of damage. There is power in the Court to remit an award under sec. 13 of the Arbitration Act.

Van Horne v. *Winnipeg Railway Company*, 14 D.L.R. 897; *Re Montgomery, Jones & Co., and Liebenthal*, 78 L.T. 406; *Humphreys* v. *The Corporation of the City of Victoria*, 17 B.C.R. 258.

Mayers, for the railway company.

The B.C. Railway Act contains a complete code applicable to arbitration in respect of lands taken by railway companies and the Arbitration Act has no application.

By sec. 56, sub-sec. 2, the award is to be final and conclusive

B. C.

S. C.

B. C. RAILWAY ACT AND C.N.P.R. CO.

Argument

except as thereinafter provided. The provision referred to is sec. 68, which gives a right of appeal which is unknown in respect of ordinary arbitrations. The difference between the Provincial Act and the Dominion Act is seen in sec. 209 of the Dominion, Act, being ch. 37, R.S.C., which by sub-sec. 4 expressly saves the existing jurisdiction in cases of arbitration. There is no such provision in the Provincial Act, and the omission, coupled with the provisions of sec. 56, sub-sec. 2, and a consideration of the minute provisions made in the Provincial Railway Act with regard to arbitrations shews that the ordinary powers of remitting and setting aside awards are intended to be excluded. In any case the Court will not remit an award for the purpose of having the items of compensation segregated. *Ontario & Quebec R. Co.* v. *Vallières*, 11 Can. Ry. Cas. 1.

Hunter, C.J.

HUNTER, C.J.B.C.:—I think that sec. 56, sub-sec. 2, is conclusive upon the point, and prevents an award being dealt with by the Court otherwise than under the provisions of sec. 68. Once an award is made it is to be final and conclusive except for the right of appeal newly created by the statute, which I take to mean that it cannot be altered in any respect except by the Court upon the hearing of the appeal. Thus the powers of remitting and setting aside awards is excluded. Sec. 68, sub-sec. 2, provides that upon the appeal the practice and proceedings shall be as nearly as may be as upon an appeal from the decision of an inferior Court to the Supreme Court, and I know of no jurisdiction in the Supreme Court to order a Judge of an inferior Court to re-write his judgment. Moreover, even if there were power in the Court to remit the award I do not think it should be remitted for the purpose of causing the arbitrators to specify the particular amounts which they have awarded in respect of particular items of damage. The whole scheme of arbitration proceedings is to arrive at some compromise between conflicting interests and it may very well be that no two arbitrators agree upon any particular head of damage, but, by a process of mutual concession, succeed in arriving at an agreement as to the total amount to be awarded in respect of the entire claim.

The application will be dismissed.

TILL v. TOWN OF OAKVILLE.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. May 27, 1914.

1. CONTRIBUTION (§ I—3)—JOINT DEFENDANTS—JOINT ACT OF BOTH—LIABILITY.

Where two independent acts of negligence respectively committed by the two defendants caused the injury and each of such acts would have been innocuous but for the other of them, both defendants are liable for the damages and there is no right of contribution or indemnity between them, but the court has a discretion to direct contribution as to the costs awarded to the plaintiff against them.

Statement

ACTION against the Corporation of the Town of Oakville and the Bell Telephone Company of Canada to recover damages, under the Fatal Accidents Act, for the death of the plaintiff's husband from the effect of an electric shock, the plaintiff alleging negligence on the part of one or both of the defendants.

Each of the defendants served a third party notice upon the other, and the issues raised thereby were ordered to be tried with the action.

M. H. Ludwig, K.C., for the plaintiff.

E. F. B. Johnston, K.C., and *D. Inglis Grant*, for the defendant the Corporation of the Town of Oakville.

D. L. McCarthy, K.C., and *F. M. Burbidge*, for the defendant the Bell Telephone Company of Canada.

Middleton, J.

May 27. MIDDLETON, J.:—George Garfield Till, on the 13th April, 1913, while carrying a portable electric light lamp in the cellar of the Murray House, an hotel in the town of Oakville, received a shock from a high voltage current which had improperly obtained access to the lighting wires; resulting in his immediate death. This action is brought by his widow on behalf of herself and his infant children. She claims against both the corporation of the town, which operates, through a commission, the electric lighting of the town by high voltage current and the supply of low voltage current for the lighting of residences, and the Bell Telephone Company of Canada.

Till's death took place early in the morning of Sunday the 13th April, 1913. A man named Harker had met his death in a somewhat similar way on Friday the 11th. Harker's death was supposed to have been occasioned by the escape of the street lighting current; and for the safety of the inhabitants of the town the street lighting current was

ONT.
S. C.
TILL
v.
TOWN OF OAKVILLE.
Middleton, J.

off from the evening of Harker's death until after the happening of the accident to Till. This indicated that the current which caused Till's death must have escaped from the house-lighting primaries to the street-lighting circuit in some way.

A thorough investigation followed, with the result of the ultimate location of the trouble upon an electric light pole at the corner of Second avenue and Union street.

Nothing could well be more dangerous than placing a pole of a high voltage system immediately below and midway between a span of telephone wires. Furthermore, this pole was at such a height as not to afford an adequate clearance to the telephone wires.

I think that negligence on the part of the town existed both in the state of affairs found opposite the Murray House and in the state of affairs existing at Union street, and that there was negligence both in construction and in inspection, particularly in view of the serious storm which, it was known, had, to some extent at any rate, disarranged the service, and in view of the notice afforded by the electrocution of Harker on the preceding Friday. I am inclined to think that the contact in front of the Murray House must have existed from a time anterior to the wind-storm; and any reasonable inspection ought to have discovered it without difficulty.

I am also, after careful reflection, compelled to the view that the contact at Union street was caused by the Bell Telephone Company's employees.

Assuming, then, that I have rightly apprehended the facts, and that the death of this unfortunate man was the result of two independent acts of negligence, on the part of the respective defendants, and that each act would have been innocuous save for the other negligent act, what are the rights of the parties?

As, under our Rules, the plaintiff is permitted to join as defendants those against whom he is entitled to relief, either jointly or severally, some of the difficulties existing under the earlier practice have disappeared. Yet it is important to bear in mind that the defendants cannot be regarded as joint tort-feasors.

I think the real test is that indicated in *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, where at p. 646 it is said:

"It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (1816), 5 M. & S. 198, *Thomas* v. *Winchester* (1852), 6 N.Y.R. 397, and *Parry* v. *Smith* (1879), 4 C. P.D. 325, are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

In order to take the case out of the rule laid down by Lord Esher, it is necessary to find the conscious act of another volition, which I understand to be a deliberate and intentional wrongful act, something which quite exceeds and goes beyond mere negligence on the part of that other. The last case referred to clearly indicates that this principle applies even where a high standard of obligation is created by reason of the dangerous nature of the substance under the defendant's control, which either brings the case within the rule of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, or necessitates such a degree of care as to amount almost to an insuring of safety.

Sullivan v. *Creed*, [1904] 2 I.R. 317, is a case in which the owner of a gun was held liable where he left it in such a place that he might have reasonably expected what happened, namely, that a little boy, in playing with it, caused its discharge. This case is chiefly of value as an illustration of another aspect of the law discussed in *Rickards* v. *Lothian*: what took place was what a reasonable man ought to have expected.

ONT.
S. C.
TILL
v.
TOWN OF OAKVILLE.
Middleton, J.

For these reasons, I think that the plaintiff is entitled to recover against both defendants.

I have much difficulty in considering the rights of both defendants as between themselves. Where defendants are held liable because each has been guilty of an act of negligence which is a proximate cause of the injury, can there be any right on the part of either to claim indemnity against the other?

The case, as I have already indicated, is not one falling within the principle of *Merryweather* v. *Nixan* (1799), 8 T.R. 186, for there the tort was joint; but I think the principle is of wider application; for what that case really determines is that the fact of a recovery against two defendants for a tort for which they are both responsible does not of itself create a right to contribution or indemnity, even if the plaintiff elects to obtain payment solely from one. This law has been modified so as to permit contribution or indemnity if, apart from the fact of the plaintiff's recovery and the payment by one, there can be found any ground upon which to base either contribution or indemnity, so long as the contract, express or implied, upon which the right is based, is not itself unlawful or in contravention of public policy. See *The Englishman and The Australia*, [1895] P. 212; *Dugdale* v. *Lovering* (1875), L.R. 10 C.P. 196; *Toplis* v. *Granes* (1839), 5 Bing. N.C. 636; *Betts* v. *Gibbins* (1834), 2 A. & E. 57; *Corporation of Sheffield* v. *Barclay*, [1903] 1 K.B. 1. I am, therefore, unable to give either contribution or indemnity as between the defendants. I would, however, suggest that the plaintiff will be doing nothing more than what is right if she arranges that the judgment shall be levied against the defendants equally.

The question of the amount which the plaintiff should recover remains to be considered. The deceased was earning approximately $75 to $80 per month. He was 32 years old; his wife a year older. He left three young children, and since his death posthumous twins have been born. The expectation of life of the husband and wife would be each about 32 years; the joint expectation of life would of course be less. The present value of an annuity of one dollar, according to the tables used for computing dower, having regard to the widow's present

ONT.

S. C.

TILL v. TOWN OF OAKVILLE.

Middleton, J.

age, would be $12,771; but this does not make an allowance for the possibility of the husband's earlier decease. Taking the figures suggested by Mr. Ludwig, $600 per annum, this would mean a recovery of $7,662, not $18,000, as he suggests; for $18,000 invested at six per cent. would yield an income of $1,080 per annum, leaving the capital intact at the wife's death.

Having regard to all factors that have to be considered in a problem of this kind, I cannot see my way clear to assessing more than $6,000.

The plaintiff should have her costs against both defendants, and I think that I have power to direct contribution with respect to costs; so, while I make the defendants both liable to the plaintiff for costs, I direct that as between the defendants each pay one-half. See *Fouchier & Son* v. *St. Louis* (1889), 13 P.R. 318.

There will be no costs as between the defendants with relation to the third party proceedings.

[Appeal allowed, January 18, 1915.]

CHURCH v. HAMILTON.

QUE.

S. C.

Quebec Superior Court, McCorkill, J. June 12, 1914.

1. HUSBAND AND WIFE (§ I A 2—15)—LIABILITY OF HUSBAND FOR WIFE'S SUPPORT — NEEDY CIRCUMSTANCES — ALIMENTARY ALLOWANCE.

A decree of separation from bed and board obtained by the husband against his wife in the Superior Court of the Province of Quebec absolves him from the obligation to receive the wife into his house but it does not relieve him when resident in that province from the obligation of paying for her support when in needy circumstances in an action brought by her for an alimentary allowance while also resident in the province of Quebec.

[*Barns* v. *Brown*, 7 Que. S.C. 287, considered.]

2. HUSBAND AND WIFE (§ I A 2—15)—SEPARATION FROM BED AND BOARD—ALIMENTARY ALLOWANCE — LAW OF QUEBEC.

The law of Quebec applies in deciding the question of alimentary allowance to a wife separated from bed and board, where the parties reside in that province although they were married elsewhere.

Statement

ACTION by wife for alimentary allowance.

Judgment for plaintiff.

Casgrain, Lavery, Rivard & Marchand, for plaintiff.

Choquette, Galipeault, St. Laurent, Metayer & Laferté, for defendant.

McCorkill, J.

McCORKILL, J.:—Plaintiff and defendant are wife and husband; they were married at Ottawa, Ont., on June 5, 1895; they

QUE.

S. C.

CHURCH v. HAMILTON.

McCorkill, J.

were declared separate from bed and board, by a judgment of this Court bearing the No. 233.

Plaintiff, the wife, is described as of the city of Montreal. The husband is domiciled in Quebec. Plaintiff alleges she is poor, has no personal means of support and is incapable of working for her living on account of illness; she seeks an alimentary allowance from her husband, the defendant, of $200 per month.

Defendant pleads that the matrimonial domicile was in the province of Ontario; that the said judgment of separation was in his favor; allegation 3 continues:

Qu'il a été établi dans la dite cause, ce qui est vrai, que lorsque les conjoints étaient domiciliés, à Portage-la-Prairie, dans le Manitoba, la présente demanderesse avait été infidèle à ses devoirs d'épouse, s'était rendue coupable d'adultère, avait abandonné son mari et ses enfants et s'en était allée vivre à l'étranger.

Defendant admits he has paid plaintiff nothing since said judgment; he alleges that when plaintiff abandoned him and his children, she took with her, personal property worth $10,000; in parag. 7, he alleges:

Tant en vertu de la loi de la Province d'Ontario, où le mariage a été contracté, qu'en vertu de la loi de la Province du Manitoba, où les conjoints étaient domiciliés lors des faits allégués dans le paragraphe 3 ci-dessus, la présente demanderesse est déchue, à raison de sa dite conduite, de tout recours pour pension alimentaire contre le défendeur.

And continues, that if plaintiff is now in the condition she complains of, she has only herself to blame and she cannot force defendant to pay her an allowance; and he concludes for the dismissal of the action;

Plaintiff inscribes in law against the portion of the plea, which is in the French language, which I have hereinabove cited *verbatim*, and demands their dismissal on the ground:—

1. That the right to the allowance claimed by plaintiff is governed by the law of the province of Quebec and no other;

2. That defendant is bound to pay plaintiff the allowance asked for, whatever may have been the reason for the judgment of separation.

It was admitted by defendant's counsel, at the argument, that if the issue in this case is governed by the law of Quebec, the inscription in law should be maintained.

Plaintiff's action is founded on C.C. 213 which says:—

Either of the parties thus separated, not having sufficient means of subsistance, may obtain judgment against the other for an alimentary pension, which is fixed by the Court according to the condition, means and other circumstances of the parties.

It will be seen that this article differs from the corresponding article of the French code (C.N. 301), which restricts this privilege to the consort who has succeeded in the action of separation.

Commissioners' Code, vol. 1, page 195, commenting on the article 213 and two preceeding articles, say:—

Another consequence of the separation is that the party against whom it is pronounced loses all the advantages bestowed by the party who has obtained it, while the latter preserves those derived from the former, even in the cases in which there is a stipulation of reciprocity, although no reciprocity exists. If, however, one of the parties has no means of subsistance, the other must furnish them according to his or her fortune and to circumstances to be appreciated by the Court.

The references in the Commissioners' Code shew that our article is founded on the ancient law of France, which was much more considerate of the guilty consort, than the present law.

Toullier, vol. 2, no. 780 says:—

Si l'époux qui a obtenu la séparation est dans le besoin, il est en droit de prendre une pension alimentaire sur les biens de l'autre époux; mais celui contre lequel la séparation est prononcée conserve-t-il le même droit? L'ancienne jurisprudence était chancelante sur ce point. Elle paraissait pencher pour l'affirmative. . . Le code a suivi des principes différents. Il n'accorde des aliments sur les biens de l'autre époux qu'à celui qui a obtenu le divorce; or, la séparation est parallèle au divorce.

Massol p. 194 says:—

La séparation de corps ne mettant pas fin au mariage, les conjoints se doivent réciproquement des secours lorsqu'ils sont dans le besoin.

(See also 2 Pigeau, p. 234).

Plaintiff also relies on art. 6 C.C., which, in part, says:—

The law of Lower Canada is applied whenever the question involved relates . . . to privileges and rights of lien . . . , the jurisdiction of the Courts and procedure, . . . to public policy.

The laws of Lower Canada relative to persons, apply to all persons being therein. . . .

An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed . . . by its laws respecting the status and capacity of persons. . . .

She argues from this that the defendant is governed by the law of the province of Quebec, as his status and capacity are in

QUE.

S.C.

CHURCH v. HAMILTON.

McCorkill, J.

question in this case, and he resides therein, and must, therefore, pay her alimony.

I can find no authority whereby alimony is governed either by the law of the domicile of the parties at the time of marriage, or of that at the time of the commission of the offence for which these parties were declared separate as to bed and board.

Our law declares that separation may be obtained for certain reasons and offences. It makes no exception in favour of parties who were married in the province of Quebec nor does it take any account of the law of that province, or of the reasons for which separation will be granted in any other province or country.

Two conditions only are necessary to obtain such a decree here; they are regulated entirely by our own law:—1. The defendant must be within our jurisdiction; it matters not where the parties were married; 2. The offence charged must be one of those mentioned in our code; it does not matter where it was committed.

The reason of this is because of the provisions of art. 6 C.C.

In the case of *Barns* v. *Brown*, 7 R.J.S.C. 287, which was an action by a daughter-in-law against her father-in-law, whose domicile was in New York, but who was temporarily within the district of Montreal, Mr. Justice Doherty rejected a motion for provisional alimony, not because defendant was only temporarily within his jurisdiction, when the action was taken, but because he had left the province and returned to his home before the motion was made.

The *considérants* clearly shew that the Judge's opinion was that under our law relative to persons, plaintiff would have been entitled to her alimony, had the defendant's sojourn here not ceased before the adjudication, and this notwithstanding the fact it was proven that, under the law of New York, no obligation whatever rested upon the father-in-law to maintain or contribute to the support of his daughter-in-law.

Lafleur, Conflict of Laws, cited by defendant, at pp. 59 and 163, commenting on the case of *Barns* v. *Brown*, is also of the same opinion.

Defendant cited C.C. 7 and 8, which refer to acts and deeds and contracts passed out of this province, and contended the

QUE.

S. C.

CHURCH v. HAMILTON.

McCorkill, J.

obligation of alimony arose out of the nature of the contract—that the source of the obligation was the contract of marriage—this marriage having been solemnized in the province of Ontario, the question of alimony is governed by the law of Ontario.

I do not think these articles are pertinent. Marriage is not merely the result of an agreement between the contracting parties; it is a legal relation in which the public of Quebec has an interest. This relation does not cease, under our law, by the decree of separation. It absolves the defendant from the obligation to receive the plaintiff into his house (C.C. 207), but it does not relieve him from the obligation of furnishing her with the necessities of life, in proportion to her wants and to his fortune and income. He cannot cast her upon the charity of the world or the charge of a municipal corporation.

I am, therefore, of opinion that the inscription in law is well founded, and it is maintained with costs.

BLAKELY v. MONTREAL TRAMWAYS CO.

QUE.

C. R.

Quebec Court of Review, Archibald, Greenshields and Beaudin, JJ. June 6, 1914.

1. CARRIERS (§ II G—70)—MEASURE OF CARE REQUIRED; NEGLIGENCE — DISCHARGING PASSENGERS AT DANGEROUS SPOT — STREET RAILWAYS.

If the act of a third party, *ex. gr.* the city municipality, in reconstructing a street paving, has rendered dangerous an alighting place chosen by the street railway, the latter must, even at the risk of inconvenience to the passenger, choose another point of alighting for the time being at least; or it should take reasonable and prudent steps to cause the threatened danger for the time being to disappear or should warn of the danger a passenger who is about to alight.

Statement

The judgment inscribed for review, which is reversed, was rendered by the Superior Court, Charbonneau, J., on June 23, 1913. The material part of it is as follows:

Charbonneau, J.

CHARBONNEAU, J.:—Considering that the accident was caused by the fact that the plaintiff alighted and let go the railing, without looking before putting her foot to the ground a fact which she admits herself plainly in her own testimony; Considering that the accident is due to no omission or act of the defendant; Considering that the company defendant cannot be held responsible for not having warned the plaintiff, as it was in the day time, and the plaintiff could see and should have looked where she was alighting.

QUE.

C. R.

BLAKELY v. MONTREAL TRAMWAYS CO.

Doth dismiss the plaintiff's action with costs.

The appeal was allowed.

Claxton & Kerr, for the plaintiff.

Perron, Taschereau, Rinfret, Genest, Billette & Plimsoll, for the defendant.

The judgment in review was delivered by

Greenshields, J.

GREENSHIELDS, J.:—On September 30, 1912, the plaintiff, a lady of some fifty-five years of age, accompanied by her daughter, entered one of the cars of the company defendant, operated on what is known as the "Wellington St." line, at Point St. Charles, for the purpose of being conveyed to the corner of McGill and Notre Dame Sts. From McGill street, westward on Notre Dame, there is a double track. On the date in question, the city of Montreal was making repairs on the south side of Notre Dame St., between the south rail of the company defendant, and the curb-stone. On account of these repairs, no cars ran west on Notre Dame St., at least, between McGill and Inspector St., and eastbound cars, contrary to the general rule, on arriving at about Inspector St., by means of an arrangement which is called "cross-over rails," left the south track, crossed to the north track and proceeded on that track, to a point some distance west of McGill St., when, by means of the same, device or arrangement, the car crossed over to the south track, and proceeded on its way eastward. A word as to these cross-overs. So far as the record shews, the cross-over consisted of a line of two rails, laid side by side with the regular permanent rails (I speak of the cross-over near McGill), gradually turning at an angle towards the south and rising in height, then crossing over the top of the regular rails and resting either upon them, or on ties placed upon them, then commencing to descend at an angle until a car crossing over would reach the regular track. The result was, that any car, crossing on this cross-over, would be raised above the ordinary conditions, so far as the ground or pavement was concerned, at least the height of the rail, and that height is put by witnesses at at least five inches. So that, assuming that the pavement was level with the regular rails, any person alighting from the car at this cross-over, would have a descent to the ground or street level

increased by at least five inches. Now, the condition of the street on September 30, or that part of the street, south of the line of the defendant's tramway, at the corner of McGill and Notre Dame St., had been brought about by operations of the city, and the condition was somewhat the following. Previous to the commencement of the repairs, the street had been paved with scoria blocks. These blocks, I think the record would establish, were about four and one-half inches in height; they had all been removed and apparently the earth or concrete under them had been removed and new concrete had been placed. The work of placing the concrete had been completed. The next operation, to be followed was, apparently, to put sand to the depth of two inches, and, upon this sand, the scoria blocks, of the height of four and one-half inches, were to be placed, to bring the pavement up to the level of the street car track. This sand, although it would appear it had been hauled to a point near and left in piles, had not been spread or levelled for the purpose of receiving the blocks. There can be no doubt that this operation had not been completed, although it would appear, from the evidence, that the piles of sand had been more or less scattered about by persons trafficking over it. There were piles of sand, and no doubt a considerable quantity of scoria blocks lying around this locality, on the date of the accident. On the south track, and about the corner of McGill and Notre Dame Sts., and the locality is not clear, there was a switch for the purpose of diverting cars northwards on McGill St. when required.

On the day of the accident, the car in question, no. 835, carrying the plaintiff and her daughter, and other passengers (the exact number, not clearly determined), came along eastward, on the north track of Notre Dame St.; arriving at the cross-over, west of McGill, entered upon the cross-over and somewhere near the corner of McGill and Notre Dame Sts., and something will have to be said about the exact spot in a moment, the car stopped for the purpose of allowing passengers to alight. The plaintiff and her daughter intended to take a car on what is known as the "Beaver Hall" line, to go to Saint Catherine St. The plaintiff was sitting near the rear of the car, and upon the car stopping, she arose, walked to the steps and proceeded to

QUE.
C. R.
BLAKELY
v.
MONTREAL
TRAMWAYS
CO.
Greenshields, J.

alight. The steps were three in number. It should be remarked that the car was a "pay as you enter" car. The plaintiff started to alight with her left hand on the upright railing, and when in the act of reaching the ground, describing it in her own words, she flew in the air and fell her full length on the ground, landing on her right side and fractured her hip. She became partly, if not entirely unconscious; she was assisted by two men into an ice cream store, almost immediately before which, she fell. A cab was called, and she was taken to the hospital where she remained for seven weeks and three days. The injury was serious, her suffering was great and an operation was performed. On October 7, her limb was put in a plaster cast; it remained in the cast until November 12, when the cast was removed, and finally on November 20, at her urgent request, she was taken home in the ambulance; put in bed and was practically and effectively confined there at least until the date of the trial in the present case, a period of eight months. Her right leg is shortened and it can with certainty be said that she is to-day a cripple for life. These are briefly the facts upon which the plaintiff's action is based. She charges the defendant with having allowed her and invited her to alight from the car, at a knowingly dangerous place, without warning her of the danger, and without taking the slightest precaution to protect her against that danger.

The defendant repudiates all liability, and affirmatively alleges, that without taking any precaution whatever, negligently and imprudently, the plaintiff jumped from the step to the ground, and such imprudent and negligent act on the plaintiff's part, was the sole cause of the accident.

The learned trial Judge dismissed the plaintiff's action, apparently, for the following reason:—Considering that the accident in question was caused by the fact that the plaintiff alighted and let go the railing without looking before putting her foot to the ground, a fact which she admits herself plainly in her testimony.

A reversal of this judgment is sought. As to the law governing the case, no serious difference of opinion was manifested by the learned counsel for the respective parties in interest, and indeed the law on the subject does not present any serious diffi-

culty. The defendant is a common carrier for hire, and, as such, it is bound, in law to prudently and safely convey its passengers to their destination. At such points as it allows its passengers to get on, it must provide a reasonably safe place for the purpose. In like manner, at such points as it invites or allows its passengers to get off, or alight and it chooses such points, irrespective of the wishes or will of the passengers, it must choose a reasonable and safe place and must provide reasonably and prudently safe facilities for passengers to alight. It is urged by the learned counsel for the defendant, that if a third party, for instance, the city of Montreal, within legal rights, does something which might render a place more dangerous in alighting from the car, and that thing is being done for the public good, the defendant is in no way responsible. I should say that that is hardly a fair statement of the law. I should think it more in consonance with the principles of our law to say, that if the act of a third party has rendered an alighting place, chosen by the defendant, dangerous, even at the risk of inconvenience to the passenger, the company should choose for the time being, at least, another point of alighting, or should take reasonable and prudent steps to cause the, threatened danger, for the time being, to disappear, or warn a passenger about to alight, in some way, of the existence of the danger, if indeed such danger did exist. Now, in the present case, assuming for the moment that the point at which the plaintiff left the car and met with the accident, was, to say the least, more dangerous than ordinarily, none of the precautions were taken by the defendant, and if the accident was due to the existence of that dangerous, unguarded condition of affairs, I should have little hesitation in saying that the company is responsible. Taking up the facts briefly, it is clearly in proof that if Notre Dame St., at the point where the plaintiff alighted, had been in a normal condition, that is, the pavement flush or level with the rail, the distance from the lowest step of the car to the pavement would have been thirteen inches, which, apparently, from the proof, is the ordinary distance between the last step of the cars and the pavement, at least the cars operated by the defendant in this city, and the distance to which persons frequently using these cars have be-

QUE.
C. R.
BLAKELY
v.
MONTREAL TRAMWAYS CO.
Greenshields, J.

come accustomed. Assuming again, which is most doubtful, that the rear of the car in question had entirely left the cross-over rails, and had reached the permanent south track of the defendant company, the distance from the lowest step to the ground was increased, I should say without hesitation, at least from six to six and one-half inches. This statement is based upon the proof that the scoria blocks were not there; they were at least four and one-half inches in height. I am satisfied that there was no sand spread to the depth of two inches, as was subsequently done. The intention was, and that intention was carried out when the repairs were finally completed, to bring the top of the scoria block to the level of the rail, a distance of six and one-half inches; so that this lady, the plaintiff, instead of stepping down a distance of thirteen inches, to which she was accustomed, was confronted with a distance of from nineteen to nineteen and one-half inches. One of the witnesses, the daughter of the plaintiff, says, the distance was two feet, eight inches; another witness of the accident who made a measurement, rough it is true, at the time, puts it at two feet six inches. These latter distances would be easily approximately correct, if the rear of the car was still on the cross-over rails. The witness Rogers, who was on the sidewalk on the south side of Notre Dame St., and was a witness to the accident, swears positively that the rear of the car at the time of the accident was on the cross-over rails:—he says that a movement of three feet would have brought it over; he says that the step was very high, and was dangerous alike to young or old, man or woman. Nuttall, who was on the car, swears in like manner, that the condition was dangerous.

The defendant company calls a number of witnesses; the first one is Brachin:—he testifies to certain measurements, which were not made at the time, but only the day before the trial;—he testifies, that before the concrete had been laid, it was customary to put planks, but not after, and he gives no reason;—but without his testimony, it is certainly clear and evident that the putting of planks upon which alighting passengers could step would certainly lessen the danger, because it is useless to pretend that a step of nineteen or twenty inches or possibly, more, is not more dangerous to any one, particularly to a lady of the

age of the plaintiff, than a step of thirteen inches. The second witness called by the defendant is one Hinchcliffe; he says, speaking of the condition as he says he saw it on that day, that there was no particular danger, if due precautions were taken in alighting. What he exactly means by particular danger does not appear; evidently he considered there was some danger, or he would not characterize it as particular;—but he adds, that he saw the plaintiff alight, and she alighted in the correct way. Taking his statement, that there was no particular danger if due precautions were taken, with the statement that the lady alighted in the correct way, I should say it would mean, that she did take due precautions, and yet she flew in the air, as she says; fell her full length and broke her hip. There must have been some particular danger. The fourth witness, examined by the defendant, is A. C. Lyttle;—he attempts to give some measurements, fixing the distance between the switch on Notre Dame St. and the cross-over rails. To say the least, his testimony upon this question is extremely unsatisfactory.—A matter of fact, a few feet, is being dealt with, and if the defendant relies on the testimony of Mr. Lyttle, or the witness called after him to convince the Court that the rear of that car was not standing on the high cross-over rails, in my opinion it must fail, particularly in view of the positive statement of eye witnesses to the accident. Mr. Lyttle says it was not very much more dangerous, presumably, than an ordinary place of alighting; he says—"We do lay planks (he is an employee of the defendant), when we think it is necessary." It is not a very satisfactory answer, especially to the plaintiff, who has fallen and broken her hip, to say: "We did not think it was necessary." The next witness is Doherty. Doherty was in the employ of the Street Railway and was apparently put there to watch this cross-over. At the time this car came along, he was standing in front, about thirty feet away. He did not see the accident at all;—he says that he was constantly on duty at least for ten hours each day. If instead of standing at the front of the car, he had gone to the rear of the car to warn descending passengers of even possible danger, I fancy the accident would not have happened; he never did this; he testifies, for what it is worth, that the car must have left the

QUE.

C. R.

BLAKELY v. MONTREAL TRAMWAYS CO.

Greenshields, J.

cross-over rails; he certainly arrives at that conclusion from no knowledge gained by sight, because he never saw the accident, and therefore he did not see, and could not see where the rear of the car was at the time. The conductor also named Lyttle, is called, and he does not know whether the car had stopped when the lady alighted; he never saw the accident; he was worried about his trolley; but he says the car must have been on the permanent rail, or rather he puts it in a different way; he says it was not on the cross-over, "not that I saw"; he admits that, at that point, there was no particular place to stop.

It was urged by the defendant that inasmuch as the car would have to advance to the switch on Notre Dame St., in order to enable the motorman by the use of the instrument to turn the switch, the rear of the car must have been clear of the cross-over rails. This statement is destroyed by the testimony of the motorman himself; he says:—"I saw the switch, when I saw the cross-over rails, and the switch was properly set and clear, and there was no necessity to turn it," and that for the very good reason that a car had immediately proceeded his, eastward on Notre Dame St., which left the switch, of course, open for him.

I am of opinion from all the evidence, that any jury would be entitled, to find, as a matter of fact, that the car had stopped, and that the plaintiff alighted and was allowed to alight when the rear end of the car was still on the cross-over rails. I believe that the accident was caused by the plaintiff being allowed to alight without warning, or without any precautions being taken, in a place which was itself dangerous, and which had been in that dangerous condition for a considerable time, to the full knowledge of the defendant, and its employees. I am of opinion that the plaintiff was without fault, and that she is entitled to compensation. I have stated briefly the nature of the plaintiff's injuries; she paid $50 to her doctor; $63.75 to the hospital; $50 for medicines;—she suffered intense pain; she is crippled for life. I should assess the damages at $3,000, and condemn the defendant in that amount, and such is the judgment of the Court.

HARRIS ABATTOIR CO. v. MAYBEE & WILSON.

ONT.

S.C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 8, 1914.

1. BILLS AND NOTES (§ III C—75)—ENDORSER'S RELEASE OF BY LAPSE OF TIME—UNREASONABLE DELAY.

The endorser of a cheque is released by the mere lapse of time if the delay is unreasonable and he need not show that, if the cheque had been presented sooner, it would have been paid.

[*Firth* v. *Brooks*, 4 L.T.N.S. 467, referred to.]

Statement

APPEAL from the judgment of MIDDLETON, J., dismissing an action to recover the amount of a cheque.

R. J. McLaughlin, K.C., for the appellant company.

J. W. McCullough, for the defendant Boyd, the respondent.

Maclaren, J.A.

June 8. The judgment of the Court was delivered by MACLAREN, J.A.:—This action was brought upon a cheque dated the 29th September, 1913, for $1,245.77, drawn by the defendants Maybee & Wilson upon the market branch of the Standard Bank in favour of the defendant Boyd, and by him endorsed and negotiated to the plaintiff company on the afternoon of the same day. It was given by him in payment of a small purchase of about $5, he receiving the plaintiff company's cheque for the difference. The plaintiff company endorsed and deposited the cheque in question, on the same day, in the market branch of the Canadian Bank of Commerce, where it kept its account.

Maybee & Wilson are the same firm who gave the cheques in question in the actions of *Bank of British North America* v. *Haslip* and *Bank of British North America* v. *Elliott*, already disposed of by this Court, and the defence is the same, namely, want of presentment within a reasonable time, and want of proper notice of dishonour to the defendant Boyd, the respondent.

The cheque was endorsed by the market branch of the Bank of Commerce, and sent by it to the head office of that bank, which delivered it to the Standard Bank at the clearing house on the morning of the 30th September. It was then taken to the head office of the Standard Bank, and by it returned the same day to the head office of the Bank of Commerce to have

ONT.
S. C.
HARRIS ABATTOIR CO. v. MAYBEE & WILSON
Maclaren, J.A.

Boyd's endorsement guaranteed, on the ground of its being irregular; and the above amount was refunded to the Standard Bank. The objection was, that the name of the payee, "Mr. Alex. Boyd," on the face of the cheque, was not clearly enough written, that the "Mr." might be intended for "Wm." and that the "Boyd" was not sufficiently legible. The trial Judge has found as a fact that the objection was frivolous and hypercritical, and I quite agree with him. There was no need to ask for the guarantee of Boyd's endorsement by the Bank of Commerce, as the endorsement of the cheque by that bank, before sending it to the clearing house, was a guarantee of the genuineness and regularity of the previous endorsement by Boyd: Bills of Exchange Act, sec. 133 (*b*).

The Bank of Commerce sent the cheque back to its market branch, which guaranteed the endorsement of Boyd and returned it to the head office, which took it to the clearing house again on the morning of the 2nd October, and re-delivered it to the Standard Bank. It lay at the head office of that bank until the morning of the 3rd October, when it was taken to its market branch; but, before it was presented, the account of Maybee & Wilson had been exhausted by cheques which had come in by the morning mail or from other branches.

The accountant endeavoured to get Maybee & Wilson to send in funds, but failed, and, shortly before noon on Saturday the 4th October, the cheque was returned to the Bank of Commerce as dishonoured and a refund of the amount received. The Bank of Commerce immediately mailed the cheque to its market branch, which it reached on Monday morning the 6th October. Notice was given at once by telephone to the plaintiff company, who, the same day, mailed a letter to the defendant Boyd at Markham, his proper address, asking him to make it good. The plaintiff company also had the cheque presented and protested by a notary on the 6th October, notice being given to the defendant Boyd.

The law on the subject is discussed in the case of *Bank of British North America* v. *Haslip*, and I need not repeat what is there said.

The first question is, was this cheque presented within a rea-

sonable time after its endorsement by the defendant Boyd so as to hold him liable? There are no special circumstances to take it out of the general rule laid down in the *Haslip* case. Having been endorsed by Boyd and delivered by him to the plaintiff company on the 29th September, it should have been presented to the market branch of the Standard Bank on the 30th September. It was not presented until the 3rd October, at the earliest, and possibly not until the 4th. No valid reason is given for this delay. The result is that, in my opinion, the defendant Boyd is released from liability. As pointed out in the *Haslip* case, he need not shew that, if the cheque had been presented sooner, it would have been paid. He is released by the mere lapse of time, if the delay is unreasonable.

It was strongly argued by Mr. McLaughlin that the custom of presenting cheques through the banks and the clearing house has become so general in Toronto that the defendant Boyd should be presumed to have contracted with reference to it. He cited the case of *Firth* v. *Brooks*, 4 L.T.N.S. 467, in support of this proposition, and contended that the propriety of presenting a cheque on a banker in an outside town through the London Country Clearing House was recognised and upheld, although the clearing house had been in operation only eighteen months. It is quite true that the propriety of such a presentment was upheld in that case, but it was upon the express ground that the cheque was presented as soon as if it had been sent through the mail after the old method.

Here the bank on which the cheque was drawn was not more than one hundred yards from the office of the plaintiff company, where it was negotiated; and it is not reasonable that it should have taken from the 29th September to the 3rd October to reach its destination.

Such being the view I take of the case, it becomes unnecessary to consider the question of the protest, which would appear to be superfluous and useless, or the question of the sufficiency of the notices of dishonour.

We are not called upon in this case to consider where the responsibility for the undue delay may lie, and no opinion is expressed on that point. All that we decide is that we see no rea-

ONT.
S. C.
Maclaren, J.A.

son for disturbing the decision of the trial Judge that the defendant Boyd is released by the cheque not having been presented for payment within a reasonable time after its endorsement and negotiation by him.

The appeal should be dismissed.

QUE.
C. R.

RAINBOTH v. O'BRIEN.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ. June 30, 1914.

1. CONTRACTS (§ I C—15)—CONSIDERATION—NECESSITY: LACK OF—WRITING SILENT AS TO—EFFECT—ONUS.

The plaintiff suing upon a written agreement which discloses on its face no consideration whatever for the obligation sought to be enforced must allege and establish the consideration.

2. EVIDENCE (§ XII A—923)—WEIGHT, EFFECT AND SUFFICIENCY—POSITIVE AND NEGATIVE—EQUAL CREDIBILITY—CORROBORATION—ONUS.

If one person testifies to a fact and that fact is denied with equal certainty by the other, both standing equal as to credibility before the Court, that one upon whom the onus lies to prove that fact has failed unless there be exterior circumstances which would come to his assistance.

Statement

APPEAL from the Superior Court, Weir, J., in favour of plaintiff for an accounting in respect of certain timber limits in which the plaintiff claimed a one-quarter interest from the defendant.

The appeal was allowed.

Aylen & Duclos, for the plaintiff.

Campbell, McMaster & Papineau, for the defendant.

The judgment in review was delivered by

Greenshields, J.

GREENSHIELDS, J. (after setting out the facts at length):—The plaintiff testifies in clear terms that the sole consideration for the contract was the information, such as it was, that he possessed concerning the timber limits in question. The defendant denies this absolutely and clearly, and testifies that the consideration which induced him to sign the document relied on by the plaintiff, was the assurance, or statement, or representation by the plaintiff that these limits could be obtained by private sale. It is clearly in evidence, if this be true, that the consideration entirely failed. As a matter of law, I should say that an agreement or writing by which a defendant is sought to be bound or held to an obligation, and which writing discloses on its face no consideration whatever for the obligation sought to

be enforced, the writing itself as an agreement is not enforceable and the plaintiff seeking its enforcement must allege and establish the consideration and if he fails to clearly establish the alleged consideration, he must be denied the relief he seeks. It may be that such consideration can be proved by parol testimony, but it must be proved, and legally proved, and convincingly proved. Again I should say, that, under our law, where a writing itself was a consideration, but the party against whom it is invoked pleads the failure of that consideration, he is entitled to prove by parol testimony the fact that the consideration, in part or in whole, failed. If this be a correct statement, the essential question in my mind to determine the rights of the parties in this case is whether the plaintiff has succeeded in establishing the consideration for the contract alleged which would justify its enforcement against the defendant. As I have already stated, that proof is made by the plaintiff alone.—He is contradicted by the defendant. It is a fairly well recognized principle of the law governing such matters, that if one person testifies to a fact, and that fact is denied with equal certainty by another, both standing equally as to credibility before the Court that one upon whom the onus lies to prove that fact has failed, unless, indeed, there be exterior circumstances which would come to his assistance. In the present case, all the circumstances would weigh in favour of the defendant rather than of the plaintiff. For ten or eleven years, the plaintiff, alleging to be the owner of one-fourth valuable timber limits, says not a word, never even enquires from his so-called joint owner what is being done, or what is proposed to be done with these limits. The defendant, on the other hand, deals with them as his own property, openly and publicly. A short time after he acquired them, he publicly pledges them. He pledges them a second time. He gives a contract to one Charest to dispose of these limits. I am of opinion that the plaintiff has failed to prove the very essential allegation of his declaration. I am of opinion that he never became the undivided owner of one-fourth of the lots in question, or of a one-fourth interest of the lots. I am of opinion that he learned of Mr. Lemieux's failure to acquire these limits by private sale and that from that moment he con-

QUE.
C. R.
RAINBOTH v. O'BRIEN.
Greenshields, J.

sidered, as was the fact, that the agreement between himself and the defendant was absolutely at an end, and that he had no further rights or interest in the lots in question. I express no opinion as to whether he might have any claim against the defendant for the value of his information, if indeed, he gave any. I am not called upon to express an opinion on that subject.

I am of opinion that there was error in the judgment, "*a quo*," and that the same should be reversed and the plaintiff's action dismissed with costs, and such is the judgment of this Court.

QUE.
C. R.

COONEY v. MOREL.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ. March 13, 1914.

1. MASTER AND SERVANT (§ III A 3—291)—INJURY — MISTAKE — RATIFICATION—WORKMEN'S COMPENSATION ACT, R.S.Q. 1909.

Before a workman or his representative can claim the benefit of the Workmen's Compensation Act, R.S.Q. 1909, sec. 7321, he must prove the existence of the contractual relationship of employer and employee; and an action under the Act cannot be maintained if the workman, mistaking the place to which he was sent, misrepresented to defendant's foreman that defendant had sent him to work and had consequently been permitted to work and there was no ratification as the injury occurred before the employer had learned that he was there.

Statement

APPEAL from a judgment under the Workmen's Compensation Act.

Aylen & Duclos, for the plaintiff.

T. P. Foran, K.C., for the defendant.

The judgment in review was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff, the widow of one Boland, succeeded in obtaining a judgment against the defendant for $1,000. Her action is brought under the Workmen's Compensation Act, and she alleges, that her husband, while in the employ of the defendant, met with an accident resulting in his death and that she is entitled to the benefit of the Act. She alleges, that the industry carried on by the defendant was one of the industries covered by the Workmen's Compensation Act, and that her husband met with the accident, while the relationship of employer and employee existed between her husband and the defendant, and that the accident occurred in the course of his work.

The defendant denies, first, that the Workmen's Compensation Act applies to the industry in which he, the defendant, was engaged. I cannot agree with the defendant's pretension on this point. By par. 4 of the plaintiff's declaration, she alleges, that the defendant had a contract covering the construction of the branch line of railway, belonging to the C.P.R., and works in connection with the repair, operation and maintenance of the said line of railway. The defendant admits in its entirety the paragraph. Sec. 7321 R.S.Q., the Workmen's Compensation Act, says, that accidents happening by reason of, or in the course of their work, to workmen or apprentices and employees engaged in, or any business having for its object the building, repairing or maintenance of railways or tramways, etc. The defendant admitting that he was carrying out a contract for the building, maintaining and repairing of a railway, clearly brings himself within the operation of the Act, and even if the admission was not made, the proof would justify such a conclusion. He was carrying out a contract which had for its object the repairing and maintaining of the right of way of a railway company, and I have no doubt that the industry was one of those specified in the Act. Upon that point I should agree with the learned trial Judge.

The defendant denies, secondly, that the deceased, Boland, was ever in his employ. The learned trial Judge found in favour of the plaintiff's pretension upon this point. The defendant makes serious attack upon that finding, and that is the question this Court is called upon to decide. I think it may, with safety, be stated, that before a workman, or his representative can claim the benefit of the Act, the party claiming must prove the existence of a contract of hire of services. It is true that contract may be proved in the same way as other contracts may be proved, and the contract itself may be express or implied, and may be oral or in writing; but the burden of proving the existence of the contractual relationship of employer and employee lies upon the plaintiff. It has been, indeed, said that the relationship of employer and workman implies the existence of two conditions: (1), that the workman shall have been freely chosen by the employer, and (2), that the employer is entitled to con-

QUE.
C. R.
COONEY
v.
MOREL.
Greenshields, J.

trol him in the carrying out of the work. I should go so far as to say, that if a person made false statements or fraudulent representations to a person, and as a result of such fraud obtained employment with a patron, and met with an accident the relationship of employer and employee did not exist. Said the Court of Cassation in France in 1901:—

> If the contract of hire be tainted by fraud, for instance, if the employee has misrepresented the fact that he was under the age fixed by the Factory Act, and has given a false name so as to prevent a proper enquiry on the subject being made, he will not be given the benefit of the Act in case of accident.

Mr. Sachet, vol. 1, p. 158, in discussing this question, considers the causes of nullity in a contract of which the employer may take advantage, because, says he, in these accidents, the employer usually only has a right to contest the nullity of the contract alleged against him. He says:—Among the defects or "vices du consentement," fraud alone appears susceptible of application to this contract, and says he:—"In a case where a contract was obtained by fraud or misrepresentations, it is deemed never to have been entered into, and the party claiming will be denied the benefit of the Act."

Now, applying the facts of the present case—the defendant had a contract, as stated, on the line of the C.P.R., north of Ottawa. He had about twelve men employed there. He had a foreman in charge and a timekeeper. He swears positively that no men were engaged by the foreman, and that the foreman had no power or authority to engage any men. The defendant swears he never engaged the deceased; never knew that he had gone to the works; in fact, had never spoken to him about employment on these works. The foreman says that he never engaged the deceased. A hotelkeeper at Mattawa, Lamothe by name, swears that he was instructed by a foreman of Kirby & Stuart, who were repairing a dam at Temiskamingue, to engage some men, and that he did engage ten or eleven, including the deceased; that he gave him goods to the value of $7.50, and paid his railway fare and saw him on the train with the other men to go there. The deceased was sober at the time, says Lamothe. Apparently he was furnished with something to change his condition, or was provided with it by someone else, because during

QUE.
C. R.
COONEY
v.
MOREL.
Greenshields, J.

the course of the journey, he became intoxicated. He did say to the conductor that he was going to work for Morel, and when the train arrived at the place of debarkation for the works of Kirby & Stuart, the other men left the train, and he remained on board. On the train reaching the camp of the defendant, he was helplessly drunk, and was lifted by two men from the train and put on the side of the track. He could give no account of himself then, but, apparently, on recovering his senses somewhat, he told the foreman that he had been sent by the defendant to work. It should be noticed that the defendant was not at the works then. Relying upon the statement made by Boland, the foreman sent him to work the next morning along with the other members of the gang; his name was entered in the pass-book kept by the clerk, but without any terms of engagement or any price per day being entered. He worked three or four days, and, in the accident, was killed along with another of the workmen.

The proof relied upon by the plaintiff, as to the engagement, is the testimony of herself, and she states that after the Coroner's inquest, Morel, the defendant, stated to her that he had engaged her husband and sent him to work. She is corroborated, in this, by her sister-in-law. The defendant denies the conversation. Reliance is placed upon a statement made by the defendant at the Coroner's inquest, viz.:—"that the deceased had been working for him, and was in his employ, at the time of the accident." The defendant explains this by stating that he had then, for the first time, been informed that this man had been working on his works, and he used the words—"He was in my employ," because he had been informed that he was working, but he denied positively any engagement. Now, the defendant never ratified any act of his foreman in placing this man at work; he could not ratify his act, if what the defendant says is true, that he did not know this man was working there and had never engaged him. If he had gone to the works, and found him working there, there is no doubt he could have discharged him, and, from what he says, he probably would have, but unfortunately the man was killed before the defendant reached the works. If the obligation rests upon the plaintiff to establish a

QUE.
C. R.
COONEY v. MOREL.

contract of lease and hire of services, in other words, to establish the contractual relationship of employer and employee, it is difficult for me to find that the plaintiff has discharged that obligation.

Greenshields, J.

I am of opinion that she has failed in her proof and the judgment should be reversed.

Appeal allowed.

ONT
S. C.

VIVIAN v. CLERGUE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Falconbridge, C.J.K.B., Magee and Hodgins, JJ.A. November 27, 1914.

1. JUDGMENT (§ III—202)—LIEN—HOW LOST OR SUSPENDED—SUBSTITUTION AGREEMENT—SALE OF LAND.

Except as to the costs under the writ of execution following a judgment for an overdue instalment of purchase money, the right to levy is lost if by agreement between the parties and a company the latter was substituted as the purchaser and the defendant relieved from his obligation to purchase, but with a reservation of the defendant's liability for the overdue instalment, and if the agreement of sale and the moneys paid thereunder have been forfeited by the vendor under a power contained in the contract; retention of rights notwithstanding the termination of the agreement would require clear and definite expression and could not be inferred from a proviso that nothing "done under it" should cancel the liability for the first instalment.

[*Clergue* v. *Vivian*, 41 Can. S.C.R. 607, referred to; *Cameron* v. *Bradbury*, 9 Gr. 67; *Fraser* v. *Ryan*, 24 A.R. (Ont.) 441; *Gibbons* v. *Cozens*, 29 O.R. 356; *McPherson* v. *U.S. Fidelity*, 6 O.W.N. 677, followed.]

Statement.

APPEAL by the plaintiffs from an order declaring that the appellants are not entitled to enforce their judgment and execution against the respondent except as to costs.

A. H. F. Lefroy, K.C., for the appellants.

G. F. Shepley, K.C., and *H. S. White*, for the defendant, the respondent.

November 27. The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—The circumstances in which this judgment was recovered are set out in 16 O.L.R. 372 and 41 S.C.R. 607, where the facts are all detailed. The additional feature is that, since judgment was pronounced in the Supreme Court of Canada, the appellants have sold the mining property for $75,000, after having forfeited it under a power in that behalf contained in the agreement of the 10th March, 1905, the terms of which are discussed in the reports already referred to.

Undoubtedly, prior to the act of forfeiture mentioned, if the

respondent had paid the amounts for which judgment has been recovered, he would have paid them as the person originally liable for the purchase-money as purchaser of the mining property. The assignment of that agreement, according to the previous judgment, did not release him; in fact, the right to assert that he remained liable is expressly preserved in the assignment. So long as the same situation existed as formed the foundation of the judgment mentioned, the respondent's position did not differ from that of a mortgagor who, being liable on covenant to the mortgagee, sells his lands to a third party. His conveyance does not prevent the mortgagee from holding him liable for the debt, and that notwithstanding that the mortgagee takes a covenant from the third party to pay it. But in the latter case the mortgagee is unable to enforce against the original mortgagor his covenant unless he is prepared to convey the property to him subject to the right of the third party. See *Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610; *Stark* v. *Reid* (1895), 26 O.R. 257.

The sole question here is: does the forfeiture under the agreement of the 10th March, 1905, and the sale pursuant thereto, work such a destruction of the appellants' right against the respondent as disables them from further pursuing him in respect to the debt? The argument is, that the forfeiture and sale were something done under the agreement, and that it was expressly agreed therein, *inter alia*, that "this agreement and anything that may be done hereunder shall not affect or prejudice" the appellants' claim in respect of the $24,000, and part of the subsequent instalment, *i.e.*, the sum for which judgment was recovered in this action, nor shall it prejudice the rights of the respondent with respect thereto.

But that clause concludes in a way which indicates that it was meant to preserve those rights during a period in which it was open to the purchaser to pay the instalment, and for which, if the respondent pays, he obtains a lien. The final words in the clause in question are: "But until the purchaser shall pay the first two instalments of $24,000 each, with interest as aforesaid, the rights of the vendors and the party of the third part shall remain as they now are in respect of said instalments and

ONT.
S. C.
VIVIAN CO. LIMITED v. CLERGUE.
Hodgins, J.A.

interest." This is supported by the provision, found later on, that all moneys paid under the agreement were in the first place to be applied (after paying an earlier judgment) "in and to the discharge of the claims of the vendors against the party . . . of the third part in respect of which their rights have been hereinbefore reserved."

It appears from the notice of forfeiture that, unless within one month the overdue instalments were paid, the appellants intended to forfeit the agreement and any moneys paid thereunder, and that the said agreement was to become null and void. The forfeiture was carried out about July, 1909, owing to default not only on subsequent instalments, but on account of the instalment for which judgment had been recovered in 1907; and the property was sold on the 4th July, 1912.

The forfeiture deprived the purchasers of the right to make payment and demand the property. Treating the liability of the respondent as having continued down to that time, and his right as one requiring the payments by the purchaser to be applied in discharge of that liability, and it appearing that the rights and liabilities of the parties to this appeal were preserved expressly until payment of the first two instalments, it seems to follow that the forfeiture worked a serious change in the rights of the respondent. The appellants themselves put an end to the situation during which their rights against the respondent were preserved, and, by precluding payment by the person primarily liable, rendered the protection provided by the agreement to the respondent of no value.

Such a radical change as putting an end to the agreement itself, and therefore to all its provisions, does not seem to come within the true meaning of the words "anything that may be done hereunder," notwithstanding that they may seem literally applicable. Retention of the rights now set up ought to be clearly and definitely expressed: *Arnold* v. *Playter* (1892), 22 O.R. 608.

Upon the best consideration that I can give to the argument of Mr. Lefroy, I think that the true intent and meaning of the agreement was, that the respondent should remain liable, notwithstanding the assignment, for the moneys due by him before,

ONT.

S. C.

VIVIAN CO. LIMITED v. CLERGUE.

Hodgins, J.A.

but that otherwise the old agreement was merged in the later one, and that the respondent, when sued upon that old liability, was entitled to rely upon the merger as having changed his position from that of a simple purchaser to that of surety, *quoad* the land, for the purchase-money: *Muttlebury* v. *Taylor* (1892), 22 O.R. 312.

There is a further ground upon which the judgment in appeal may be supported, namely, that the effect of the agreement between the appellants, the Standard Mining Company of Algoma Limited, and the respondent, was merely to substitute for the respondent that company as the purchaser of the property, and to relieve the respondent from his obligation to purchase, but not from his liability to pay the overdue instalments of the purchase-money, the amount of which paid by the respondent was to be credited upon the purchase-money. In either view, the principle of the cases referred to by my brother Kelly is applicable.

Appeal dismissed with costs.

PARE v. BAKER.

QUE.

C. C.

Quebec Circuit Court, McCorkill, J. July 24, 1914.

1 MASTER AND SERVANT (§ V—340)—CLAIM FOR WAGES—CONTRACT OF LEASE—ACTION DURING LONG VACATION—(QUEBEC).

A workmen's claim for wages is upon a contract of lease or hire of work and may be tried in the long vacation under the exception of article 15 C.P., Que., of "actions arising from the relation of lessor and lessee," the latter term being recognized by the Quebec Civil Code, article 1600, as including both a lease of things or a lease of work.

Statement

HEARING of objection to an inscription for trial.

Drouin, Sévigny & Drouin, for plaintiff.

Guay & Fairmont, for defendant.

McCorkill, J.

MCCORKILL, J.:—Defendant is a quarryman at Chateau Richer. He is alleged to have employed plaintiff to work in his quarry, on May 4, last, at 20 cents an hour. Plaintiff worked until June 6, when he was dismissed by defendant. He claims $45.30 wages, for 226½ hours at 20 cents, with interest and costs.

Defendant contested the action by a general denial.

Plaintiff inscribed the case for proof and hearing on the merits on July 22 instant.

QUE.
C. C.
PARE
v.
BAKER.
McCorkill, J.

When the case was called, defendant's counsel objected that this was not one of those cases that could be tried during the long vacation. Art. 15, C.P., says:—

The Courts cannot sit between the thirtieth day of June and the first day of September . . . except in the fourteen classifications of cases given in the article, of which the first is:

Actions arising from the relation of lessor and lessee.

Plaintiff contends his action comes under this head, whereas defendant denies that it includes salaries.

Art. 1600 C.C. says:—

The contract of lease or hire has for its object either things or work, or both combined.

It will be seen that the leasing of things and work are grouped together in this article.

Reference is made to Art. 1708 C.N. This article reads as follows:—

Il y a deux sortes de contrats de louage: celui des choses et celui d'ouvrage.

The articles, therefore, do not read the same and the principles applicable are not exactly the same.

See Mignealt, vol. 7, page 218.

Art. 1602, C.C. says:—

The lease or hire of work is a contract by which one of the parties, called the lessor, obliges himself to do certain work for the other, called the lessee, for a price which the latter obliges himself to pay.

This article agrees exactly with Art. 1710 C.N.

The codifiers, vol. 2, p. 22, explain the classification of the title. "Of lease and hire," into the four chapters. The second chapter treats "Of the lease or hire of things;" the third: "Of the lease and hire of work."

Article 11 (C.C. 1600) does not follow the form of expression of Art. 1708 C.N., which is inaccurate, inasmuch as there are not two kinds of lease, one of things and the other of work, but the contract of lease may have either of these, or both of them together, as its object.

Commenting on Art. 3 (C.C. 1602, already cited), they say:—

In this article the proper application of the terms lessee and lessor of work is declared. It is necessary to do this in order to avoid the uncertainty and consequent perplexity which arises from the use of the lessor, *locateur*, *locator*, sometimes as indicating the person who does work, and at other times the person for whom it is done, and who is always in truth the lessee, *locataire*. There is a good deal of discussion among the

authors upon the double application of the words, which dates back as far as the Roman law, but the Commissioners think there can be no hesitation, after an examination of the modern books, in adopting the solution of the difficulty presented by the article.

See also comment on ch. 3 of the title (Art. 1666 and following), which has reference to "The lease and hire of work" and the difficulty sometimes of distinguishing between a contract of lease and hire of services and of mandate and the various theories maintained by different jurists upon the subject.

Art. 1667 C.C., which specially covers the case in question, reads as follows:—

The contract of lease or hire of personal service can only be for a limited term, or for a determinate undertaking.

It may be prolonged by tacit renewal.

It is quite apparent, therefore, that plaintiff in this case leased his services to the defendant for the price, consideration or rental of 20 cents an hour.

Art. 1670 C.C. says:—

The rights and obligations arising from the lease or hire of personal service are subject to the rules common to contracts.

Then follow exceptions which are not applicable to this case.

Plaintiff claims that, as the relation of lessor and lessee exists between him and the defendant, his action is governed by Art. 1150 and following C.P.

Art. 1150 says, in part:—"The following are deemed to be summary matters and are tried as such according to the rules set forth in this chapter:—

"1. Actions arising from the relation of lessor and lessee."

This is in amendment to Art. 887 and amendments of the old code, which specially referred to certain proceeding between lessors and lessees, as well as to cases "arising from the relation of lessor and lessee, generally."

It was apparently not deemed necessary by the Commissioners who revised our Code of Procedure to specialize any of the proceedings arising between lessors and lessees as Art. 887; no qualification is made as to "actions arising from the relation of lessor and lessee."

According to the authorities I have cited, therefore, these actions include actions for salaries, such as the present one. A lessor of his services has as much right to sue his employer,

QUE.
C. C.
PARE
v.
BAKER.
McCorkill, J.

who was lessee, for arrears due to him, during the long summer vacation, as the lessor of a house has to sue his tenant, for arrears or rental.

I am of opinion, therefore, that defendant's objection is unfounded; it is rejected and the parties are ordered to proceed under the inscription on July 29 (see *Charron* v. *Gillies Bros.*, 7 Q.P.R. 146; *Casson* v. *Vaillancourt*, 5 Q.P.R. 88.

B. C.
C. A.

HALL v. CANADIAN PACIFIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. July 14, 1914.

1. MASTER AND SERVANT (§ II A 2—46)—MASTER'S LIABILITY — PROPER PLACES TO WORK—PROPER SYSTEM—MATERIALS—COMMON LAW LIABILITY—NOTICE.

The master's primary duty to the employee is to provide in the first instance fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work, but he is not bound to see that the place is safe from day to day or from hour to hour; so if changes have to be made incidental to the work and to the place the employee is called upon to work in, and if these are made under the direction of persons competent to carry forward the work and under a system and with resources which would enable them to carry it out with due regard to the safety of themselves and their fellow-servants, the master is not at common law liable for the failure of such persons to exercise due care, skill and diligence in its prosecution unless the negligent performance amounts to a breach of a statutory duty imposed on the master or unless he had after actual or implied notice of the mistakes of the persons so entrusted failed to correct the same.

[*Ainslee* v. *McDougal*, 42 Can. S.C.R. 420, applied; *Fakkema* v. *Brooks*, 44 Can. S.C.R. 413, distinguished; *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326, referred to.]

APPEAL from the judgment of Murphy, J.

Appeal dismissed.

Sir Charles Hibbert Tupper, K.C., for appellant, plaintiff.

J. W. deB. Farris, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The ridge of earth which caused the plaintiff to stumble and fall under the wheels of the car was taken out by a gang of defendants' workmen from an excavation made necessary in the work of improvement and maintenance of the defendants' railway. It was work of a class which in the operation of a great railway system must of necessity be carried out from day to day by the company's servants as occasion should arise, and in the performance of which a pretty wide discretion must be left to those immediately in charge of

the particular work. The men who placed the earth there were in charge of a foreman whose general instructions were to "see that everything was left safe." The negligence charged consisted of (1) leaving the pile of earth there in close proximity to the tracks where switching operations were being carried on; or (2) in not placing red lights upon it.

I do not think it can be said that defendants' system of leaving it to their foreman to "see that everything was left safe" and supplying him with resources to that end such as were supplied in this case in the way of danger signals, was a defective one. There were several alternative courses open to the foreman. He might remove the earth altogether. He might level it down to safety or he might put lights on it. The only comprehensive instruction therefore would be "to see that everything was left safe." A competent and careful foreman should, one would think, be the best person to entrust with such a duty confined as it would be to the work upon which he was immediately engaged. I think I am controlled by *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. The instruction to be careful is mere surplusage in this case.

The fitness of the foreman to discharge the duty imposed on him has not been questioned, either in the pleadings, the notice of appeal, or in the arguments before us.

With reference to the statement of Mr. Justice Davies in *Ainslie Mining* v. *McDougal*, (1909), 42 Can. S.C.R. 420, that the doctrine of common employment cannot be extended to cases arising out of the

> masters' primary duty of providing in the first instance at least fit and proper places for the workmen to work in and a fit and proper system and suitable materials under and with which to work.

The words "in the first instance" must not be overlooked. This statement of the law does not mean that the employer is bound to see that the place is safe from day to day or from hour to hour. Changes may have to be made incidental to the work and to the place the employee is called upon to work in, and if these are made under the direction of persons competent to carry forward the work, and under a system, and with resources which would enable them to carry it out with due regard

B. C.

C. A.

HALL v. CANADIAN PACIFIC R. CO.

Macdonald, C.J.A.

to the safety of themselves and their fellow-servants, the master is not at common law liable for the failure of such persons to exercise due care, skill, and diligence in its prosecution. He would be liable if he did not correct their mistakes after actual or implied notice, or where the negligent performance amounts to a breach of a statutory duty imposed on a master.

I would therefore dismiss the appeal.

IRVING, J.A.:—It is objected by the defendant that by means of the form of the statement of claim no damages can be recovered at common law but only under the Employers Liability Act. The departure from an ordinary form cannot possibly deprive a person of his rights. The first three paragraphs shew perfectly plainly that the plaintiff is suing at common law, the last three, under the statute. To my mind the pleading is very neatly drawn, and no amendment is necessary.

The learned trial Judge on a motion for nonsuit refused to allow the common law branch of the case to go to the jury on the ground that the negligence which caused the accident was the negligence of a fellow-servant. The defendants thereupon admitted liability under the Employers Liability Act and judgment was given for $3,900.

The plaintiff now appeals from the refusal of the Judge to permit the common law action to go to the jury.

The operation in which the plaintiff was engaged was connected with the making up of a train in the yards of the defendants in the night time. Cars were being shunted backwards and forwards and the plaintiff stationed about halfway between the engine and the rear of the train was expected to repeat the signals from the switchman to the engine-driver as required from time to time. For that purpose he was standing well to the north of the railway track, but, as the track was somewhat curved, he thought that he could discharge his duty better by getting on top of the cars and repeating the signals from there. With this end in view he ran from where he had been standing on the north side of the track towards the train, and stumbled over a pile of earth which had been placed close to the track by some workmen in the employ of the defendant

company. The workmen had been engaged during the day in excavating for a new track to the south of the track upon which the freight cars were being shunted. This pile of earth was some 30 to 40 feet long from east to west; near the track it was some 15 inches high; but on the northern or outside edge, against which part the plaintiff had stumbled, it must have been between 2 or 3 feet high. The men employed in excavating had thrown dirt across the track to the north side and from time to time, as was convenient, a car would be brought to the pile and the dirt removed, but it had been there alongside of this track in more or less substantial form for a week, and was the result of some weeks' work. At the time of the accident no warning lights were upon the mound; although suitable lights had been provided by the company for that purpose. No special directions as to placing lights had ever been issued by the company. The system adopted was to rely on the discretion of the foreman of each gang as to when and where lights should be placed.

Plaintiff's counsel takes two grounds in support of the contention that the Judge should have allowed the case to go to the jury. First, that there was a defective system and he refers to the language of Mr. Justice Duff in *Fralick* v. *G.T.R. Co.*, 43 Can. S.C.R. 494, as follows:—

> The desideratum is a system which, consistently with reasonable efficiency, reduces to as low a degree as possible, the risks arising from imperfections of human instruments.

Mr. Farris contends it was for the jury to pass upon the sufficiency of the system of leaving the matter to the foreman in this case. The defendants concede that a light ought to have been placed there. The plaintiff has said had there been a warning light no accident would have occurred. The point for the Judge to determine is, was there any evidence of negligence on the part of the company to go to the jury? It seems to me the uncontroverted evidence established that it was the neglect of a fellow-servant, just as in *Wood* v. *C.P.R. Co.*, decided in 1899, 30 Can. S.C.R. 110, where the duty of getting the line of the railway and the side track in proper order was delegated to the defendant's roadman and section foreman, who were

B. C.
C. A.
HALL
v.
CANADIAN PACIFIC R. CO.
Irving, J.

shewn to be properly qualified, and if there was any failure to perform a duty which the defendants owed to the appellant, it was the fellow-workmen who were guilty of it. As they were for the purpose of the defence of common employment fellow-servants of the plaintiff, the action failed.

The second ground is founded on the dictum of Sir Louis Davies in giving judgment in *Ainslie Mining* v. *McDougal*, (1909), 42 Can. S.C.R. 420, where the following language is used:—

> Defective places in which to work, defective machinery with which to work, and defective systems of carrying on work are none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ.
>
> That exception as defined by Lord Cairns in his celebrated dictum in *Wilson* v. *Merry*, does not cover the duties owing by the employer to the employed in those respects.

In that case there was evidence from which it might be inferred that the directors did know and direct, or acquiesce in what was being done.

I am unable to distinguish this case on its facts from *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. There, on account of new work being undertaken, a scaffold had been constructed by Neish on Saturday. On Monday the plaintiff with others began to work, and on Wednesday by reason of the accumulation of gas—which accumulation had taken place on account of the scaffold interfering with the system of ventilation, an accident took place. It was there held that because Neish was a fellow-servant of the plaintiff he could not recover. That seems to me this case exactly.

I do not see that the other two cases cited by counsel carry the plaintiff's case any further: *Canadian Woollen Mills* v. *Traplin*, (1904), 35 Can. S.C.R. 431, was a case of an accident resulting from the use of a dilapidated elevator of which there had been no inspection and for the repairs of which there was no competent person employed. That was not mere negligence of a fellow-servant but a gross case of long continued neglect on the part of the management to provide a safe machine.

The other case, *Fakkema* v. *Brooks* (1911), 15 B.C.R. 461; 44 Can. S.C.R. 413, re-affirms the dictum from *Ainslie Mining* v.

McDougal, 42 Can. S.C.R. 420. In the opinion of one of the learned Judges it is doubtful if that case would have been decided against the company if the question of fellow employment had been raised at the trial. That doctrine seems to have been pressed before the Court of Appeal here, but not in the Supreme Court of Canada. The precise ground upon which the *Fakkema* decision rests is that there was either a faulty installation or a defective system being carried on in either case making the company liable within the rule laid down in *Ainslie* v. *McDougal*, *supra*, can only say that in the present case there was no evidence to go to the jury that the company had any knowledge of the existence of this varying pile of dirt, and that the Judge was right in refusing to allow the jury to pass upon the question.

I would dismiss the appeal.

MARTIN, J.A., dissented. Martin, J.A.

GALLIHER, J.A.:—I would not interfere with the judgment below. Galliher, J.A.

There is no suggestion that before the pile of dirt in question was placed there, that the company had not provided a fit and proper place for its workmen in operating trains to work. It became necessary to excavate a bank of earth close to the track for a site for a tool house, and the construction gang engaged in this under a foreman placed the dirt from the excavation in a pile across the track upon which the accident occurred.

The evidence is that this dirt was levelled back some four feet from the track, and then sloped up to a height of about 4ft. and about 40 ft. in length. No light was placed upon this pile of dirt at night. The plaintiff in the course of his duties as switchman, not seeing this pile of dirt in the dark, stumbled over it and fell beneath a moving train that was being made up and suffered very severe injuries, and seeks to make the company liable at common law.

The learned trial Judge withdrew the case from the jury at common law, and the company admitting that they were liable under the Employers Liability Act, judgment was signed against them for $3,900. It is against the learned trial Judge's refusal to let the case go to the jury at common law that this appeal is taken.

B. C.
C. A.
HALL
v.
CANADIAN PACIFIC R. CO.
Galliher, J.A.

Mr. Farris, for plaintiff, relied on *Ainslie* v. *McDougal*, 42 Can. S.C.R. 420; and *Fralick* v. *G.T.R. Co.*, 43 Can. S.C.R. 494, but in my opinion those cases are not applicable.

The general instructions of the company to its foremen in the different departments was to leave all work safe and guarded; their system was established, and what was done here was not a providing of a fit and proper place for men to work in, or the establishing of a system, but a piece of work which arose incidentally in the course of business operations, or changes that take place from time to time, and as there is no suggestion that the men in charge of this work were incompetent, the failure to properly guard or light this pile of dirt was the neglect of the foreman in charge, and for whose neglect the company under the circumstances are not liable at common law.

McPhillips, J.A. (dissenting)

McPHILLIPS, J.A., dissented.

Appeal dismissed.

ONT.
S. C.

CANADIAN WESTINGHOUSE v. MURRAY SHOE CO.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Leitch, JJ. March 6, 1914.

1. SALE (§ III B—61)—CONDITIONAL SALES—RESERVING PROPERTY IN GOODS UNTIL PAID FOR—PARTIAL PAYMENTS AS LIQUIDATED DAMAGES—VENDOR'S LIEN.

Under a conditional sale contract which contains in addition to the reservation of property in the goods until paid for, a stipulation that in case of default the sellers may retain all partial payments as liquidated damages, and may also retake possession, the sellers may avail themselves of their common law right of suing for the instalments as they become due or prove against the purchasing company in liquidation proceedings, and still retain the property in the goods.

[*Utterson Lumber Co.* v. *Petrie*, 17 O.L.R. 570, followed; *McEntire* v. *Crossley*, [1895] A.C. 457, referred to.]

2. SALE (§ I C—18)—CONDITIONAL SALES—VENDOR'S NAME, STAMPED OR AFFIXED—PLATE REMOVED BY PURCHASER—EFFECT—CONDITIONAL SALES ACT.

The removal of the manufacturer's name-plate, the affixing of which on a machine dispenses with the necessity of recording the conditional sale contract under the Conditional Sales Act (Ont.) will not, where the name-plate is taken off by the purchasing company, prevent enforcement of the seller's right on default to the possession and property in the machine as against sub-purchasers from them who were aware that the machine was supplied to their vendors by the manufacturer claiming the lien.

[*Wettlaufer* v. *Scott*, 20 A.R. (Ont.) 652, followed.]

Statement

APPEAL by the defendants from the judgment of the Senior Judge of the County Court of the County of Wentworth.

ONT.

S. C.

CANADIAN WESTINGHOUSE v. MURRAY SHOE CO.

Statement

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

A contract was entered into by the plaintiffs and the Parkin Elevator Company Limited, of Hespeler, whereby the plaintiffs furnished the Parkin company two electric motors. "The property in and title to" them was agreed not to pass from the plaintiffs until "all payments . . . shall have been fully made in cash . . . and the said apparatus shall remain the personal property of the company . . . until fully paid for in cash. If default is made in the full payments in the manner and form herein specified, the company may retain any and all partial payments . . . as liquidated damages, and shall be free to enter the premises where such apparatus may be located and remove the same as its property."

The payments were ($280 being the price), 50 per cent. cash by sight draft attached to bill of lading, 40 per cent. cash by sight draft in 30 days, and 10 per cent. in 60 days.

The contract is dated the 5th July, but it was not to be effective until approved by the plaintiffs, and that was done on the 6th August.

On the 23rd July, the Parkin company wrote the plaintiffs saying that the motors were to be supplied to the Murray Shoe Company, London, the defendants; and on the 3rd August, the defendants wrote the plaintiffs to the same effect; so that, at the time the contract became effective, the plaintiffs knew that the motors were to be installed in the defendants' premises as part of their elevator.

But they were sent on to the Parkin company with name-plate attached, on the 29th July, before formal acceptance of the contract; and were shortly afterwards installed in the defendants' premises, the name-plate having been removed. A sight draft for half price was attached to the bill of lading, and paid; the whole price being increased by extras to $293.

No further or other sum has been paid, and the plaintiffs claim that there is still $140 of the price of the motors unpaid. Efforts were made to obtain payment from the Parkin company, but in vain. In March, 1910, the Parkin company went into liquidation, and the plaintiffs put in a claim against the

ONT.

S. C.

CANADIAN WESTINGHOUSE v. MURRAY SHOE CO.

Statement

company for the balance due on the motors and an open account, but nothing has been paid. It is said there is nothing in the estate. The plaintiffs had, before the liquidation, included the amount of the claim on the motors in drafts which also included other claims.

Not realising anything from the insolvent company, the plaintiffs notified the defendants, on the 31st July, 1911, of the balance due on the motors, which was asserted to be $146.50, asked them to remit the amount, and threatened to take possession unless they were paid. The defendants refused, and this action was brought, the plaintiffs claiming the motors.

The case came on for trial before the Senior County Court Judge at Hamilton, and he gave judgment in favour of the plaintiffs for $140 and costs.

The appeal was dismissed.

G. S. Gibbons, for the appellants.

G. C. Thomson, for the plaintiffs, the respondents.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—In this inquiry, I entirely agree with Mr. Gibbons's contention that the Conditional Sales Act does not enlarge the common law rights of those who allow their goods out of their hands; but it prevents all who have not complied with its conditions from asserting certain common law rights. The plaintiffs have complied with these conditions, and must be held entitled to all the rights the law would have given them had the statute not been passed, and to no more.

It was argued that the filing of a claim before the liquidator was equivalent to an action at law, and that this was in itself an election to treat the property as having passed. This appears to be the law in some of the States of the Union—*Moline Plow Co.* v. *Rodgers* (1894), 53 Kans. 743—but it is not our law. The matter has been fully discussed by a Divisional Court in *Utterson Lumber Co.* v. *H. W. Petrie Limited*, 17 O.L.R. 570. I think that case is well decided and should be followed. *McEntire* v. *Crossley Brothers Limited*, [1895] A.C. 457, mainly relied upon in support of this appeal, was considered in that case, and

it was held not to be applicable to the case then in hand, partly by reason of a clause in the *Petrie* contract that the liability of the purchaser to pay should not be affected by the vendor retaking possession. No such provision appears in the contract in the present case, and, were that the sole *ratio decidendi* in the former case, it would not be of assistance.

What is strongly urged upon us in the *McEntire* case (followed as it is in *Purtle* v. *Heney* (1896), 33 N.B.R. 607) is what is said by the Lord Chancellor, at pp. 464, 465: "Of course, the distinction is as well settled as it possibly can be between a debt for the price of goods the property in which has passed, and an action for damages for the breach of a contract to buy and pay for the goods. In the former case . . . the debt due is the balance of the price, the purchaser keeping the goods. In the other case the vendor retains possession of the goods; but he sues for the damages that he has sustained by the purchaser not carrying out his agreement to buy as stipulated. . . . Suing or proving for these damages implies, of course, the property as well as the possession being still in the vendor." And at p. 464: "Messrs. Crossley may . . . elect to sue for the remainder of the instalments. . . . No doubt if they take that course they elect to have the purchase then completed. They could not sue for the purchase-money and insist that the property in the goods, the price of which they were suing for, had not passed."

But, as is pointed out in the *Utterson* case, this is a decision on a special contract in which the vendor is bound down to two alternatives—he is given the right on default of an instalment to call all the money payable, or, "instead of seeking to recover such balance," to take possession.

There is no such clause here. The vendor may, on default, retain all that has been paid and take possession of the apparatus. But this is not given as an alternative of calling all the instalments due, and suing for them—this right he has not been given by the contract at all.

I see no sound reason why the plaintiffs should not avail themselves of their common law rights without troubling with the special right given by the contract. These are to sue for

ONT.
S. C.
CANADIAN WESTINGHOUSE v. MURRAY SHOE CO.
Riddell, J.

the instalments as they become due, and retain the property in the motors till the amount is paid in cash.

The claim before the liquidator can have no higher effect than an action at law.

Then it is contended that the plaintiffs are estopped by their knowledge that the motors were to be installed in the defendants' premises. What they knew was that the defendants were installing two elevators with their motors, and the Parkin Elevator Company were doing the work (letter of the defendants of the 3rd August); that the two motors were to be supplied by the Parkin company to the defendants (letter of the Parkin company of the 23rd July). They also knew that in their contract the Parkin company had expressly agreed "to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in" the plaintiffs.

I see nothing to indicate that the plaintiffs knew or should have known that the defendants were buying and paying for the motors out and out, and that the Parkin company were not observing their agreement.

There is a mass of American authority as to estoppel in such cases, most of which is to be found in the judgment of Winslow, J., in *Mississippi River Logging Co.* v. *Miller* (1901), 85 N.W. Repr. 193, which also cites *Pickering* v. *Busk* (1812), 15 East 38 (quite another kind of case). The principle is as well stated as anywhere by Howk, J., in *Winchester Wagon Works and Manufacturing Co.* v. *Carman* (1886), 109 Ind. 31, 35: "The purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition, upon which the sale and delivery were made, must be deemed fraudulent and void as against purchasers from the original vendee of the property." There is nothing of that kind in the present case; and, without expressing any opinion on the general question, I think there is no estoppel.

I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

BALDREY v. FENTON.

SASK.
S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ.
July 15, 1914.

1. NEGLIGENCE (§ I C 2—50)—OPEN WELL—DUTY OF OWNER—TRESPASSING ANIMALS—DEFENDANT'S KNOWLEDGE—OPEN WELLS ACT (SASK.)—RURAL MUNICIPALITIES ACT (SASK.)—ASSUMPTION OF RISK.

The Open Wells Act, R.S.S., ch. 124, imposes on the occupant of lands duties in respect of trespassing animals above the liability at common law; but where a horse fell into an open well on defendant's farm while trespassing there, and its owner knew of the well and that it was dangerous for stock, yet turned his horses at large, knowing that they would probably stray to where the well was, and thereby contravened a municipal by-law passed under the Rural Municipalities Act, Sask., making it unlawful to allow horses and cattle to run at large, he has thereby assumed the risk and the responsibility for the loss is to be attributed to his own negligence in disobeying the by-law.

[*Watkins* v. *Naval Colliery Co.*, [1912] A.C. 693, and *Butler* v. *Fife Coal Co.*, [1912] A.C. 149, applied.]

Statement

APPEAL from the judgment of the acting District Court Judge for the judicial district of Moose Jaw, dismissing the plaintiff's action. The plaintiff sued for the value of a horse, which fell into an open well on the farm of the defendant and was killed. The defendant disputed liability, on the ground that the plaintiff's horse was unlawfully and wrongfully upon his farm. At the time the horse was killed there was in force in the municipality in which both plaintiff and defendant resided a by-law, duly passed under the authority of the Rural Municipalities Act, of which one section read as follows:—

(1) And it shall not be lawful to allow any animal, excepting dogs only, to run at large at any time of the year within the limits of the rural municipality of Enfield No. 194.

There was also in force an Act respecting Open Wells and other things Dangerous to Stock (R.S.S. ch. 124), sec. 2 of which reads as follows:—

(2) No person shall have on his premises or on any premises occupied by him any open well or other excavation in the nature thereof of a sufficient area and depth to be dangerous to stock and accessible to stock of any other person which may come or stray upon such premises.

T. D. Brown, for appellant.

G. E. Taylor, K.C., for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The learned trial Judge found as a fact that the well in question was dangerous to stock and accessible to the plaintiff's horses. Under these circumstances is the plaintiff entitled to recover?

SASK.

S.C.

BALDREY v. FENTON.

Lamont, J.

At common law the plaintiff's horse was a trespasser. In 2 Cyc. 392, the learned author lays down the law as follows:—

> It is well settled that at common law every man was bound at his peril to keep his cattle within his own close, and if he failed to do so, was liable for their trespasses upon the lands of another, whether the lands trespassed upon were enclosed or not, unless the owner of such lands was bound by prescription, agreement or assignment to fence his lands.

See also *Kruse* v. *Romanowski*, 3 S.L.R. 274.

The plaintiff's horse being a trespasser, he trespassed at his peril. An owner of land has no duty to a trespasser beyond this, that he must not be allured onto the land with malicious intent to injure him, nor must anything be done wilfully to injure him or make the premises more dangerous for him than they otherwise would have been: *G.T.R. Co.* v. *Barnett*, [1911] A.C. 361; *Latham* v. *Johnson*, [1913] 1 K.B. 398. Apart, therefore, from the Open Wells Act, the defendant was not guilty of any breach of duty to the plaintiff. Does that Act impose upon the defendant any duty in respect of trespassing animals which prior to the passing of the Act he was not obliged to observe? I am of opinion that it does. By the section above quoted the defendant was expressly prohibited from having on his farm an open well dangerous to stock and accessible to the stock of any other person which might come or stray on his farm. But stock coming or straying upon the defendant's land were at common law trespassers, and it was not contended that the common law had been altered in the municipality of Enfield so as to make it lawful for cattle to stray or run at large there at the passing of the Open Wells Act. Straying animals were, therefore, trespassers when they entered upon an owner's land. But it was for the protection of animals coming or straying upon the land of an owner or occupier that the statute prohibited such owner or occupier from keeping an open well. I am, therefore, of opinion that the statute does create on the part of an owner or occupier of land a duty towards straying or trespassing animals not to keep an open well. That duty the defendant did not observe, and is therefore liable if the death of the horse resulted from his negligence in this respect. He, however, contends that the death of the horse resulted from the negligence of the plaintiff in not observing the provisions of the by-law prohibiting him from allowing his horse to run at large. The by-law, being passed under the provisions of the Rural Municipalities

SASK.

S. C.

BALDREY v. FENTON.

Lamont, J.

Act, has all the force of a statute. The breach of a statutory duty causing damage to another is negligence: *Butler* v. *Fife Coal Co.*, [1912] A.C. 149, at 159 and 160; and it is immaterial that the duty is a negative one by prohibition. In *Watkins* v. *Naval Colliery Co., Ltd.*, [1912] A.C. 693, Lord Atkinson, referring to the provisions of the Coal Mining Regulations Act, says, at p. 704:—

> Now, the combined effect of secs. 49 and 50 of this statute is, where rules such as those mentioned are violated, I think, this. They make every person who contravenes or does not comply with them guilty of an offence against the Act, and, therefore, impose upon such persons corresponding statutory obligations to observe them. Each person concerned is thus made responsible for every breach of the rules which he has himself committed, and for every failure of his to observe them.

The plaintiff was therefore guilty of negligence in allowing his horse to run at large.

This case, however, may, in my opinion, be disposed of on the ground that the plaintiff knew the well was there and that it was dangerous to stock, yet knowing that, he turned his horses at large, well knowing that they would probably stray into the defendant's field where the well in question was situate, and in doing so he did it in direct violation of the by-law. That being so, he must be held to have decided to take chances and to assume the risk of his horses falling into the well when he turned them out.

The appeal, therefore, should be dismissed with costs.

Appeal dismissed.

FLEURQUIN v. PILON.

QUE.

C. R.

Quebec Court of Review, Tellier, De Lorimier and Greenshields, JJ. January 30, 1914.

1. TRIAL (§ V D—295)—JURY—FORM OF VERDICT—FURTHER DELIBERATIONS—CHANGE OF VERDICT—MISDIRECTION BY JUDGE—NEW TRIAL.

While the trial Judge may guide the jury in the matter or form of their verdict, he should not send them out for further deliberations once their decision is in form with the law, with the view of having them change the substance of their return; such may constitute a mistrial and ground for quashing the verdict.

Statement

APPEAL from the Superior Court, GUERIN, J.

New trial ordered.

Trihey, Bercovitch & Kierney, for plaintiff.

J. H. Jalbert, for defendants.

The opinion of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J. (after stating the facts):—The serious question to be decided , and from my point of view, the only ques-

QUE.

C. R.

FLEURQUIN v. PILON.

Greenshields, J.

tion to be decided, is, whether the learned trial Judge erred in refusing to enter and record as the verdict of the jury what I shall term the "second verdict" reported by the jury.

When the jury first returned into Court, it, in a word, said: The accident happened to the boy; the accident was not due to the sole fault of the defendants; it was not due to the sole fault of the boy, but it was due to their common fault, and, being obliged by the question to give the respective faults, proceeded to do so: They found a fault attributable to the defendants, which the learned trial Judge was of opinion was not charged in the declaration, and for that reason, and that reason alone, he did not wish to receive that as a verdict.

The learned trial Judge expressed doubt and perplexity as to whether the fault found was charged, which clearly and undoubtedly led the jury to believe that it was not a fault which the defendants had been called upon to meet; and for that reason, and that reason alone, he sent the jury out for further deliberation. He told the jury, in effect, that if they could not find, or did not find another fault, their verdict, in the form in which it was rendered, would not be acceptable.

Now, I am of opinion, that if a jury being asked whether an accident was due to the fault of the defendants, and, if so, to specify what the fault was, and if they find a fault or a negligent act which is entirely strange or foreign to the issue, and is in no way covered by the pleadings, I believe that it is proper for the trial Judge to tell the jury that their verdict is defective, and give them time within which to do it.

The jury retired, and, coming in a second time, they answered the questions categorically and completely. They said there was no fault on the defendants' part; there was no fault on the part of the boy, and there was no common fault; and they said, "The boy suffered damages to the amount of $2,000."

Now, clearly, this was a complete and perfect verdict, in form, at least. Whether the proof justified such a finding, is a matter of perfect indifference for the purpose of this case. Rightly or wrongly, the jury, upon rendering that verdict, had discharged their full duty: had left nothing to be done, and had done nothing which they should not have done. The jury had nothing whatever to do with the legal responsibility of the parties. The jury

has to find the facts. The Court deals with the legal responsibility.

It cannot be said for a moment that the plaintiff's son did not suffer damages by reason of the accident: he did. It was quite proper and quite competent, although possibly useless, for the jury to assess these damages; and I should have told the jury that, whatever conclusion they might arrive at with respect to the questions 2, 3 and 4, I should, nevertheless, have asked them to assess the damages.

Now, clearly, there was no answer necessary or any answer that could be given to question 6: the first five being answered in the manner in which I have indicated.

The learned trial Judge said to the jury: "But you have assessed damages, although you have found no fault," and the foreman of the jury said: "Well, we did not see the connection between this question 5 and the preceding questions;" and I think the jury was quite right in one sense. If he meant that the jury were not bound to take into consideration, in answering the fifth question, what their answers were to the previous four questions, he was perfectly right.

The assessment of damages by a jury has nothing whatever to do with their finding as to the question of negligence or fault.

The learned trial Judge appears to have thought that there was contradiction between the first verdict and the second verdict returned by the jury. I find no such contradiction. The jurors were told by the learned trial Judge that, if they could not find a fault other than the one they had returned by their first verdict, their verdict would not be received; and apparently, and I think it is a fair conclusion to arrive at, they retired to their room, and were unable to find any fault other than what they had returned on the first verdict, and, therefore, said there was no fault.

Now, I fail to see any reason for the learned trial Judge to refuse to receive and record the second return made by the jurors as their verdict; in other words, I think there was error made by the learned trial Judge in refusing to grant the motion of the defendants then and there made, that the return or answers be recorded and entered and registered as the verdict of the jury.

Where a jury have answered clearly and fully all the questions which they can and are bound to answer, I should say it

QUE.

C. R.

FLEURQUIN v. PILON.

Greenshields J.

was the duty of the trial Judge, in law, to receive and record such finding or answers, and that, while a trial Judge has the right and is bound to guide the jury in the matter or form of their verdict, and to instruct the jury to the fullest extent, in order that their verdict in form may comply with the law; once their decision is in form with the law, he should not send the jury out for further deliberations with a view of changing the substance of their return. The return which I have called No. 2 is perfect in form, and is entirely in accordance with the requirements of the law as to the duty of a jury in answering questions.

I am of opinion that there was a mistrial, and that there must be a new trial.

I should dismiss the motion of the plaintiff for judgment for $2,000, in accordance with what is called the "verdict" of the jury.

I should quash the said verdict as entered and unregistered and signed by the foreman of the jury, and should order a new trial at the diligence of the parties.

SASK.

S. C.

DUNCAN v. BECK.

Saskatchewan Supreme Court, Lamont, J. June 8, 1914.

1. DAMAGES (§ III A—61)—WARRANTY OF AUTHORITY—BREACH OF—PERSONAL LIABILITY OF AGENT—PURCHASER IN GOOD FAITH.

If a person purporting to make a contract as agent for another has in fact no such authority, he renders himself personally liable to one who contracts with him in good faith in reliance upon the warranty of authority, and who by so contracting has suffered loss in consequence of the absence of authority.

[*Oliver* v. *Bank of England*, [1902] 1 Ch. 610, applied; 31 Cyc. 1545, 1550, cited.]

2. PRINCIPAL AND AGENT (§ II A—5)—AGENT ACTING WITHOUT AUTHORITY—VERBAL SALE—PART PERFORMANCE—REMEDY IN EQUITY—BREACH OF WARRANTY.

Where a person assumes without authority to act as agent for another in the sale of real estate and the contract is merely verbal and consequently would not have been enforceable at law as against the supposed principal, even if he had authorized it, the equitable doctrine of part performance does not apply so as to give a remedy in equity in respect of subsequent acts of part performance by the agent so as to attach a liability for damages against him where none attached at the time of the breach of warranty of authority; the latter is not a continuing warranty, but came to an end with the making of the contract.

[*Warr* v. *Jones*, 24 W.R. 695, applied.]

HEARING of a counterclaim for damages.

J. K. Sparling, for plaintiff.

C. D. Livingstone, for defendant.

SASK.

S. C.

DUNCAN v. BECK.

Lamont, J.

LAMONT, J.:—On the hearing of this action, all matters involved therein were by consent referred to the local registrar for the purpose of having the various accounts taken, with the exception of the claim made by the defendant Beck by way of counterclaim for damages for breach of warranty of authority on the part of the plaintiff to sell a quarter-section of land belonging to the plaintiff's wife. This claim was tried out before me. As I intimated during the argument, I find that the plaintiff, purporting to act as agent for his wife, had agreed to sell to the defendant Beck a quarter-section of land known as the Moynes farm for the price and on the terms stated by Beck in his evidence. According to that evidence the deal was made about the last of November or the first of December, 1905. The price was to be $4,000, payable $1,000 as soon as Beck could pay it, $750 in a year from the time the deal was made, another $750 in two years from that time, and the balance by assuming a mortgage of $1,500, which, it seems to have been contemplated, the plaintiff's wife would place on the farm. The interest was to be 7 or 7½ per cent., the defendant cannot say which. There was no memorandum in writing of the contract sufficient to satisfy the Statute of Frauds. In the spring of 1906, Beck entered into possession of the land, and he cropped it every year until 1912. He paid certain instalments of purchase money to the plaintiff as agent for his wife. In April, 1912, the wife repudiated the contract made on her behalf by her husband, and the Courts have held that the plaintiff had no authority from her to sell the land. For representing that he had authority to sell when in fact he had none, the defendant now claims damages from the plaintiff.

The law is well settled that where a person purports to make a contract as agent for another he is deemed to warrant that he had authority to make the contract in question. If, therefore, he in fact has no such authority, he renders himself personally liable to one who contracts with him in good faith in reliance upon the warranty, and who by so contracting has suffered loss in consequence of the absence of authority: *Oliver* v. *Bank of England*, [1902] 1 Ch. 610, 31 Cyc. 1545. But in order to make the agent personally liable for making an unauthorized contract, the contract must have been one which would have been enforceable against the principal if he had in fact authorized it. If this

SASK.

S. C.

DUNCAN v. BECK.

Lamont, J.

were not so, the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract when a breach of the contract itself, if it had been authorized, would have furnished no ground of action: 31 Cyc. 1550.

The contract in this case being for an interest in land, and not being in writing, the only way in which it could be enforced against Mrs. Duncan would be by the application of the equitable doctrine of part performance by the defendant. Assuming that this part performance was of such a character as to dispense with the necessity of having the contract in writing, and that the contract was otherwise enforceable against Mrs. Duncan, had she authorized it, I am of opinion that the defendant even then would not be entitled to succeed. He would not be entitled for the reason that the doctrine of part performance cannot be invoked to establish the enforceability of a contract entered into by an unauthorized agent so as to make him liable for damages for loss occasioned to the other party to the contract by reason of his want of authority. In *Warr* v. *Jones*, 24 W.R. 695, it was held that where a person assumes without authority to act as agent for the sale of real estate, and the contract is merely verbal, the person injured by relying on his representations has no remedy in equity against him for damages on the ground of part performance. The law upon this point is laid down in Bowstead on Agency, 3rd ed., at 387, as follows:—

> Where the contract would not have been enforceable at law as against the principal, even if he had duly authorized it, because the formalities required by law were not observed, the equitable doctrine of part performance does not apply so as to give a remedy in equity for damages in respect of the breach of warranty of authority.

Here the contract was not enforceable at law against Mrs. Duncan, because there was no memorandum of it in writing, and under the above authorities the defendant cannot invoke the equitable doctrine of part performance to establish its enforceability. The reason for this is apparent. The defendant's right of action against the plaintiff for breach of warranty of authority arose as soon as the contract was made. At that time the contract could not have been enforced against Mrs. Duncan even if she had authorized her husband to enter into it on her behalf. The contract not being enforceable, the defendant could not have

SASK.

S. C.

DUNCAN v. BECK.

Lamont, J.

held the agent liable for damages when the cause of action against him arose, because the defendant had suffered no legal damage from the breach of warranty by the agent. The only damages to which a person dealing with an unauthorized agent is entitled is the amount which he could have recovered against the agent's principal if the agent had been duly authorized, but the principal refused to carry out the contract, together with the costs and expenses, if any, incurred in respect of legal proceedings reasonably undertaken against him on the contract. If, when the cause of action against the plaintiff arose, the defendant could not have obtained any damages against Mrs. Duncan for her refusal to perform the contract had she authorized it, he cannot obtain any from the agent for breach of warranty of authority. The warranty of authority on the part of the agent was not a continuing warranty. It came to an end with the making of the contract. Had the defendant sued as soon as the cause of action arose against the plaintiff he could not have recovered damages. That being so, subsequent acts of part performance by the defendant cannot be effective to attach damages to a cause of action against the agent where no liability attached at the time the breach of warranty was made. The defendant's counterclaim will therefore be dismissed with costs.

NEVILLE v. MacMILLEN.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Brown and Elwood, JJ. November 28, 1914.

1. MOTIONS AND ORDERS (§ I—1)—SUMMARY JUDGMENT AFTER APPEARANCE —DEFAULT IN DELIVERY OF DEFENCE—MOTION PENDING.

A plaintiff who has launched a motion, under rule 135, Sask., District Court rules, for summary judgment after appearance, cannot sign judgment for default in delivery of defence, while the motion for judgment is still pending.

[*Hobson* v. *Monks* (1884), W.N. 8, applied.]

APPEAL from an order of a District Court Judge.

The appeal was allowed.

J. A. Allan, K.C., for appellant, defendant.

J. M. Hanbidge, for respondent, plaintiff.

The judgment of the Court was delivered by

BROWN, J.:—This is an appeal from the judgment of the learned District Court Judge at Kerrobert. The plaintiff

Brown, J.

SASK.

S. C.

NEVILLE v. MACMILLEN.

Brown, J.

brought action against the defendant on a certain promissory note, and the defendant duly entered an appearance on July 3, last. On July 7, the plaintiff served a notice of motion for an order striking out the defendant's appearance and for leave to sign summary judgment against the defendant for the amount of the plaintiff's claim. This motion was made returnable for July 13, and allowed to stand until the 14th. On this latter date the plaintiff's counsel, on the matter being spoken to, abandoned the application, stating that the plaintiff had already signed judgment in default of defence being delivered. The defendant had not filed or delivered any defence, and on July 14, the plaintiff had signed judgment against him for the full amount of his claim and costs. This judgment was signed while the motion for summary judgment was still pending. The defendant applied to the District Court Judge to set aside the judgment so entered, and the Judge held that the plaintiff was within his rights in so signing judgment set aside the judgment allowing the defendant to defend but ordered the defendant to pay the plaintiff's costs of motion. The plaintiff justifies his action under rules of Court Nos. 102 & 224. R. 102 requires the defendant in an action, if he wishes to defend, to enter an appearance and within 6 days thereafter file his defence, and R. 224 provides that in the event of the defendant failing as aforesaid the plaintiff may enter final judgment for the amount of his claim and costs. The question is to what extent, if any, has the plaintiff affected his right to so sign judgment under these rules by making his application for summary judgment. That application is made under Rule of Court 135, which provides that upon the defendant entering an appearance the plaintiff may, on affidavit proving his claim and stating that in his belief the defendant has no defence to the action, apply to a Judge in Chambers for liberty to enter final judgment. In answer to such an application, the rule itself requires that the defendant must satisfy the Judge that he has a good defence or disclose such facts as may be deemed sufficient to entitle him to defend. The plaintiff, by making such an application, says in effect that the defendant has no de-

fence to the action and should not be allowed to file a defence to same. So we have on the one hand the plaintiff applying to the Judge for judgment on the ground that the defendant can have no defence to the action, and on the other hand, while this motion is still pending before the Judge, he applies to the clerk of the Court for judgment against the defendant because he has not filed a defence. Such a practice was surely never contemplated by the rule. The plaintiff, by applying to the Judge for summary judgment, in effect said to the defendant, "While this motion is pending you not only need not but must not file a defence." I am clearly of the opinion that in view of the motion, and while the motion was pending, the plaintiff had no right to sign judgment in default of delivery of defence. In Odgers on Pleading, 6th ed., p. 229, (7th ed. 1912, p. 234) the following statement is made:—

> Where the writ is specially endorsed under O. III. r. 6, the defendant must deliver his defence within 10 days from the last day on which he could have entered an appearance—unless in the meantime the plaintiff has served on him a summons either for directions or for judgment under O. XIV. As soon as the defendant is served with either of these summonses, he must hold his hand and deliver no defence until the summons is disposed of, even though the prescribed time for delivering the defence will expire before the summons is returnable. (*Hobson* v. *Monks* (1884), W.N. 8.) By taking out such summons the plaintiff practically extends the time for delivery of the defence.

The case of *Hobson* v. *Monks*, cited by Odgers, is not available to me, but it is also referred to in the Annual Practice under English rule 239 for the same proposition.

In the result the appeal in my opinion should be allowed with costs, and the judgment varied by directing the costs of the motion to be paid by the plaintiff.

Re MUIR AND LAKE ERIE AND NORTHERN R. CO.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. November 13, 1914.

1. EMINENT DOMAIN (§ II D—100)—EXPROPRIATION OF LAND—AWARD—APPEAL FROM JURISDICTION OF COURT—SCOPE OF.

It is competent for the court apart from the jurisdiction given by the Railway Act (Can.) to act upon its own view of the evidence taken by the arbitrators in expropriation proceedings upon an appeal taken from the award.

[*Re Macpherson and Toronto*, 26 Ont. R. 558, followed.]

ONT.

S. C.

RE MUIR AND LAKE ERIE AND NORTHERN R.W. CO.

2. EMINENT DOMAIN (§ III C—140)—EXPROPRIATION OF LAND—ACCESS TO RIVER—COMPENSATION—MEASURE OF—ACCRUING ADVANTAGES.

The advantage accruing to a large residential property capable of useful subdivision from its frontage along a river is to be considered in fixing the compensation for injurious affection of the remaining lands on a strip of the property being taken for a railway right of way which cut off access to the river.

[*R. v. Buffalo and Lake Huron R. Co.*, 23 U.C.R. 208; *North Shore R. Co. v. Pion*, 14 A.C. 612, referred to.]

Statement

APPEAL by Muir, the land-owner and claimant, from an award of arbitrators, under the Railway Act of Canada, fixing at $4,250 the amount to be paid to the appellant by the railway company as compensation for a part of his land taken for the railway and for the injurious affection of the remainder.

G. Lynch-Staunton, K.C., for the appellant.

W. S. Brewster, K.C., for the respondents.

Hodgins, J.A.

November 13. The judgment of the Court was delivered by HODGINS, J.A.:—The award and the reasons supplied by the arbitrators disclose that the amounts awarded were:—

1. For 1 $\frac{6.5}{100}$ acres taken, extending across the whole of the river front of the property, at $1,500 per acre, including trees	$2,475
2. Damage to the remainder caused by the purpose for which the land is expropriated	1,775
Total	$4,250

In the first item is included the land, the trees, the cutting off of the ends of springs, and the value to the rest of the property of the land taken as the river front thereof.

The property has a long frontage on Ava road and 348 feet on the river by a depth of about 1,000 feet on the south and 1,300 feet on the north. There is a ravine along the south boundary containing about 4¼ acres, while the level land runs out into two knolls overlooking the river.

The value of the whole property is variously given. The appellant's house cost $18,000, while the respondents' witnesses valued it at $12,000. The latter treated the 13½ acres as worth only $6,000 or $7,000, while those of the appellant went as high as $43,000 to $46,000. The evidence of these expert witnesses is, to my mind, unsatisfactory. Those called for the appellant

displayed no knowledge of actual sales, and depended on inquiries as to properties, none of which were stated to be in any way similar in position or value to the one in question. The respondents' evidence of this class is open to criticism in the same direction.

The property lies 2¼ miles west of the Brantford market-place, and Mr. Schultz owns the adjoining land, 13½ acres to the west. Beyond this is the golf club. East of the appellant and towards Brantford are the VanWestrum property, 14 acres, the Stratford property, 41 acres, and the Woodyatt property, 20 acres. Comparison with these lands is reasonable, and the sale of the Woodyatt 20 acres in April, 1914, for $21,000, to a syndicate for subdivision purposes, is really the only reliable evidence of selling value. See *Falconer* v. *The Queen* (1889), 2 Can. Ex. C.R. 82. Based on this, the appellant's acreage would give $14,205, which, added to the cost of the house, would total $32,205. The evidence is conflicting as to whether values remained stationary, but there is nothing to shew that on the 31st May, 1913, the property was worth less per acre than the Woodyatt property.

If, therefore, $1,050 per acre is taken throughout as the fair value of the property as a whole for the purposes of the appellant's residence, and its amenities, apart from its speculative value subdivided, the $1\frac{65}{106}$ acres taken would represent $1,732, leaving $743 for the trees, springs, and the damage to the remainder of the property by loss of access to the river front.

It may be that this is not the division of the amount intended by the arbitrators. But they have not in their reasons indicated upon what basis they proceeded; and, if the valuation of $1,050 per acre is reasonable, then, in my judgment, the remaining amount is a quite inadequate damage for loss of access to the river. It is true, no doubt, that to make a good road or path to the water's edge and to build a boat-house would cost the owner a considerable sum of money. But this added cost would be represented by tangible improvements.

The appellant had, in the language of Lord Kingsdown in *Miner* v. *Gilmour* (1858), 12 Moore P.C. 131, 156, where the

ONT.

S. C.

RE MUIR AND LAKE ERIE AND NORTHERN R.W. CO.

Hodgins, J.A.

ONT.
S. C.
RE MUIR AND LAKE ERIE AND NORTHERN R.W. CO.
Hodgins, J.A.

river was non-navigable, the "right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle. . . . But, further, he has the right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." This language is quoted with approval in *North Shore R.W. Co.* v. *Pion* (1889), 14 App. Cas. 612, and the right spoken of is treated in *Chasemore* v. *Richards* (1859), 7 H.L.C. 349, and *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas. 662, 683, as "a natural incident to the right to the soil itself," *i.e.*, the soil of the adjoining lands.

That the obstruction of the right of access is a proper and important subject of compensation cannot be doubted: *The Queen* v. *Buffalo and Lake Huron R.W. Co.*, 23 U.C.R. 208.

The damage is, I think, to the whole of the property as such, used as it is, and as an entire block; and there seems no good reason to doubt that access by the smaller ravine and to houses built to the south overlooking the longer ravine by a way constructed down and through it, might be advantageously had. The principle stated by Mr. Justice Burbidge in *The Queen* v. *Carrier* (1888), 2 Can. Ex. C.R. 36, 45, that an owner is "not bound to sell, and may reasonably prefer to keep his property for the purposes of his business, and in that case should be indemnified for any depreciation in its value to him for the purposes for which he had been accustomed, and still desires, to use it," is as applicable to the expropriation of part of the property as to the whole.

The cutting off of the whole river front in addition to loss of its possible commercial and domestic value reduces the whole 14 acres from the position of an attractive and unusual property to that of a level lot just as uninteresting as any to be found anywhere on the outskirts of any city.

The estimates of damage to the lots 2, 3, and 4, overlooking the river, made by some of the witnesses and by the appellant, are, I think, excessive, and it is not easy to arrive at a proper percentage in settling the detriment suffered. The estimates

vary from 7 per cent. to 25 per cent., and the distant view has not in fact been interfered with. But, whatever basis may be adopted, it is clear that the arbitrators have not viewed it in the light of its advantage to a property of the nature and kind in question as used by the appellant. He is entitled to be compensated on the basis of the value to *him*, and not the expropriators. The only explanation of their figures is, that they have treated it upon the footing of a property incapable of useful subdivision, or as one which, though equipped with a good residence, approximates rather to a farm than a villa property. In so doing I think the arbitrators have erred in their application of the principles underlying the question of injurious affection, and have deprived the appellant of an advantage to which he is fairly entitled. See on this point *Paint* v. *The Queen* (1890), 2 Can. Ex. C.R. 149.

Viewing the value of the house and land as $32,205, and applying what, I think, is the proper principle, it does not seem unreasonable to allow upon the whole evidence 10 per cent. or $3,220.50, having regard to and including the loss of access and the attractiveness of a river front with all its beauty and possibilities of use, including the spring interfered with.

The evidence as to the trees is as discordant as that regarding the value of the property. Taking the most conservative view, I think the amount spoken of, $75.20, should be increased to at least $170.

The arbitrators have allowed $1,775 as depreciation for vibration, smoke, and noise. No evidence was given upon this head specifically, except as included in general terms of the whole damage to the property, and it is not possible to disturb the award on this point.

In the award itself it is stated that the arbitrators gained no information by their view on which they relied in making the award. Following the view of Street, J., in *Re Macpherson and City of Toronto* (1895), 26 O.R. 558, it is competent for the Court, apart from the jurisdiction given by the Railway Act, to act upon its own view of the evidence in dealing with the figures arrived at by the arbitrators.

ONT.

S. C.

RE MUIR AND LAKE ERIE AND NORTHERN R.W. CO.

Hodgins, J.A.

The result is, that the award should be varied as follows:—

Allowance for land taken	$1,732.00
For damage by cutting off access to river	3,220.50
For trees cut	170.00
For depreciation due to use of lands taken	1,775.00
Total	$6,897.50

As the appellant substantially succeeds upon the points raised before us, he should have his costs of the appeal.

Appeal allowed.

MAN.

K. B.

SKRYHA v. TELEGRAM PRINTING CO.

Manitoba King's Bench, Curran, J. September 23, 1914.

1. NEWSPAPER—(§ I—4)—PROVISIONS OF NEWSPAPER ACT—BENEFITS OF LIBEL ACT—R.S.M. 1913, CH. 113.

Non-compliance with any of the provisions of the Newspaper Act, R.S.M. 1913, ch. 143, disentitles such newspaper from the benefits conferred by the Libel Act, R.S.M. 1913, ch. 113.

2. STATUTES (§ II A—95)—NEWSPAPER ACT (MAN.), 1913, CH. 143—REQUIREMENTS UNDER THE ACT.

Information as to both printer and publisher and the place of abode of each is required to be published in a newspaper under the Newspaper Act, R.S.M. 1913, ch. 143.

3. STATUTES (§ II A—95)—NEWSPAPER ACT—REQUIREMENTS UNDER THE ACT.

The statement in a newspaper of its address as the corner of named streets is not a sufficient compliance with the Newspaper Act, R.S.M. 1913, ch. 143, unless the name of the city or town is also given; it is not to be left as a matter of inference.

[*Ashdown* v. *Manitoba Free Press*, 20 Can. S.C.R. 43, referred to.]

4. COSTS (§ I—14)—LIBEL ACTION—NEWSPAPER ACT, R.S.M. 1913, CH. 143—REQUIREMENTS UNDER THE ACT—FAILURE TO COMPLY—SECURITY FOR COSTS.

Security for costs under the Libel Act, R.S.M. 1913, sec. 10, will be refused the publishers of a newspaper sued for libel if the newspaper has failed to publish the complete data required by the Newspaper Act, R.S.M. 1913, ch. 143, so that any one aggrieved or injured by anything appearing in the newspaper may by referring to the newspaper itself ascertain who is legally responsible for what is published.

APPEAL from the referee.

Appeal dismissed.

F. Heap, for plaintiff.

A. M. S. Ross, for defendants.

Curran, J.

CURRAN, J.:—This is an appeal from an order of the referee dismissing an application of the defendant for an order for se-

curity for costs against the plaintiffs under sec. 10 of The Libel Act, ch. 113, R.S.M. 1913. The propriety of the learned referee's decision depends upon the construction of sec. 10 of the Newspaper Act, ch. 143, R.S.M. 1913, as applied to what the defendant company actually did by way of compliance with this section. It (the defendant company) urges that a substantial compliance with the requirements of this section has been made by the following notice printed in its newspaper:

> The Telegram, The Telegram Printing Co., Ltd., corner McDermott Ave. and Albert St., C. A. Abraham, president and business mgr.

The section of The Newspaper Act involved is as follows:

> In some part of every newspaper, pamphlet or other such paper aforesaid there shall be printed the real name, addition and place of abode of every printer and publisher thereof and also a true description of the place where the same is printed.

A sub-section prescribes a penalty for non-compliance which need not be considered in view of sec. 16 of the same Act, which is as follows:

> No person or corporation not having complied with the provisions of this Act shall be entitled to the benefit of any of the provisions of "The Libel Act" and sec. 15 of The Libel Act provides that "no person who has not complied with the Newspaper Act shall be entitled to the benefit of this Act."

Obviously, therefore, to entitle the defendant in this action to the benefit of sec. 10 of the Libel Act, providing for the giving of security for costs under certain circumstances by a plaintiff, it must shew that it has complied with the provisions of The Newspaper Act. Has this defendant done so? This is the sole question to be determined. The learned referee found as a fact that it had not done so, and as a matter of law that it was, therefore, not entitled to the benefit of The Libel Act, and refused the order for security for costs. I think he was right in so doing. I think the defendant has not, by the notice before referred to, printed in its newspaper, thereby complied with the requirements of sec. 10 of The Newspaper Act. I take it that the words used in sec. 15 of the Libel Act, "No person who has not complied with the Newspaper Act, etc." mean just what they say and that anything short of full compliance with *all* that is required of a newspaper under the provisions of The Newspaper Act disentitles such newspaper to the benefits conferred by The

MAN.

K. B.

SKRYHA v. TELEGRAM PRINTING CO.

Curran, J.

Libel Act. The notice printed by the defendant does not state by whom the newspaper in question is printed, by whom published, or the place of abode and addition of the printer and publisher. This information as to both printer and publisher must be given as it may happen that the printer and publisher are different parties. The addition of the words "C. A. Abraham, president and business mgr." does not, in my opinion, help the defendant. There is no direct information or statement that this man is either the printer or publisher or both printer and publisher of the defendant's newspaper or what his place of abode is. It is not stated that the company itself is the printer and publisher, although this might be gathered by inference. Inference will not satisfy the statute; a plain statement of fact is what is required. Again, the notice does not contain "a true description of the place" where the newspaper is printed. Even if the notice was sufficient in other respects it is clearly deficient in this. Where is the corner of McDermott Ave. and Albert St.? In what place, city, town or village? The notice does not state. Yet the statute requires such a statement of fact to be printed in the newspaper. I think the omissions I have referred to are plain contraventions of the statute. In *Ashdown* v. *Manitoba Free Press*, 20 Can. S.C.R. 43, the only case cited to me on the argument, the form or sufficiency of the notice there required by law, 50 Viet. ch. 23, sec. 10, was considered by Mr. Justice Gwynne and declared by him to be a plain contravention of the statute. This notice was as follows:

> Manitoba Free Press, published every day except Sunday, at 6 a.m. by the Manitoba Free Press Company. W. F. Luxton, managing director and editor in chief.

A comparison of the two notices will, I think, indicate that the one carried by the Free Press was much nearer a compliance with the law than that printed by the defendant in this case. It is to be noted that the section of the statute applicable in the case cited was word for word the same as sec. 10 of the Act now in force. It is true that the judgment of Mr. Justice Gwynne was a dissenting judgment, but none of the other Judges of the Appellate Court referred to this particular section as affecting the decision of the case, which seemed to hinge upon another section of the Newspaper Act requiring registration and the suffi-

ciency of the registration of the Free Press Newspaper under it, and not of the notice appears to have been the only questions decided by the majority of the Court. The dictum of the learned Judge upon this question of the sufficiency of the notice has weight, and I think may safely be followed. I think the notice required by the statute should in explicit and direct language give to the public all of the data prescribed in sec. 10; nothing should be left to inference, so that any one aggrieved or injured by anything appearing in the columns of a newspaper can, by referring to the newspaper itself, ascertain beyond any question who is legally responsible for what is published. That the plaintiffs in this case were able to ascertain this and properly bring their action is beside the question. The defendant is seeking to impose a burthen upon the plaintiffs that could not be imposed under ordinary circumstances, and to entitle it to this it must shew a full compliance with the law. This, I am of opinion, it has failed to do, and so cannot justify its right to security for costs against the plaintiffs.

I dismiss the appeal with costs.

ARMSTRONG v. CANADIAN NORTHERN R. CO.

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. July 15, 1914.

1. CARRIERS (§ III D 2—400)—NOTICE OF ARRIVAL—PERSON OTHER THAN CONSIGNEE—PRACTICE OF COMPANIES—DELAY.

Where a railway bill of lading is issued with the name and address of a party other than the consignee as a person to be notified on bulk grain reaching the destination, the railway is under obligation to send notice to such person, and is not relieved therefrom by the practice of the terminal elevator companies of forwarding weight certificates; and the railway is liable for delay in giving notice due to the freight conductor's error in naming in the way-bill as the party to be notified, another firm having no interest in the matter.

[*Golden* v. *Manning*, 3 Wils. 429, and *Collard* v. *South Eastern R. Co.*, 30 L.J.Ex. 393, applied.]

APPEAL from a district Court.

Appeal dismissed.

A. Fraser, for appellant.

H. D. Pickett, for respondent.

NEWLANDS, and LAMONT, JJ., concurred with BROWN, J.

BROWN, J.:—The plaintiff, who is a farmer, shipped from Briercrest, Sask., by the defendant's line of railway a carload

SASK.

S.C.

ARMSTRONG v. CANADIAN NORTHERN R. CO.

Brown, J.

of flax on or about May 16, 1912. The bill of lading which was used in connection with the shipment is in the form approved of by the Board of Railway Commissioners, and reads in part as follows:—

Form of Bulk Grain Bill of Lading approved by Board of Railway Commissioners for Canada by order 14691 of 18th August, 1911.

CANADIAN NORTHERN RAILWAY—BULK GRAIN BILL OF LADING. ORIGINAL—Not negotiable unless property is consigned "To Order."

FORM 901.

Received subject to the tariff in effect on date of issue of this original Bill of Lading, at Briercrest, May 16th, 1912, from Albert E. Armstrong, the bulk grain described below, consigned and destined as indicated below, which the company agrees to carry to its usual place of delivery at said destination, if on its road; otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said bulk grain over all or any portion of said route to destination, and as to each party at any time interested in all or any of said bulk grain, that every service to be performed hereunder shall be subject to all the conditions whether printed or written herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original Bill of Lading, properly endorsed, shall be required before delivery of the bulk grain when consigned "TO ORDER" or upon application by the owner or consignee for terminal elevator delivery or warehouse receipt. Inspection of the bulk grain covered by this Bill of Lading will not be permitted unless provided by law, or unless provision for inspection at the final point of destination is endorsed by the shipper on this original Bill of Lading or given in writing by the holder thereof. The shipper represents the bulk grain to be dry and suitable for warehousing.

The freight rate from.....station to .....is..... cents per 100 pounds.

Consigned to order of Canadian Bank of Commerce.
Destination: Port Arthur, Ont., care Canadian Northern Terminal.
Notify: Wm. J. BETTINGEN & Co.
At Winnipeg, Man.
Route: C.N. Car initial: C.N. Car No. 66086.

Bushels.	Kind of Grain.	Weight (Subject to correction).
1175.	Bus. Flax.	66,000.

As the defendants had no agent stationed at Briercrest, the bill of lading was signed by the conductor of the train as the company's agent, and one copy was handed to the plaintiff. This bill of lading was endorsed to the Canadian Bank of Commerce

at Briererest, and they forwarded the same to their Winnipeg branch, who subsequently delivered it to Wm. J. Bettingen & Co., referred to therein. It appears that the conductor, when making up his way-bill, by mistake inserted the name of The Grain Growers' Grain Co. instead of Wm. J. Bettingen & Co. as the party to be notified. One of the results was that when the car was inspected in Winnipeg the inspection certificate was delivered to the Grain Growers' Grain Co. The car reached Port Arthur about May 28, and was, on June 21 unloaded in the National elevator at that point. Here, again, because of the error in the way-bill, the elevator company sent the usual documents, namely, the weighmaster's certificate, expenses bill and the out-turn to the Grain Growers' Grain Co. instead of to Wm. J. Bettingen & Co. Some time in July the last-named company, not having been advised of the arrival of the car, made inquiries from the defendants, and then, for the first time, ascertained the cause of the delay. It was July 10 before Wm. J. Bettingen & Co. secured the proper documents; and on July 11, the grain was sold at $1.68 per bushel. Had Wm. J. Bettingen & Co. been notified on June 21 of the delivery of the grain at the elevator and received the necessary documents, they could have sold the grain on June 24, at the price of $1.90¾ per bushel. The plaintiff claims, and the trial Judge has allowed him, the difference between $1.90¾ and $1.68 per bushel, or an admitted total of $222.21. The defendants have appealed from such decision.

The defendants having accepted the grain for carriage, it was their duty not only to carry the same safely to Port Arthur, but also to deliver it at the elevator at that point. Their liability as carriers did not cease until there was actual delivery: 4 Hals. 11; *Taylor* v. *G.N.R. Co.*, L.R. 1 C.P. 385. Having so delivered the grain, it would ordinarily, under the circumstances of this case, have been the duty of the defendants to notify the consignees, in this case, the Bank of Commerce at Briererest, of such delivery: Beal on Bailments, p. 501; 4 Hals. 12; *Golden* v. *Manning* (1773), 3 Wils. 429. In the last-mentioned case the law is laid down as follows:—

> There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed of the arrival of those goods within a

SASK.
S.C.
ARMSTRONG v. CANADIAN NORTHERN R. CO.
Brown, J.

reasonable time, and must take special care that the goods be delivered to the right person.

By the bill of lading in this case, however, the plaintiff has given directions that Wm. J. Bettingen & Co. be notified. As I view the contract, this direction relieves the defendants of the necessity of notifying the bank, but requires them instead to notify W. J. Bettingen & Co. It is shewn in evidence that it is customary for terminal elevator companies, upon receiving grain, to forward at once the weight certificate, the expense voucher and the out-turns to the parties to be notified as set out in the way-bill; and by this means such parties have advice as to the delivery of the wheat, and, being in receipt of the necessary documents, are in a position to sell the grain. It is contended on behalf of the defendants that the directions as to notice given in the bill of lading are simply for the convenience of the elevator company, and do not in any way obligate the defendants to give any notice to the parties so directed to be notified. I cannot agree with this view. The defendants received the goods on the terms set out in the bill of lading; the only parties to the bill of lading are the plaintiff and the defendants; and the directions to notify are, in my opinion, clearly instructions to the defendants, and not to someone else who is in no way a party to the contract. Just as without such directions the defendants would be under obligation to notify the consignees, so with such directions they are bound to notify Wm. J. Bettingen & Co. The mere fact that in practice the elevator companies virtually send out the notices does not, in my opinion, in any way relieve the defendants of their liability in the matter.

The defendants having failed to give notice, was their failure in that respect responsible for the delay in the marketing of the grain? The evidence is that Wm. J. Bettingen & Co., who are grain commission agents, could not sell the grain until they received the documents which have already been referred to. Although it was the duty of the defendants to notify Wm. J. Bettingen & Co. of the delivery of the grain, it would not be their duty to furnish all these documents, as some of them at least, could only be furnished by the elevator company, and as

already indicated, in practice it appears that they are all furnished by the elevator company. It is clear, however, that had Wm. J. Bettingen & Co. been advised of the delivery of the grain, they could at once have secured these documents from the elevator company and put themselves in a position to sell the grain. The result is that, in my view, the defendants must be held responsible for the delay in selling the grain. The law is, that when there is a regular market for goods, and the price falls between the times when the goods ought to have been delivered and when they were actually delivered, the difference between the market price at the time of actual delivery and the market price at the time when the goods ought to have been delivered is recoverable in damages: 4 Hals. 18; *Collard* v. *The South Eastern R. Co.*, 30 L.J.Ex. 393. The latter case is one where the plaintiff sent hops in bags from Kent to London by the defendants railway for the purpose of delivery to the vendee, a hop dealer. There was delay in delivery, and in the meantime a fall in the market. Martin, B., in delivering a judgment which was concurred in by the other members of the Court, is reported to have said as follows:—

> We are all of opinion that this rule must be discharged. The Lord Chief Baron before he left the Court desired me to state that he was of that opinion. It appears to me to be as clear a case as there could possibly be. We are to assume that these hops ought to have been delivered on a certain day; and, further, we are to assume that by reason of the contract being broken by the defendants, these hops could not be brought into the market until a certain other day. It was proved that if they had been brought to market they would have produced a certain sum, but that when they were brought to market, at a future day, we find the market price had fallen, and the articles had fallen in value by an amount of £65. If that is not a direct, immediate, necessary and essential consequence of the breach of contract by the defendants, I cannot understand what is. Then it is said that the railway company had no notice of this. I think the railway company had notice that the hops were being sent from Kent to London for one of two purposes; either for consumption by the person who was sending them or, as was very much more likely to be the case, to be sold by that person as an article of commerce. I think that the jury had a right to assume that the company had notice of what was the actual case as to these hops, namely, that they were being sent to London to be sold for profit.

In the case at bar, the defendants undoubtedly knew that the grain was being shipped to be sold, the only difference being

SASK.

S. C.

ARMSTRONG v. CANADIAN NORTHERN R. CO.

Brown, J.

that in the case at bar the delay was caused by failure to give notice rather than by failure to deliver. I cannot, however, see that this makes any difference. If a failure to deliver gives a good cause of action, then, it seems to me, delay in giving notice of delivery which results in similar damages would equally give a good cause of action. Counsel for defendants referred to clause 5 endorsed on the bill of lading, claiming that this clause should govern in assessing the damages. When the previous clauses endorsed on the bill of lading are examined, it seems to me that clause 5 is intended to apply to a case where there has been actual loss of, or damage to, the grain itself. I find myself quite unable to intelligently apply clause 5 to the circumstances of this case.

The appeal, therefore, in my opinion, should be dismissed.

Appeal dismissed.

SASK.

S. C.

MOORE v. STEWART.

Saskatchewan Supreme Court, Lamont, J. December 30, 1914.

1. VENDOR AND PURCHASER (§ I E—25)—DEFAULT — RESCISSION OF CONTRACT — RETENTION OF MONEYS PAID — DETERMINATION OF CONTRACT BY COURT — COSTS OF.

Where a vendor cancels an agreement for sale of land pursuant to a clause permitting him on default to do so and to retain the moneys paid on account of the purchase price, he cannot afterwards sue for the purchase money nor is he entitled to ask the court to determine the contract which he has determined himself; but he may ask the court to decree that he had validly determined the contract and that it therefore no longer affected his title which declaratory judgment if uncontested must be obtained at his own expense; *semble*, an alternative claim for rescission may well be pleaded in case it should appear that the cancellation notice was defective.

[*Wilson* v. *Abbott*, 18 D.L.R. 34, followed.]

2. VENDOR AND PURCHASER (§ I E—25)—CONTRACT FOR SALE OF LAND — AGREEMENT THAT VENDOR MAY CANCEL ON DEFAULT — CONSEQUENCES — COURT OF EQUITY — RELIEF — PROMPT TENDER OF AMOUNT IN DEFAULT.

Where a purchaser of land upon deferred payments has contracted that his vendor may cancel the contract and retain moneys paid on account of the purchase price he can avoid this consequence only by satisfying a court of equity that he should be relieved from the forfeiture caused by his default; this he may do by promptly tendering the amount in default on receiving notice of the cancellation and if this be not accepted, by promptly coming to the court for relief.

Judgment for plaintiffs.

ACTION in rescission of an agreement of sale.

J. A. Allan, K.C., for plaintiffs.

James McKay, K.C., for defendants.

SASK.

S. C.

MOORE v. STEWART.

Lamont, J.

LAMONT, J.:—In their statement of claim the plaintiffs set out that by an agreement in writing dated July 28, 1911, they agreed to sell lands amounting to 1,329 acres to one J. R. Stewart for $210,000, payable by instalments the last of which became due on July 28, 1913; that the agreement contained a clause by which, in case the defendant made default in the payment of any of the instalments, the plaintiffs might cancel the contract and retain the sums of purchase-money already paid; that the defendant made default, and that on May 12, 1913, the plaintiffs, in accordance with the terms of the contract, cancelled the same; that there remained unpaid under the contract the sum of $117,500; and they asked for payment of that sum, an order cancelling the contract and declaring that the plaintiffs were entitled to retain the sums of purchase-money paid. The defendants at the trial admitted the agreement, and that default had been made in the payments of purchase-money, and that the sum of $117,500 remained unpaid under the contract. They also admitted that the plaintiffs had duly cancelled the contract—which, they argued, was an answer to the plaintiffs' claim for judgment; but they contended, and it was their only real contention, that under a provision contained in the agreement they were entitled to a transfer of 168 acres of the land covered by the agreement at the time it was cancelled, over and above the 410 acres which had been transferred. The clause referred to provided that the purchaser was to be at liberty to sub-divide the said land as he might think fit, at his own cost, and that he should be at liberty to sell or contract for the sale of all or such parts of said land for any price not less than $160 per acre, and that

upon payment to the said vendors (the plaintiffs) of a sum equal to $160 per acre the vendors will grant and convey any lands so sold in blocks of not less than 10 acres at a time to the purchaser, his heirs and assigns, or to whomsoever he or they may direct, and that after $75,000 has been paid by the purchaser under clause 2 hereof, in blocks not less than one acre at a time. Any moneys received by the vendors under this clause shall be applied by them in reduction of the next instalment for the time being payable under clause 2 hereof.

J. R. Stewart died, and the defendant Regina Stewart was appointed his administratrix. The purchase-money paid by J. R. Stewart in his life-time and by his administratrix after his

SASK.

S. C.

MOORE v. STEWART.

Lamont, J.

death amounted to $26,880. Regina Stewart then transferred all the estate and interest of J. R. Stewart in the said land to the defendants, the Victoria (B.C.), and Prince Albert Syndicate. This syndicate or its assigns paid to the plaintiffs the sum of $65,600, and received transfers of 410 acres therefor, being the lands they were entitled to at $160 per acre. The claim now made is that the defendants are entitled to a transfer of the number of acres which the money paid in by J. R. Stewart and Regina Stewart would represent at $160 per acre. This claim cannot be supported. The agreement does not contemplate a transfer at $160 per acre for any purchase-money paid in by J. R. Stewart, but only for the lands which he may sell or contract to sell. Transfers have been issued for all the lands sold by him or his administratrix for which there was paid to the plaintiffs the sum of $160 per acre.

In the alternative, the defendants claim to be entitled to payment for the moneys expended by J. R. Stewart on the premises. This also must be refused. A valid cancellation of an agreement for the sale of land pursuant to a clause therein which permits a vendor, upon default, to cancel the agreement and retain the moneys paid, carries with it certain consequences both to the vendor and the purchaser. The vendor, having put an end to the contract, cannot sue for the purchase-money, nor is he entitled to ask the Court to determine the contract, he having determined it himself. He is, in my opinion, as I held in *Wilson* v. *Abbott*, 18 D.L.R. 34, entitled to an order declaring that he had validly determined the contract, and that it therefore no longer affected his title. If his right to this declaration is not contested, he must obtain it at his own expense. It is probably judicious pleading where any doubt exists as to the validity of the cancellation notice, to ask in the alternative for rescission by the Court in case it should appear that the vendor had not made a valid cancellation. So far as a purchaser is concerned, a valid cancellation notice puts an end to the contract. Having agreed that the vendor might do this and retain the moneys paid, the purchaser is bound by his contract. To escape from the consequences of his agreement he must satisfy a Court of Equity that he should be relieved from the forfeiture caused by his default.

SASK.

S. C.

MOORE v. STEWART.

Lamont, J.

This he may do by promptly tendering the purchase-money on receiving notice of the cancellation, thus remedying his default, and, if this be not accepted, promptly coming to the Court for relief. If he is not prepared to remedy his default he must abide by the consequences thereof. In this case the defendants are not prepared to remedy their default. They do not ask that the plaintiffs be directed to carry out the contract, the reason doubtless being that the evidence shews that the land untransferred by the plaintiffs would not now sell for half of the amount of purchase-money still unpaid. The defendants are therefore not entitled to a return of the moneys paid by J. R. Stewart or his administratrix, nor to be reimbursed for the moneys spent in sub-dividing the property or the clearing of the streets.

There will therefore, be judgment for the plaintiffs declaring that the contract was validly determined. As the defendant, Regina Stewart and The Victoria (B.C.), & Prince Albert Syndicate contested the plaintiffs' right to this declaratory order except upon the terms of conveying to them 168 acres, they will pay the plaintiffs' costs. The defendants' counterclaim will be dismissed with costs.

QUE.

S. C.

LACHINE, JACQUES CARTIER AND MAISONNEUVE R. CO v. THEBERGE AND BEDARD.

Quebec Superior Court, Dunlop, J. March 31, 1914.

1. ARBITRATION (§ III—17)—AWARD — CONCLUSIVENESS — ARBITRATORS —MODIFICATION — SETTING ASIDE.

An award under the Railway Act, Can., on the expropriation of land for railway purposes is not conclusive merely on the signing of an award by a majority of the arbitrators; it must be promulgated within the period provided for making the award in order to be binding, as although signed within the period it is subject to modification until published; the arbitrators are *functi officio* and the award must be set aside if not notified to the parties until after the expiry of the time.

[*Hampson v. Dupuis*, 8 D.L.R. 500, applied.]

EXPROPRIATION under the Railway Act of Canada. Appeal dismissed.

Henri Jodoin, K.C., for the petitioned.

Handfield, Handfield and Handfield, for the respondent.

Dunlop, J.

DUNLOP, J.:—The arbitrators, Messrs. Bédard, Mailloux and Sullivan at this first meeting on January 9, 1913, fixed January 19, 1913, as the day on or before which the award should be

QUE.

S. C.

LACHINE, JACQUES CARTIER AND MAISONNEUVE R. CO. v. THEBERGE AND BÉDARD.

Dunlop, J.

made.—They prolonged this delay on January 17, to February 28;—and on this latter date, to March 12, 1913, and again to March 20 and March 31, and finally to April 10, 1913. On March 27, the arbitrators, Sullivan and Mailloux, agree to give to the proprietors 80 cents per sq. ft. for his lots of land, Bédard dissenting. They gave instructions to Mr. Dumesnil, notary, to prepare the deed of the award and adjourned to March 31 to sign it, which was done at this late date. The award was served on the interested parties on April 16, 1913, six days after the expiration of the delay to render said award.

The company appellant presented a petition alleging the above facts, prayed that said award be set aside as illegal, and that the Court render the award which should have been rendered by the arbitrators for, in substance, the following reasons: "The award was and is entirely unfair, unjust and illegal, and the methods followed by the majority of the Board in computing said award are entirely unfair, unjust and illegal and shews gross partiality towards the said proprietor-respondent and unfairness towards the offer of the petitioner: because the sum awarded is so grossly and scandalously too high as to shock one's sense of justice, and contrary to the evidence adduced; because the delay for the rendering and promulgation of the award as prescribed by the Railway Act having expired on April 10, 1913, the arbitrators are *functi officio* and absolutely without right to proceed further, and in such a case as prescribed by the Railway Act the sum offered by the company was the compensation to be paid by the appellants to the proprietor.

The proprietor contested the petitions by denying every one of its allegations.

The Court maintained the petition, declared the award null and void, and condemned the company to pay to the proprietor the sum of $1,196.64, being the sum offered as full compensation by said company.

The considérants of law of the judgment are as follows:

Considering that at the first meeting of the said arbitrators, on January 9, 1913, they fixed January 19, 1913, as the day on or before which the award in this case should be made, and subsequently, on different occasions as hereinabove mentioned they

prolonged the delay to the various dates, also hereinabove stated, and subsequently, they prolonged said delay to April 10, 1913;

Considering that on March 31, 1913, they signed the said award, which said award is of no effect for the reasons above mentioned;

Considering that the said pretended award was served on the interested parties on April 16, 1913, that is to say six days after the expiration of the delay to render said award when the said arbitrators were absolutely *functi officio* and without right to make any proceedings concerning the expropriation in this case and which award is herein filed as exhibit A of the petitioners;

Considering that the said arbitrator L. A. Bédard was dissenting on the ground that the amount offered by the appellants was a fair compensation for said expropriated lands;

Considering that the said award is of no effect, because the delay for the rendering and promulgation of the award as prescribed by the Railway Act having expired on April 10, 1913, the said arbitrators are *functi officio* and absolutely without right to proceed further, and in the present case, as prescribed by the Railway Act, the sum offered in said award, was the compensation to be paid by the appellants to the proprietors;

Considering that the award of the arbitrators, or a majority of their number, is final and conclusive only when all the prescriptions of the Railway Act have been duly complied with, which has not been done in the present cause;

Considering that the said award of the majority of the said arbitrators, under the Railway Act, is final and conclusive, like judgments of the Superior Court, only by their being promulgated, and so long as the said judgment has not been promulgated, the arbitrators, like the Judges of the Superior Court, have the right and power to re-open the enquête and modify their award or judgment, even if the same has been signed by them. See on this point the judgment of the Hon. Mr. Justice Saint-Pierre, of date June 23, 1911, in *Hampson* v. *Dupuis*, respondent, and the *City of Montreal*, mis-en-cause, which said judgment was subsequently unanimously confirmed in the Court of Appeals on November 30, 1912. (*Hampson* v. *Dupuis*, 8 D.L.R. 500).

QUE.
S. C.
Duclos, J.

Considering that the appellants' action is well found and that the respondent's plea thereto is unfounded.

Appeal dismissed.

[Appealed to Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ. September 30. The appeal was dismissed, Tellier, J., dissenting.]

ONT.
S. C.

McGREGOR v. CURRY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 6, 1914.

1. EXECUTORS AND ADMINISTRATORS (§ III B—70)—SUITS AND JUDGMENTS AGAINST—SPECIFIC PERFORMANCE—AGREEMENT TO TRANSFER STOCK.

Specific performance against the executors of an estate may be granted of the testator's agreement to transfer a fixed number of company shares which plaintiff was to receive for organization of the company.

2. LIMITATION OF ACTIONS (§ I E—30)—TO WHAT CLAIMS APPLICABLE—RECOVERY OF PERSONALTY.

There is no statute of limitations applicable to an action for the recovery of personal property in Ontario and therefore no statutory bar to such an action though laches and delay for even a shorter time than the statutory period applicable to real property may be a bar to it. (*Per* Meredith, C.J.O., and Maclaren, J.A.)

[*Charter* v. *Watson*, [1899] 1 Ch. 175; *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161, referred to.]

3. EXECUTORS AND ADMINISTRATORS (§ IV A—80)—PROOF OF CLAIMS—CORROBORATION—DEGREE OF PROOF.

The corroboration required against the estate of a deceased person under a statute preventing recovery upon the evidence of the opposite party alone "unless such evidence is corroborated by some other material evidence" need only be of such material facts as lead to the conclusion that the testimony of the party is true.

[*Radford* v. *Macdonald*, 18 A.R. 167, applied.]

Statement

APPEAL from the judgment of LENNOX, J., decreeing specific performance.

E. F. B. Johnston, K.C., for the appellants.

I. F. Hellmuth, K.C., and *A. R. Bartlet*, for the plaintiff, respondent.

Meredith C.J.O.

April 6. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment dated the 6th October, 1913, which was directed to be entered by Lennox, J., after the trial before him sitting without a jury at Sandwich on the 29th May, 1913.

The action is brought to enforce specific performance of an agreement alleged to have been entered into between the repondent and John Curry, deceased, by which the latter agreed

ONT.

S.C.

McGregor v. Curry.

Meredith, C.J.O.

with the respondent that, in consideration of his services in procuring subscriptions to the capital stock of a company which was proposed to be incorporated for the purpose of acquiring the land of the Walkerville Waggon Company and carrying on the business of manufacturers of motor cars at Walkerville, the deceased would transfer to the respondent 10 out of the 25 shares, of the par value of $100 each, which were to be allotted to the deceased in part payment for the land.

The company was incorporated under the Ontario Companies Act, by the name of the Ford Motor Company, by letters patent dated the 7th August, 1904, and the 25 shares were allotted to the deceased in May, 1905. Subsequently, the company was reorganised under a Dominion charter, and its capital stock was increased from $125,000 to $1,000,000, and each shareholder received 6 shares of the capital stock of the reorganised company for each share held by him in the Ontario company.

The appellants, besides denying the alleged agreement, plead as a defence to the action the Statute of Limitations, and sec. 12 of the Statute of Frauds, 9 Edw. VII. ch. 43.

The learned trial Judge found that the agreement was proved, and there was evidence sufficient to support his finding. It was contended at the trial, and again on the argument before us, that, if any agreement was proved, it was not an agreement to transfer to the respondent 10 out of the 25 shares which were allotted to the deceased in part payment of the purchase-money of the waggon company's land, but to transfer $1,000 worth of the stock, which the deceased might have satisfied by transferring any 10 shares of the capital stock.

Although, in testifying as to the terms of the agreement, the expression "$1,000 worth of stock" was used by the respondent and his brother, who testified that he was present when the agreement was made, the effect of the testimony of both of them, taken as a whole, is, that what was to be transferred to the respondent was 10 of the 25 shares which the deceased was to receive as part payment of the purchase-money of the land.

As I have said, the proper conclusion upon the evidence is, that the stock which the respondent was to receive was to be

ONT.
S. C.
McGREGOR v. CURRY.
Meredith, C.J.O.

part of the 25 shares which the deceased was to receive, and that it was a sufficient number of these shares at par to represent $1,000.

It was argued by the appellants that, assuming the agreement to have been proved, the respondent became entitled to have the 10 shares transferred to him so soon as the 25 shares were issued to the deceased. This view of the matter is not quite accurate. Where no time is fixed for the performance of a contract, the law is, that it must be performed within a reasonable time according to the circumstances; and that, in my opinion, was the obligation of the deceased.

It was also argued that the Statute of Limitations is a bar to the action and that in any case the respondent has been guilty of such laches and delay as disentitle him to the relief which he seeks.

In order to ascertain how far, if at all, these defences are maintainable, it is necessary to inquire what were the rights of the respondent which arose out of the agreement.

I apprehend that so soon as the services of the respondent which constituted the consideration for the deceased's promise were performed this deceased became a trustee for the respondent of the 10 shares and the respondent the equitable owner of them.

The position of a purchaser of land before conveyance was considered by this Court in *In re Flatt and United Counties of Prescott and Russell* (1890), 18 A.R. 1, and it was held, upon a review of the authorities, that until the conditions upon which the conveyance is to be made are performed and the purchaser becomes entitled to the conveyance he does not become the equitable owner of the land or the vendor a trustee for him. Maclennan, J.A., was of opinion that this was the position of the parties from the making of the contract, but the other members of the Court did not think so.

I know of no reason why the same rule should not be applicable to a purchase of shares in a joint stock company; and, if that be the case, the Limitations Act, 10 Edw. VII. ch. 34, has no application, the shares being trust property still retained by the trustee and therefore within the exceptions mentioned in sub-sec. 2 of sec. 47.

ONT.
S. C.
McGregor v. Curry.
Meredith, C.J.O.

The respondent's claim may be also supported upon the ground that he is entitled to specific performance of the contract to transfer the shares to him. That such an action will lie is well settled: Fry on Specific Performance, 5th ed., paras. 76 and 1497, and cases there cited. There is no Statute of Limitations applicable to an action for the recovery of personal property: *Charter* v. *Watson*, [1899] 1 Ch. 175; *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; and therefore no statutory bar to such an action, though doubtless laches and delay for even a shorter time than the statutory period of limitation in the case of real property may be a bar to it.

It is to be observed that laches and delay, except in so far as they are involved in the defence founded on the Limitations Act, are not pleaded; but, even if they were, the explanations offered by the respondent for the delay in bringing his action, if true—and they have been believed by the learned trial Judge to be true—would be an answer to such a defence.

The testimony of the respondent as to the reasons for the delay was not corroborated by other testimony; but, in my opinion, it was not necessary that it should have been, as his testimony as to the main question, the making of the agreement, was so corroborated, and the corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true. That I understand to be the rule as expounded in the cases to which the learned trial Judge refers.

There were, no doubt, circumstances and conduct upon the part of the respondent so inconsistent with the existence of the agreement which he alleges that, if unexplained, they would have been fatal to his success, and, even explained as they were, might have led to a different conclusion from that reached by the trial Judge; but that is no reason for reversing his judgment unless we are satisfied that he came to a wrong conclusion, and that I am not able to say. The learned Judge was impressed with the truthfulness of the respondent's testimony; and his standing in the community and truthfulness, as well as

ONT.

S. C.

McGREGOR v. CURRY.

Meredith, C.J.O.

those of his brother, were vouched for at the trial by the appellant Curry, and counsel for the appellants conceded that neither of them "would say anything he did not really believe."

There is no room for suggesting that they may be mistaken; their testimony was either true or false to their knowledge; and it is impossible to say that, with this certificate of character in their favour, as well as the trial Judge's belief in their truthfulness, it should have been rejected as false.

I would dismiss the appeal with costs.

Maclaren, J.A.

MACLAREN, J.A.:—I agree.

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

MAGEE and HODGINS, JJ.A., agreed in the result.

Appeal dismissed.

ALTA.

S. C.

Re LAWLER AND CITY OF EDMONTON.

Alberta Supreme Court, Scott, Stuart and Beck, JJ. October 23, 1914.

1. WRIT AND PROCESS (§ II A—10)—MAGISTRATE'S ORDER—MOTION TO QUASH—SERVICE OF NOTICE—SUFFICIENCY OF.

Service of notice of motion to quash a magistrate's order made under the Master and Servants Ordinance, 1904, Alta., for payment of wages may be made on the complainant by leaving it with an adult at his place of residence.

[*R. v. Trottier*, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, applied.]

2. STATUTES (§ II A—95)—MASTER AND SERVANT—DEMAND FOR WAGES—MAGISTRATE'S JURISDICTION—MASTER AND SERVANT ORDINANCE (ALTA.).

A previous demand for the wages is a condition precedent to the exercise of the magistrate's jurisdiction to award wages in a summary proceeding taken under the Master and Servants Ordinance, 1904, Alta.

3. STATUTES (§ II A—95)—WAGES—AWARD IN ADDITION—DISMISSAL FOR CAUSE.

The right conferred under the Master and Servants Ordinance, 1904, Alta., as amended by Alta. statutes, 1911-12, ch. 4, to award in addition to wages earned a sum in respect of the interval between the dismissal and the hearing of the complaint, applies to a case where the dismissal is sought to be justified on the ground of good and sufficient cause and not to a case where the dismissal was in pursuance of a legal right to dismiss without assigning cause.

APPLICATION to quash an order.

Order quashed.

J. C. F. Bown, K.C., for applicant.

F. D. Byers, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an application by way of *certiorari* to quash an order made by the acting police magistrate under

the Master and Servants Ordinance (1904, ch. 3—amended by Statute Law Amendment Act, 1911-12, ch. 4, sec. 11) for the payment by the city to the complainant of $75 as wages and $75 damages in lieu of notice on the ground of wrongful dismissal. A preliminary question was raised as to the service of the notice of the application upon the complainant.

The Crown Practice Rules (r. 2) require that the notice should be "served" upon the complainant. The rule does not say that personal service is necessary. In *Rex* v. *Trottier*, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, I held that "service" *simpliciter* does not mean only personal service; that leaving the paper at the person's residence or place of service was equally good service; and I referred to a number of authorities which make this quite clear. The service in the present case was made by serving a copy of the notice on the complainant's father at his place of residence which was also that of the complainant. The service was undoubtedly sufficient.

The complainant was employed in the streets and scavenging department which was under the direction of a superintendent. He was paid monthly. There was a regular "pay day," on which employees in the department received cheques for the previous month's wages by application to an official in the department.

The only provision of the Edmonton Charter which is material is sec. 5 of ch. 32 of 1913, 2nd sess.

No by-law of any kind was put in evidence. The complainant was dismissed by a notice dated August 13, 1914, which said that his dismissal would take effect on August 15, and that he would receive his salary to that date. This notice was given in pursuance of a resolution of the commissioners.

The complainant might have got his cheque by applying for it as he had done when getting a cheque for his wages for previous months. Instead of doing so he laid a complaint under the Master and Servants Ordinance for a month's wages, and on the ground of wrongful dismissal for another month's wages by way of damages in lieu of notice. It is true he demanded wages for the whole month of August and "a month's notice" which

ALTA.

S. C.

RE LAWLER AND CITY OF EDMONTON.

Beck, J.

may mean a month's additional salary in lieu of notice. But he was told also on this occasion that he would be paid his wages up to August 15. He made no demand for these wages. If his demand for more may be taken as a demand for these latter wages—though I think it cannot be—there was no refusal to comply with the demand, but, on the contrary, no offer to pay the amount. I think the demand meant by the Ordinance is a demand not complied with. The magistrate made an order in accordance with the complaint.

Under the provision of the Edmonton Charter which I have quoted, it is beyond question that the complainant could be dismissed at any time without notice and without cause or assigning cause. This is so clear on the words of the statute and in view of many decisions in England and in Ontario that it is quite unnecessary to discuss the question.

Another question is, however, raised on the construction of the Master and Servants Ordinance. Sub-sec. 1, sec. 3 of ch. 3 of 1904, says:—

> Any justice upon oath of any employee, servant or labourer complaining against his master or employer concerning any non-payment of wages (not exceeding two month's wages, *the same having been first demanded*) . . . may direct the payment to him of any wages found to be due (not exceeding two months wages as aforesaid) together with costs of prosecution.

Sub-sec. 3 of the same section (as amended by sec. 11 of ch. 4 of 1911-12), says:—

> In the event of the said justice determining that the servant or labourer has, *for good and sufficient cause*, been dismissed from the service of the master or employer, he may in addition to directing the payment to him of any wages found to be due (not exceeding two months' wages as aforesaid) direct such master or employer to pay such servant or labourer an amount not exceeding the wages which would have been earned by such servant or labourer between the date of his dismissal and the date of the determination of the matter of the complaint by such justice had such servant or labourer continued in such employment at the rate at which he was being paid when dismissed as aforesaid, together with the costs of prosecution.

The order of the justice was made on September 9; the dismissal on August 15, so that even if the foregoing provision was applicable it would not completely justify the order made by the justice even if he had purported to apply it, which he did

ALTA.

S. C.

RE LAWLER AND CITY OF EDMONTON.

Beck, J.

not, for the order declares that the dismissal was wrongful. In my opinion, the facts justified no order whatever against the city even if we exercised the fullest powers of amendment.

1. There was no wrongful dismissal. 2. The evidence does not shew a previous demand for payment of the wages in respect of which the complaint was laid. On the contrary it appears that the complainant not only knew that upon his going to the proper office he would receive a cheque for the amount of his wages earned up to the date of his dismissal, but was told that he would be paid his wages up to the date of his discharge. If there was a demand there was a compliance with it. The special provision of the Master and Servants Ordinance above quoted does not help him, because: 3. A previous demand is a condition precedent to the magistrate's exercise of jurisdiction to apply this provision—and there was no demand. 4. The provision in question contemplates a case where the dismissal is sought to be justified on the ground of good and sufficient cause and not to a case—as the present—where it is based on the ground of a legal right to dismiss without assigning cause.

In my opinion, the order of the justice should be quashed—without costs as the city does not ask for them.

WINDSOR, ESSEX AND LAKE SHORE RAPID R. CO. v. NELLES.

IMP.

P. C.

Judicial Committee of the Privy Council, Lord Dunedin, Lord Parmoor, and Sir Charles Fitzpatrick. October 20, 1914.

1. EQUITY (§ I H—45)—SPECIFIC PERFORMANCE—PRIMARY RELIEF—DAMAGES—ALTERNATIVE RELIEF—COURT OF EQUITY—JURISDICTION.

Where specific performance was the primary claim in the action and a decree was made for specific performance and alternatively on failure of that relief, a reference as to damages, the proceeding for damages, is nevertheless one in equity and not at common law, and an appeal from the decision of the provincial Appellate Court affirming the right to damages might have been taken as of right to the Supreme Court of Canada within 60 days thereafter without awaiting the result of the reference; and where no appeal was taken from that judgment it would not be competent for the court hearing the case on further directions after a report had been made on the referred question of damages, to open up the original decree, nor would it be competent on an appeal from the judgment on further directions for the Appellate Court to make an order which could not be made below.

[*Windsor, etc., R. Co.* v. *Nelles*, 10 D.L.R. 832, 47 Can. S.C.R. 230, affirmed.]

Statement

APPEAL from Supreme Court of Canada, 10 D.L.R. 832, 47 Can. S.C.R. 230.

Appeal dismissed.

IMP.

P. C.

WINDSOR, ESSEX AND LAKE SHORE RAPID R. CO. v. NELLES.

Lord Dunedin

The judgment of the Board was delivered by

LORD DUNEDIN:—The plaintiffs and respondents in this case were engineers and contractors, and acted as promoters in making preliminary arrangements and negotiating franchises through the different municipalities for the defendant company, now appellants.

The defendant company was incorporated by an Act of the province of Ontario of 1901. The plaintiffs entered into an agreement with certain persons who formed the major part of the provisional directors of the company, by which they stipulated for a payment of $ 900 of the paid-up capital stock of the company and $45,000 first mortgage bonds of the company to be paid to them by the company in respect of their services as promoters. The line was eventually constructed under arrangements which need not be here detailed.

The present action was brought on September 25, 1906, by the plaintiffs against the company and against the individuals who had been parties to the above-mentioned agreement. In the writ and statement of claim they claimed specific performance of the terms of agreement or damages for breach thereof, with various ancillary claims which need not be detailed. The action was tried before Mr. Justice Clute, and judgment was given against all the defendants on March 16, 1907, decreeing specific performance, and on failure to make good that decree to go before the master on a reference as to damages.

Appeal was taken by all the defendants to the Court of Appeal for Ontario, when, on April 21, 1908, the judgment of the trial Judge upon the merits (the defendants having on various grounds denied liability altogether) was affirmed. The action was, however, dismissed as against the individual defendants, but specific performance was again decreed against the company, and, failing specific performance, a reference as to damages. Upon that judgment the defendants (the present appellants) took no step to bring it to further appeal, but went back to the Court below and appeared before the master, before whom a long and expensive reference was conducted. On April 7, 1909, the Master made his report. That report

IMP.
P. C.
WINDSOR, ESSEX AND LAKE SHORE RAPID R. CO. v. NELLES.
Lord Dunedin

was brought before the Chief Justice of the Common Pleas by appeal, and, on January 23, 1911, the Chief Justice varied the amount as brought out by the master. On March 8, 1911, on a motion for further directions, the Chancellor of Ontario gave judgment against the company in accordance with the report as varied.

The company then appealed to the Court of Appeal for Ontario against the judgment of the Chief Justice varying the master's report and the judgment of the Chancellor on further directions. On April 28, 1911, the Court of Appeal unanimously dismissed both appeals with costs.

The appellants then appealed to the Supreme Court of Canada against the last judgment and sought in that appeal to review the original judgment of the Court of Appeal of April 21, 1908. The question of jurisdiction or competency was raised, and the registrar of the Supreme Court affirmed the jurisdiction of the Supreme Court to hear an appeal from so much of the judgment of September 28, 1911, as had reference to the order of the Chancellor on further directions, but held that the Supreme Court had no jurisdiction to hear an appeal from the original judgment of April 21, 1908. This order of the registrar was confirmed on appeal by the Supreme Court of Canada on February 23, 1912.

On March 6, 1912, an application was made by the appellants to the Chief Justice of Ontario for special leave to appeal from the original judgment of April 21, 1908, but was refused. On June 18, 1912, a motion by way of appeal from this order was made to the Court of Appeal for Ontario, and a substantive motion was also made to extend time and for leave to appeal. Both motions were refused, and the reasons of refusal were given by Mr. Justice Maclaren in a judgment in which Moss, Chief Justice of Ontario, and Garrow and Magee, JJ., concurred, in the following words (6 D.L.R. 541, at 542 and 543):—

> The trial Court ordered specific performance and in default damages. On appeal to this Court the judgment was modified, but specific performance was decreed against the company on the 21st April, 1908. . . . In my opinion the company might have appealed as of right from the last-named judgment within the sixty days provided by sec. 69 of the Supreme

IMP.
P. C.
WINDSOR, ESSEX AND LAKE SHORE RAPID R. CO. v. NELLES.
Lord Dunedin

Court Act . . . Sec. 38 (c) of the Supreme Court Act gives an appeal to that Court from any judgment whether final or not of the highest Court of final resort . . . in any action, suit, cause, matter, or judicial proceeding in the nature of a suit or proceeding in equity . . . Assuming that we still have the power under sec. 71 of the Supreme Court Act to extend the time and allow the appeal, I am strongly of the opinion that it should not be done.

On the argument of the appeal before the Supreme Court of Canada from the judgment on further directions which, as already mentioned, had been allowed by the judgment of that Court of February 23, 1912, the appellants maintained that this was a common law action and that, if so, they were entitled as of right to open up the original judgment on the appeal from the judgment on further directions. On December 10, 1912, the Supreme Court of Canada dismissed the appeal, [*sub nom Hesseltine* v. *Nelles*, 10 D.L.R. 832, 47 Can. S.C.R. 230], holding that they were not entitled under it to touch the original judgment of the 21st April, 1908.

When the appellants applied to this Board for special leave to appeal, the point was taken by the respondents that no appeal ought, in the circumstances above detailed, to be allowed against the original judgment of April 21, 1908. Their Lordships have perused the remarks of those of their Lordships who sat at the Board on the occasion of granting leave to appeal, and they are clearly of opinion that such leave was only granted *periculo petentis*, and that the point of whether leave upon a full knowledge of the circumstances should have been granted is still open.

The first matter to be considered is whether the Supreme Court were right in holding that under the judgment on further directions they were not entitled to go into the question of the merits which had been disposed of in the original judgment of April 21, 1908. Assuming that this were a common law action, the difficulty might be said to arise in this way: The appellate jurisdiction of the Supreme Court is dealt with as regards final judgments by sec. 36 of the Supreme Court Act. Now in the original common law procedure the judgment on liability and damages would always be given at one and the same time. That is obviously the case in cases tried by a jury, and would also

be so in cases tried by a Judge, and accordingly a judgment which fixed liability and assessed damages would inevitably be a final judgment. Since, however, the fusion of Courts of law and equity there has grown up a practice—convenient, no doubt, in cases tried before Judges without juries—to make a finding of liability and direct an inquiry into damages, a course of procedure which is really borrowed from the equity side. In such a case, is the judgment fixing the liability a final or is it an interlocutory judgment? The view in Canada seems to have prevailed that, so long as the whole matter is not effectively dealt with, the first judgment is merely interlocutory, and that therefore no appeal as of right lies against the judgment fixing liability, damages being yet undetermined, in a purely common law action. That being so, it seems to their Lordships that the judgment of the Supreme Court was necessarily right. The appeal from the directions had to do with the damages, and the damages alone. All that the Supreme Court could do was to pronounce the order which the Judge below should have pronounced if he had done it right. In other words, they might, if they thought right, have varied the amount of the damages; but the Judge below never could have touched the judgment on the merits of his own Court of Appeal; he, in pronouncing the order as to the damages, was really merely carrying out what the Court of Appeal had already determined as to the liability; and accordingly the Supreme Court could not pronounce an order which the Judge below himself could never have pronounced. This may be inconvenient, and as a matter of fact their Lordships notice that by a subsequent statute (ch. 51 of 3 & 4 Geo. V. sec. 1) an alteration in the law has been made which will allow a judgment of the class of which their Lordships have been speaking, which settles liability and leaves an inquiry as to damages to follow, to be treated as a final judgment. That, however, was not the law in Canada at the period to which these matters relate.

In their Lordships' view, however, this proceeding was not a common law proceeding, but was an equity proceeding. Specific performance was the primary claim, and the alternative claim for damages in default of specific performance is a well-known equity remedy, and in particular was one that was in use, to

IMP.

P. C.

WINDSOR, ESSEX AND LAKE SHORE RAPID R. CO. v. NELLES.

Lord Dunedin

be given by the old Court of Chancery in Ontario, as is evident by sec. 40 of the Chancery Act of Ontario (R.S.O., 1877, ch. 40). That being so, their Lordships are of opinion that Mr. Justice Maclaren was right in the passage already quoted, and that an appeal as of right against the judgment of April 21, 1908 lay under sec. 38(*c*) of the Supreme Court Act. That appeal was not taken, and although their Lordships are willing to consider that an application under sec. 71 was quite competent, that application was made and was refused by the unanimous judgment of the Court of Appeal of Ontario of June 18, 1912. Their Lordships have come to the conclusion that if these facts had been fully stated and understood as they now are no leave to appeal would have been given in this case. In their Lordships' view it would be most unfortunate that where a matter could have been brought up in the ordinary course, and where the discretion of the Court has been exercised, of saying that indulgence as to extended time should not be given, the whole of the proceedings should be allowed to come to an end, a long lapse of time intervene, and then the whole matter be opened from the very beginning by an appeal to this Board.

In these circumstances their Lordships do not express any opinion upon the difficult and intricate questions which were argued before them as to the technical objections which existed against the agreement sued on being binding on the company, but they will humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. March 9, 1914.

1. TAXES (§ IV—175)—LIEN FOR—ENFORCEABLE BY ACTION—ASSESSMENT ACT, 1904 (ONT.).

The lien given for taxes under sec. 89 of the Assessment Act, 1904 (Ont.), 4 Edw. VII. ch. 23, is not a mere possessory lien, but one which may be enforced by action and decree for sale.

[*Sturgeon Falls* v. *Imperial Land Co.*, 7 D.L.R. 352, varied; *Mutrie* v. *Alexander*, 23 O.L.R. 396, distinguished.]

2. TAXES (§ IV—175)—LIEN—ASSESSMENT—CHARGE RESULTING—SPECIFIC ON EACH LOT.

It is of the essence of the charge resulting from a tax assessment under the Assessment Act, 1904 (Ont.), and of the lien on the land under sec. 89 of that Act, that it is specific upon each separate lot or block.

[*Blakey* v. *Smith*, 20 O.L.R. 279; *Christie* v. *Johnston*, 12 Gr. 534, followed.]

3. TAXES (§ III—I—160)—ARREARS OF—PROMISSORY NOTE—LANDS NOT SPECIFIED—JUDGMENT—ELECTION—ASSESSMENT ACT, 1904 (ONT.).

By taking promissory notes for part of the tax arrears due by a company in respect of a number of separately assessed parcels of land without distinguishing the specific lands upon which the notes were to apply, and by taking judgment on such notes, the municipality must be taken to have elected to proceed under sec. 90 (Assessment Act, 1904, Ont.), and treat the arrears on such lands for the years in respect of which the notes were accepted by the municipal council as a debt and not realizable in any other way.

[*Bank of Africa* v. *Salisbury*, [1892] A.C. 281, applied.]

ONT.

S. C.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.

Statement

APPEAL from dismissal at trial in an action for a declaration that taxes to the amount of $9,531.30, for the years 1906 to 1910, both inclusive, on a very large number of parcels of land, were charged by special lien on those parcels in priority to every other claim, privilege, or incumbrance of every person (including the defendants) except the Crown; and for payment by the defendants or some of them of that sum and interest and the costs ($32.50) of an order permitting the action to be brought; and, in default of payment, to enforce the lien by sale; and also for payment by the defendants the Trusts and Guarantee Company Limited and the liquidator of the defendants the Imperial Land Company Limited of all sums received by them for rents and profits, insurance, or purchase-money, on any of the lands in question.

G. H. Kilmer, K.C., for the appellants.

S. H. Bradford, K.C., for the defendants the Imperial Land Company and Clarkson, liquidator of that company, respondents.

H. W. Mickle and *A. D. Armour*, for the defendants the Trusts and Guarantee Company, respondents.

March 9, 1914. The judgment of the Court was delivered by HODGINS, J.A.:—The rights given by sec. 89 of the Assessment Act of 1904 enable the plaintiffs to invoke the aid of the Court to enforce the lien given by that statute. The Court is not called on to declare the lien, but to assist the plaintiffs to realise it by decreeing a sale.

Hodgins, J.A.

If the plaintiffs established their right to judgment for the taxes, their special lien, created by statute, can be made effective, either by a judgment which will carry the right to sell under the Execution Act, or by an order providing for a sale. I see no

ONT.
S. C.
TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.
Hodgins, J.A.

greater practical difficulty in joining claims for liens on separate lots belonging to one owner than in joining claims upon separate mortgages, and I think Rule 69 permits what was done here.

While I agree with what is said in *Mutrie* v. *Alexander*, 23 O.L.R. 396, I do not think that case applies to or affects the plaintiffs' rights under sec. 89. Nor does the lien given by that section seem to be limited to a mere possessory lien, as the judgment in appeal seems to treat it. The words of the section are "enforceable by action;" and, although, if so enforced, the owner may lose the right, given by those sections which deal with tax sales, to redeem the tax purchaser, he has no cause to complain if his default is taken advantage of either by distress, action, or realisation of lien, without waiting for three years before a sale is had.

As to the years 1906 and 1907, the judgment holds that the plaintiffs, by taking promissory notes and recovering judgments upon two of them, have waived their statutory lien.

The notes are for a total of $2,957.93, made up of balance of "unpaid taxes on note of 1906," $1,372.58, and for 1907, a total of $1,640.69, less $55.34. This last total is made up of four items, the first three being taxes in Holditch, Merchants, and Cockburn wards, without specifying lots or amounts thereon, and the last being a sum of $209.38, made up of twelve items apparently due by taxpayers upon certain lots or parts thereof.

The notes are five in number, all dated the 1st September, 1908, and are for $500 each, except the last one, which is for $957.93. They bear six per cent. interest, and run at 3, 6, 9, 12, and 12 months respectively. Upon two of the $500 notes the plaintiffs have judgment for the amount thereof, interest and costs.

It is impossible to distinguish the specific lands or lots or the taxes relating thereto which entered into the amount of any one of these notes. Payment of, or obtaining judgment upon, two of them, is, therefore, inconsistent with the right of lien preserved or established by sec. 89, or the charge imposed by assessment. It is clear, I think, that, by taking the notes and obtaining judgment for the $1,000 and interest, the plaintiffs have elected

to proceed under sec. 90 and treat the taxes as a debt. If the notes had been given and received as covering specific taxes upon specific lots, it may be that the lien would still exist, notwithstanding the taking of notes, and would be only suspended; but the effect of a judgment for part of the debt, leaving the rest indistinguishable as to definite taxes or lots, is so to alter the situation as to put it beyond the power of the plaintiffs to realise in any other way than the one selected by them. Execution upon a judgment obtained gives a charge upon all the property of the debtor, and not only upon the specific lots covered by the taxes due in 1906 and 1907. The essence of the charge by assessment and of the lien under sec. 89 is, that it is specific upon each separate lot. The essence of the consolidation of the indebtedness by notes is, that the total is regarded as due by the company as a whole, and judgment for any part of it renders it impossible to say upon what lots and to what extent the remainder is, or represents, a specific charge or lien. The case in this respect seems to come within the words of Lord Watson in *Bank of Africa* v. *Salisbury Gold Mining Co.*, [1892] A.C. 281, at p. 284, "a new arrangement incompatible with the retention of the lien," referred to in *In re Morris*, [1908] 1 K.B. 473.

With regard to the objection that in 1908-9 the collector was the same person as the clerk, and that there was therefore no person to make proper demand, I am unable to understand why, if the collector is at the same time the clerk, he is disabled from making a demand. No doubt, difficulties may occur, caused by the dual position; but this is not one.

It is also argued that in 1910 the assessor failed to make his affidavit, as required by sec. 47, until after action brought, and that consequently the taxes were not due when sued for. I think this is answered, if it be the fact, by secs. 66 and 67 of the Assessment Act of 1904, and by sec. 409 of the Municipal Act, 1903 (sec. 300 in the present revision.)

In considering the individual assessments, sec. 22 of the Act of 1904, 4 Edw. VII. ch. 23, provides that (1) land "known to be subdivided" is to be "designated in the roll by the numbers or other designation of the subdivisions, with refer-

ONT.
S. C.
TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.
Hodgins, J.A.

ence where necessary to the plan or survey thereof." (2) Land "not subdivided into lots" shall be "designated by its boundaries or other intelligible description." (3) Each "subdivision shall be assessed separately, and every parcel of land (whether a whole subdivision or a portion thereof . . .) in the separate occupation of any person, shall be separately assessed." The only other reference is to what is to appear in the collector's roll.

Column 6. Number of concession, name of street, or other designation of the local division in which the real property lies.

Column 7. Number of lot, house, etc., in such division.

Column 8. Number of acres, or other measure shewing the extent of the property.

By sec. 33, sub-sec. 2, unoccupied land, the owner of which is resident in the municipality, shall be assessed against him.

By sec. 36, land is to be assessed at its actual value.

By sec. 40, sub-sec. 2, regarding the assessment of vacant land, it is provided that: "Such vacant land, though surveyed into building lots, if unsold as such, may be entered on the assessment roll as so many acres of the original block or lot, describing the same by the description of the block, or by the number of the lot and concession of the township in which the same is situated, as the case may be. (3) In such case, the number and description of each lot, comprising each such block, shall be inserted in the assessment roll; *and each lot shall be liable for a proportionate share as to value, and the amount of the taxes, if the property be sold for arrears of taxes.*"

In 1910 (by 10 Edw. VII. ch. 88), sec. 39 was remodelled and the above sec. 40 repealed, but the clause as given above was re-enacted in two sub-sections, except that the last words, which I have italicised, were omitted, and in place thereof the words "and the provisions of section 127 shall apply" were substituted, and the provisions were restricted to lands in a town or village held and used as a farm, garden, or nursery only, and in blocks of not less than five acres, by any one person.

[Dealing with the particular assessments, the learned Judge found the amount properly assessed in respect of certain lots.]

The taxes on lots grouped thus, 1908, West King, north

half, 17, 18, 19, East King, 32, 33, 34, should be disallowed, following *Blakey* v. *Smith*, 20 O.L.R. 279, and *Christie* v. *Johnston*, 12 Gr. 534. It was contended that these cases do not now apply, owing to the amendment made in 1910 by 10 Edw. VII. ch. 88, sec. 22.

Section 127, sub-sec. 1, of 4 Edw. VII. ch. 23, which was the Act in force when the assessments were made, permits an apportionment of taxes in arrear whenever it is shewn to the Court of Revision or to the council that taxes have become due upon land assessed in one block which has subsequently been subdivided, and this provision is retroactive. By the statute of 1910 the words "which has subsequently been subdivided" are struck out.

I am unable to see how this amendment helps the appellants. The section as altered still presupposes an assessment in one block, and that the taxes upon the block so assessed are due and in arrear.

The cases to which reference is made deal with the grouping of lots, any one of which may be "one block" within the meaning of sec. 127, but two or three of them, grouped as lots in one assessment, cannot possibly be properly described as "land assessed as one block." The enactment is in case of an owner of one or more parcels of the undivided block, who, finding taxes due and in arrear over the whole area, desires to redeem his holding by paying a proportion of the arrears. The apportionment is not made by the assessor, but by the council or Court of Revision, after notice to all the other owners, and having regard to all the circumstances. Nothing of that kind appears here, and there is no allegation in the statement of claim that either the council or the Court of Revision altered the assessments as they appear on the rolls in this respect.

There are a number of lots whose description is too indefinite, such as, in 1908, "East Main, part Market Square," and "Main to Market 16 lots," and these are properly disallowed.

The result is as follows. The judgment in appeal will be set aside, and the appellants will have judgment for the amounts of taxes allowed, with ten per cent. added each year up to the end of 1913, less the rents, if any, referred to below.

ONT.

S. C.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.

Hodgins, J.A.

I make the total, without the ten per cent., to be $2,780.72, and this amount may be checked by the Registrar and the ten per cent. calculated and added. The judgment will provide for payment of the amount of these taxes within one month, and in default, the appellants may proceed to realise their specific liens, upon the separate properties assessed, by sale, for which purpose it will be referred to the Master in Ordinary, unless any of the parties desire a reference to an officer in the provisional district: the purchase-money to be paid into Court, and the amount of the taxes and of the ten per cent. thereon and the costs of realisation as hereinafter directed, on each separate lot, to be paid out to the appellants upon the confirmation of the Master's report, and the balance, if any, on each lot, to the respondents in the order of their priorities.

The arrangement made at the trial that, in case it is found that any of the lands against which the appellants are allowed a lien are owned by persons not parties to this action, the appellants would abandon their claim thereto in this action, reserving their right to proceed for their lien against such persons in other proceedings, will be observed. If the parties cannot agree as to these lands, the Registrar of this Court will ascertain the facts and omit from the judgment the lands covered by that arrangement. In case any lands are so omitted, the judgment may contain a provision reserving the appellants' rights in regard to the same.

The judgment will also be without prejudice to the appellants' rights upon all the notes and judgments thereon already referred to.

I do not think this Court has anything to do with the effect of this judgment in or on the winding-up proceedings. Leave to bring this action was properly obtained; and, as the appellants were and are creditors of the Imperial Land Company for over $1,000, they had the right to apply to wind up that company. If they desire to prove on this judgment or to subordinate their rights under it to the jurisdiction of the Official Referee, the respondents can then be heard by him; but otherwise leave to proceed with the action involves the right to enforce it as against the parties to it.

ONT.

S. C.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.

Hodgins, J.A.

As the appellants have not established their right to the taxes other than those covered by this judgment, they should not be debarred thereby from taking any other steps open to them, if there are any, under the Assessment Act.

The respondents should pay to the appellants the costs of the action and appeal, except so far as these have been increased by the inclusion of claims for taxes which have been disallowed.

The appellants should have the right to add the proper proportion of the costs of realising their lien to the taxes upon the several lots which are subject to the lien.

The appellants must pay the rents referred to in the judgment, less the amounts received from the lands for which the taxes are allowed by this judgment, to such of the respondents as the Master in Ordinary shall find to be entitled thereto, and the amounts thereof to be ascertained by him unless agreed to by the parties.

Appeal allowed in part.

GREENWOOD v. KIRBY.

MAN.

K. B.

Manitoba King's Bench, Curran, J. June 16, 1914.

1. BILLS AND NOTES (§ I A—2)—LIEN NOTE—AGREEMENT FOR ADDITIONAL SECURITY—NOT A NEGOTIABLE PROMISSORY NOTE—BILLS OF EXCHANGE ACT (CAN.).

A lien note which contains, in addition to the promise to pay, the promisor's agreement to furnish additional security when demanded and which stipulates for acceleration of the due date by the promisee if he deems himself insecure, is not a negotiable promissory note within the Bills of Exchange Act, Can., and presentment before action thereon is not necessary.

[*Bank of Hamilton*, v. *Gillis*, 12 Man. L.R. 495, applied.]

ACTION on lien notes.

Judgment for the plaintiff.

J. F. Kilgour, for plaintiff.

J. H. Chalmers, for defendant.

Curran, J.

CURRAN, J.:—There are two plaintiffs in this action, one an individual named Samuel Hulme Greenwood, resident at Elkhorn, in the Province of Manitoba, and the other the Canadian Bank of Commerce, an incorporated bank having a branch at Elkhorn, aforesaid. The defendant is a resident of Fleming in the Province of Saskatchewan. The action is brought to recover a balance of $1,985.57, and interest, alleged to be due in re-

MAN.

K. B.

GREENWOOD v. KIRBY.

Curran, J.

spect of two certain lien notes or lien contracts, exs. 1 and 2, made by the defendant, payable to the order of the individual plaintiff, each dated November 11, 1911, for the sum of $1,000 respectively, and payable on May 1, and June 1, 1912, at Elkhorn. Both documents are dated at Elkhorn and are admitted to have been signed at that place. Upon each has been endorsed an assignment to the plaintiff bank from the individual plaintiff, in the following words:—

For value received the moneys payable under the within instrument are hereby assigned to the Canadian Bank of Commerce or to its order and the maker of said instrument is hereby instructed to pay said moneys accordingly.

(Signed) S. H. GREENWOOD.

Upon each instrument is endorsed, below the foregoing assignment, the following memorandum:—

Elkhorn, 21 July, 1911.

The within note surrendered to S. H. Greenwood on bailee receipt for purposes of taking action against the promisor.

(Sgd.) R. BROTHERHOOD, Mgr.

The action was commenced by original statement of claim in the name of the individual plaintiff only, on June 12, 1913, and an amended statement of claim was filed on June 18, 1913, in which the Bank of Commerce was joined as a party plaintiff. The amended statement of claim alleges that the lien notes in question were assigned to the plaintiff bank as security for the payment of an account owing by the plaintiff Greenwood to the plaintiff bank and that the plaintiff bank now holds the said notes in trust for the plaintiff Greenwood, upon trusts whereby the moneys owing thereunder, when collected, shall be applied; first, in payment of indebtedness of the plaintiff Greenwood to the plaintiff bank, and then in payment of the balance to the plaintiff Greenwood.

The defences set up are:—

1. Denial of the making by the defendant of the lien notes or contracts sued on; 2. Denial of presentment before action or at all; 3. In the alternative that, if made, the lien notes or contracts sued on were so made in pursuance of a certain agreement of sale in writing, dated October 23, 1911, whereby the defendant agreed to purchase from the plaintiff Greenwood certain lots in the village of Fleming in the Province of Saskatchewan, together with a certain stock of farm implements, and all the goods of the plaintiff Greenwood then in stock in connection with his business as

a farm implement dealer, and also the stock in trade of the plaintiff Greenwood in connection with his business as lumber, coal and wood merchant, all of which are more particularly described in the said agreement of sale. 4. Payment in full before action to the plaintiff Greenwood without notice of the alleged assignment to the plaintiff bank. 5. Alternatively that the agreement in question was entered into at the village of Fleming in the Province of Saskatchewan and that by the provisions of a statute of that Province, known as the Land Titles Act, and particularly section 125, thereof, the said agreement for sale and the lien notes sued on are absolutely null and void. 6. Denial that the plaintiffs or either of them are the holders or owners of the alleged lien notes as alleged or at all.

The defendant counterclaims and asks: (*a*) for a reference to the Local Master to take accounts between the parties, and that the plaintiffs, or one of them, be ordered to pay defendant the sum overpaid by him on the notes of which the plaintiffs or either of them may be found the holders or owners; (*b*) that it may be declared that the said agreement of sale and the lien notes given in pursuance thereof are absolutely null and void, and ordered to be delivered up and cancelled, and the plaintiffs or one of them ordered to return to the defendant all moneys paid thereon with interest.

The defence further alleges a re-assignment by plaintiff bank to the plaintiff Greenwood of the lien notes sued on, and that subsequently to such re-assignment the plaintiff Greenwood assigned these notes, with other property, to the Western Jobbers Clearing House, Ltd., and if it should be found that any sum is owing by the defendant in respect of the lien notes sued on the defendant submits his rights to the Court in respect thereof and asks in any event to recover his costs of this action against the plaintiffs.

It is true that the plaintiff Greenwood did make an assignment in trust to the Western Jobbers Clearing House, Ltd., on November 12, 1913, ex. 7, but this assignment purports to deal only with property situated in Manitoba, belonging to the plaintiff Greenwood, connected with his Elkhorn business, and its operation is restricted in terms to such property, so I do not see how it can be contended, even if the lien notes in question were re-assigned to the plaintiff Greenwood and owned by and vested in him at the time he made this assignment to the Western

MAN.

K. B.

GREENWOOD v. KIRBY.

Curran, J.

Jobbers Clearing House, Ltd., that such notes could, or did, pass thereunder to this company, in view of the restrictive provisions contained in the deed of assignment, so this phase of the case is eliminated and need not be further considered.

The signing of the lien notes in question is not only proved by the plaintiff Greenwood, but is in fact admitted by the defendant, so there can be no question about the defendant's liability upon them unless he can be relieved upon some of the grounds of defence raised.

As to the defence of payment, it was conceded at the trial that the accounts between the plaintiff Greenwood and the defendant would have to be gone into, a somewhat lengthy and complicated matter, and one which a trial Judge could not conveniently undertake; so I intimated at the trial that if the legal questions raised by the defence were decided adversely to the defendant, I would hold the defendant liable upon the notes and direct a reference to the Local Master at Brandon to take accounts between the parties, and reserve further directions and costs until after the Master should have made his report.

The plaintiff contends that the documents sued on are lien notes or lien agreements and not negotiable instruments and therefore presentment was not necessary. The defendant contends to the contrary and argues that these instruments are negotiable promissory notes and that non-presentment having been pleaded, the plaintiffs must prove presentment or fail in their action. The instruments sued on, exs. 1 and 2, are, upon their face, clearly in the form usually adopted in this province for lien notes, or, at all events, contain many, if not all of the special agreements usually to be found in such documents, with possibly the one exception that the description of the property is not specific. On this ground the plaintiff seeks to distinguish them from a lien note proper. With the exception of the due dates and description of the property both notes are identical and read as follows, omitting the small print containing the special agreements, which I will summarize:—

$1,000. Elkhorn, Nov. 18th, 1911.

On the first day of May, 1912, for value received, I promise to pay S. H. Greenwood, or order, the sum of one thousand dollars ($1,000) at Elk-

horn, with interest at Eight (8%) per cent. per annum from February 12, 1912, until due, and eight (8%) per cent. per annum after due until actually paid. Given for part payment of Fleming lumber stock.

Then follow certain special agreements by the promisor. 1st, that the title to and ownership of the goods for which the note was given shall remain in the plaintiff Greenwood and shall not pass until the note is paid; 2nd, an agreement to furnish security at any time if required by the plaintiff Greenwood, and that failure to furnish such security, or default in payment, shall entitle the plaintiff Greenwood to declare the note due and payable at any time, and bring suit against the defendant thereon; 3rd, an agreement that if the plaintiff Greenwood should consider the note insecure, of which he shall be the sole judge, he shall be entitled to declare the note due and payable at any time, and bring suit thereon; 4th, that in the event of any of the foregoing contingencies happening, the plaintiff Greenwood shall have the right to take possession of the goods and hold them until payment of the note or sell them at public or private sale, and apply the proceeds on the amount unpaid, in which event the promisor agrees to pay any balance then remaining due. The other instrument sued on is in identical terms except that the date of payment is June 1, 1912, the rate of interest till due is 7 per cent. per annum and it is expressed to be given "for part payment for stock of farm implements." Both instruments are signed by the defendant at the end or foot thereof.

The defendant's counsel pressed the argument very strongly that the so-called "lien clause" was mere surplusage, whether regard be had to the intention of the parties as shewn in the agreement for purchase, ex. 4, upon which the transaction was founded, or to the form of the instruments sued on. He argues that the agreement, ex. 4, contains no provision for the reservation of the lien; on the contrary, that the parties expressly intended that the property should pass and that a chattel mortgage should be taken.

A chattel mortgage was taken on November 18, 1911, ex. 10, and the defendant's counsel argues that it is inconsistent with the reservation of a lien, also that inasmuch as the same form

MAN.
K. B
GREENWOOD v. KIRBY.
Curran, J.

of instrument (*vide* ex. 8) was used for the land purchased as well as for the goods, this shews that the printed form was used apparently only because it was the form at hand and not for any significance attached to the small print relating to conditional sales. He further contends that the reference to a stock of lumber and stock of implements does not identify it in the least, or afford any description from which any goods supposed to be covered by the instrument could be ascertained. He argues that chattel mortgage cases afford some analogy on the subject of insufficiency of description; that the principles of the law of contract on the subject of uncertainty of description make it clear that there must be sufficient certainty not merely as against third persons under special statutes, but as between the parties themselves. No authorities as to what sort of description of goods is necessary in the case of lien notes or agreements given to evidence conditional sales have been cited, and I have been unable to find any.

As between the immediate parties, is it not possible that this certainty of description may be ascertained by the act of the parties so as to bind the purchaser? It is admitted that the instruments sued on were given in pursuance of exhibit 4. This document is an ordinary agreement for the sale of lands, and provides for the purchase by the defendant from the plaintiff Greenwood of certain lots in Fleming, for the price or sum of $3,300, payable as therein stipulated, and to be secured by promissory notes agreeable to the terms of payment therein mentioned. It also contains an agreement on the part of the defendant to purchase from the plaintiff Greenwood

all his stock of farm implements, vehicles, repairs, binder twine and all other goods on hand and in transit such as is usually kept in connection with the farm implement business, at the wholesale prices, adding freight and handling charges,

also,

all his stock of lumber, shingles, mouldings, finish, lime, plaster, cement, paper, coal and all other goods on hand or in transit that are usually sold or kept in stock in connection with the lumber and coal business at the wholesale list prices, adding handling charges.

There is a covenant on the part of the defendant to pay interest on the unpaid portion of the purchase price of the goods:

to pay $1,000 cash on account of this price and to secure the payment of the balance by chattel mortgage and notes to cover the full amount of the purchase price of the stock aforesaid. This agreement is dated on October 23, 1911, and was apparently signed at Fleming.

Now, before the purchase price of these goods could be ascertained, something more was required to be done, namely, a taking of stock and ascertainment of the wholesale price of the freight and of the cost of handling, whatever that may mean. The plaintiff Greenwood says that stock was taken shortly after the agreement was entered into, and an inventory, ex. 5, made, which shews the total value of the stock to be $9,130.56. When the balances were figured out the defendant made the cash payment of $1,000 required, and signed the notes, eight in number, which include the notes sued on, and was let into possession of the property. He is still in possession and has been carrying on the business so purchased ever since.

Some of the notes have been paid, namely, a note of $500, part of ex. 8, given on account of the land, and another of the land notes for $1,000, and other payments have been made by the defendant to the plaintiff Greenwood on account of others of the notes so given. In the face of this state of affairs, it would be idle, I think, to argue that the subject-matter of the purchase of the different stocks of goods and chattels has not been definitely ascertained.

It is true the agreement, ex. 4, does not reserve a lien, neither does it exclude the right of the parties to so deal with the chattel property as to have a lien thereon reserved when the final ascertainment of the goods and their price was made. It is also true that the giving of a chattel mortgage is expressly provided for by this agreement, and that such would be inconsistent with the property in the goods not passing to the purchaser.

The chattel mortgage given was put in as ex. 10. It is dated November 18, 1911, the same date as the lien notes sued on, and was executed at Elkhorn. For some reason it does not secure the whole amount of the purchase price of the goods, but only $4,836 and it covers future goods to be taken into stock, con-

MAN.

K. B.

GREENWOOD v. KIRBY.

Curran, J.

tains a covenant to pay this sum, $4,836 with interest on January 1, 1912, and also all moneys received from the sale of goods from October 23, 1911, until the amount of the indebtedness is paid, and also to secure the unpaid portion of said sum by note bearing interest at the rate aforesaid. This mortgage does not appear to be the chattel mortgage in terms contemplated by the agreement, exhibit 4, and certainly does not secure all of the notes given for the purchase price as provided by the agreement. It does cover future goods to be taken into stock and this fact may account for its being taken notwithstanding the giving of the lien notes. However, the fact remains that prior to the giving of the eight lien notes by the defendant, the identity of the chattel property and its value for purposes of the sale had been ascertained. It was quite consistent then, I think, for the parties, under these circumstances, to determine between themselves that lien contracts and not negotiable promissory notes should be used to secure the purchase price of these goods. At all events this seems to be what they did, and such instruments were in fact used, and I think I am bound to give effect to them as such, at all events with respect to the lien notes sued on.

In Barron & O'Brien on Chattel Mortgages, 2nd ed., at 147 it is laid down that

> No matter what the intention of the parties to an instrument may be, effect can only be given to words in the conveyance as they are found, and the Court cannot carry out the intention of the parties under such instrument, if the words used do not shew verbatim such intention: *Tapfield* v. *Hillman*, 12 L.J.C.P. 311; *Mason* v. *McDonald*, 25 U.C.C.P. 439.

Might not this principle be applied to conditional sales as well as to mortgages of chattels, where the parties have deliberately evidenced their bargain by written lien agreements in such form as to exclude their operation as negotiable instruments under our Bills of Exchange Act? In any event, apart from the objection raised as to the indefiniteness of the description of the goods in the instruments in question, I think such instruments contain other provisions or special agreements not authorized by the Bills of Exchange Act and wholly separate from the promise to pay, namely the promisor's agreements to furnish security satisfactory to the payee at any time if re-

quired, and his agreement that if he fails to furnish such security when demanded, the payee shall have full power to declare the note due and payable at any time; also the further agreement by the promisor that if the payee should consider the note insecure, of which he shall be the sole judge, he shall have full power to declare the note due and payable at any time, and in either contingency, to sue the promisor thereon *irrespective of the actual date of maturity*. These are provisions which, I think, fall well within the reasoning of the Court in the *Bank of Hamilton* v. *Gillies*, 12 Man. L.R. 495.

In that case the instrument sued on contained a provision that if the promisor "shall sooner (that is before the due date) dispose of, sell or attempt to sell the undermentioned land, which he owns, the same (that is, the note) to be payable on demand." This was held by Mr. Justice Dubuc, at p. 501, to be a special agreement not consistent with the negotiable nature of a promissory note as contemplated by the Bills of Exchange Act.

The agreement as to title and ownership not passing, and as to the payee's right to take possession of the goods and sell, were also held in the same case by the same Judge not to be consistent with the negotiable nature of a promissory note. Similar provisions as to title, etc., and the right to take possession are found in the instruments in question. So, following the *Bank of Hamilton* v. *Gillies, supra*, I think I must hold that these instruments are not negotiable instruments within the meaning of the Bills of Exchange Act, and that presentment before action was unnecessary.

As to the defence based upon the Saskatchewan statute, I do not think that statute has any force or effect upon the plaintiff's cause of action, as the lien agreements sued on were made and payable in Manitoba; the remedy sought is one *in personam* and the contracts are, in my opinion, legal and valid contracts in this Province, and as such enforceable here against the defendant, whatever may be the case in Saskatchewan. I must hold, therefore, that this ground of defence fails, and with it that part of the counterclaim founded upon it. The defence that the plaintiffs or either of them are not the holders or owners

MAN.

K. B.

GREENWOOD v. KIRBY.

Curran, J.

of the lien notes cannot prevail. It is clear that both plaintiffs are interested in the money secured by these instruments; the bank to the extent of its claim against the individual plaintiff, and he in any balance that may remain out of the moneys realized after the bank's claim has been paid. No formal re-assignment of the lien contracts to the plaintiff Greenwood has been proved, and it may be that, strictly speaking, he ought not to have been joined as plaintiff; but the bank have expressly surrendered the lien notes to him for the purpose of taking action against the defendant, and so long as the defendant is protected by the judgment of this Court from actually having to pay to more than one party plaintiff, I do not think he is at all prejudiced or can be injured by the form in which the action is brought.

There will be judgment for the plaintiff, with a reference to the Local Master at Brandon to take the accounts between the plaintiff Greenwood and the defendant, and ascertain what balance, if any, is still due and owing upon the two lien agreements sued on. I reserve further directions and costs until after the Master shall have made his report. If necessary a proviso can be inserted in the judgment that, upon payment of the amount so found due to either plaintiff such payment will be a full discharge and acquittance to the defendant of all liability in respect of these notes to both plaintiffs, and if the plaintiff does not wish to accept this proviso, the action may be dismissed as to the plaintiff Greenwood without costs, though I do not consider this to be necessary under the circumstances.

N. S.

S. C.

BANKS v. PEARSON.

Nova Scotia Supreme Court, Graham, E.J. November 16, 1914.

DAMAGES (§ III F—145)—SALE OF LAND—DECEIT—MISREPRESENTATION—RECKLESS STATEMENTS—INTENTION.

Where the claim is not for rescission of a sale of land, but for damages for deceit, brought after conveyance has been made, based on misrepresentations as to quantity and yield of the land sold, it must be shewn that the defendant knew his representation was false or that the defendant made the statements recklessly and without any belief, knowledge or care as to its truth or falsity, with the intention that the purchaser should act on them.

Statement

ACTION claiming damages for false representations as to quantity, yield, etc., in connection with the sale of a farm.

Judgment for plaintiff.

W. E. Roscoe, K.C., for plaintiff.

W. A. Henry, K.C., for defendant.

GRAHAM, E.J.:—About March, 1911, the plaintiff purchased from the defendant a farm at Paradise, in the county of Annapolis, for $5,000. In the negotiations the defendant represented to the plaintiff that it contained 149 acres, that it cut 22 tons of hay, that there was quite a lot of wood and timber, that it had not been logged since Starratt had the place—that was 13 or 14 years before. I am taking the testimony of Charles Jodrey, a witness who has no pecuniary interest, inasmuch as the parties are at variance. A deed was given of the property dated April 10, 1911. The farm was described as consisting of 135 acres to the north of the road and 14 acres to the south of the road. The plaintiff, when he had a chance to sell some of it in the rear, in January, 1913, had occasion to pace it off, and became aware that there must be a shortage.

He consulted a solicitor and a measurement was advised, and it proved that there was only 113½ acres in the farm. In respect to the hay, it did not cut 22 tons. The first year it cut between 10 and 12 tons; the second year it cut 16 tons. In respect to the woodland, while the negotiations, as I said, took place in March, 1911, the defendant had in fact, in January, 1911, under contract with one Balcom, already agreed that the latter should log the wood lot, and Balcom had commenced in Januray to log the lot, and had by March 10 cut down 62,000 ft., worth between 4 and 5 dollars a thousand standing, and by March 20 had removed it all except five or six loads, which he afterwards removed except three loads.

In respect to the shortage in the acreage, the defendant's testimony—and he is corroborated by his wife—is that he stated, in answer to the plaintiff's question as to the acreage, that his deed gave him that amount, and it does so; that he guarded himself in that way. But I think I must take the evidence of Jodrey on that point. He is positive that it was not qualified in that way, and he was cross-examined in respect to that matter particularly.

But the defendant contends that in this kind of an action, brought not for a rescission, or in a case where there has been an express preliminary agreement providing for the contingency

N. S.
S. C.
BANKS
v.
PEARSON
Graham, E.J.

of a shortage in quantity, there having been a completion of the contract and a deed given, there cannot be a recovery of damages unless it is shewn that the defendant knew his representation was false, or that the defendant made the statement recklessly and without any belief, knowledge or care as to its truth or falsity, with the intention that another should act on it.

I think I have to yield to this contention in respect to the acreage. It is suspicious that the defendant had lived on the place so long, 13 years, and had not discovered that there was really a shortage of about 35 acres in the 135 acres of land above the road as described in the deed. I cannot say, when he had this deed to rely on, that he knew he was misrepresenting the acreage or that he was reckless in making the statement.

In respect to the yield of hay, the defendant says that the representation was that it would cut 15 or 16 tons, and that in speaking of 22 tons he included the cut of another lot on which he still resides, and which, although under negotiation, was not included in the final bargain. And he admits that he never got 22 tons off the property sold, although he argues that it might be made to produce that.

As I said, I am taking the testimony of Mr. Jodrey, and he says that it was in respect to the 169-acre lot that the representation of 22 tons applied to. In respect to this statement, I am of opinion and I find that the defendant knew that the place did not cut 22 tons of hay, and in respect to this representation the plaintiff is entitled to recover.

It is contended for the defendant that the plaintiff was late in making his complaint, but I can quite understand a plaintiff not making a complaint about such an uncertain thing as the yield of hay on a piece of land in different years; and moreover, not until the material representation about the acreage had turned out incorrect. The period of 6 years under the Statute of Limitations would run from the date of the agreement.

In respect to the wood lot, the defendant says that what he did say was:—

> Mr. Banks asked me how about the wood, and the remark I made to him was there was wood enough on the place to last your lifetime, and it will leave some for your boys. That is all that was said about the wood.

This is reiterated by his wife. But Mr. Jodrey corroborates the evidence of the plaintiff, and I accept that.

N. S.
S. C.
BANKS
v.
PEARSON.
Graham, E.J.

It is said that it is improbable that the defendant would say such a thing when the actual fact would be very shortly found out. It may also be said that it being a matter that in the ordinary course should have been disclosed by a vendor, yet this vendor did not disclose it, although the fact would be very shortly found out. Even taking his own statement of what he said in answer to the plaintiff's inquiry, it, considering the fact that he had so recently let a contract for cutting the wood over a certain size on the property, would be misleading and fraudulent: Kerr on Fraud, 59 and 60.

This was a matter that he knew to be untrue.

Here, too, there is a question of delay, but it appears that the plaintiff did not discover the cutting until the autumn of 1911, and even then he could not ascertain from Balcom whether it was logged after the purchase or before, and did not apparently find out when the action was brought. In respect to this matter, the defendant received from Balcom, he says, some $260 for the timber cut.

In respect to the two false representations I have last dealt with, I think they were in respect to substantial matters, and an essential inducement to the plaintiff to make the bargain, and that he relied on them.

In respect to damages, I assess them at the sum of $460, but I cannot allow the plaintiff the costs.

First, he has failed on a substantial matter, namely, as to the acreage, and secondly, in my opinion, although it was not mentioned at the hearing, the 6th paragraph of the statement of claim as to the cutting of the timber will require to be amended in accordance with the facts as I have found them, and I allow such an amendment.

CARRIQUE v. CATTS AND HILL.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ. December 24, 1914.

1. CONTRACTS (§ III F—291)—MISREPRESENTATION—CONTRACT INDUCED BY —PARTIAL INFORMATION—RATIFICATION.

It is insufficient to prove partial information giving rise to suspicion only, to prove affirmance of a contract notwithstanding the false representation on which it was obtained; there can be no effective affirmation or election which is not based on complete and exact knowledge.

[*Jarrett* v. *Kennedy*, 6 C.B. 319; *Clough* v. *London & N.W. R. Co.*, L.R. 7 Ex. 26; *Re London & Prov. Electric, Ex parte Hale*, 55 L.T.R. 670; *Morrison* v. *Universal Marine*, L.R. 8 Ex. 40, 197, referred to.]

ONT.

S. C.

CARRIQUE v. CATTS AND HILL.

Clute, J.

APPEAL from the judgment of LENNOX, J., setting aside a contract for sale and for damages.

H. D. Gamble, K.C., for the appellant Catts.

W. E. Raney, K.C., for the appellant Hill.

James H. Carrique, the plaintiff, respondent.

CLUTE, J.:—The action is brought by the plaintiff to set aside a contract of the 5th January, 1912, as having been obtained by fraud, and for the return of $5,000 paid thereunder. An amendment was allowed, permitting the plaintiff to claim $1,000 for loss of time, expenses, etc.

The judgment set aside the contract as fraudulent and void, and damages were assessed to the plaintiff at $6,000.

There is evidence to support the finding that the contract was obtained by misrepresentation and fraud. The trial Judge did not accept the evidence of the defendants. He saw the witnesses, and it was for him to say what weight he would attach to their evidence.

The real difficulty in the case from the plaintiff's standpoint is that, upon his own evidence, it is quite clear that he did not repudiate the contract after he had become fully aware of the misrepresentation made to him, but on the contrary treated it as still existing for some months, and in his correspondence and interviews with the defendants allowed them to believe that he regarded the contract as valid. This view of the case does not seem to have been taken, or, if taken, pressed, at the trial.

The trial Judge finds that, shortly before the execution of the contract, and as an inducement to the plaintiff to enter into it, the defendant Catts, in the presence and hearing of Hill, stated to the plaintiff that he had made a contract with Mr. Hastings, of the Hydro-Electric, to install lamps at the corner of King and Yonge streets, in the city of Toronto, as a test, the lamps to be up within two weeks, and the plaintiff regarded this as a very important concession, and he believed Mr. Catts' statement and was influenced by it. He further states that evidence given by the plaintiff satisfied him that Hill heard this statement, and his subsequent actions indicated that he did not believe it; that the defendant Catts had not the slightest justifi-

cation for this representation, and it was false in every particular. He further finds that the defendants, acting in concert, falsely and fraudulently represented to the plaintiff that in the matter of the sale of the patent Catts was dealing with Hill exactly upon the same terms as he was dealing with the plaintiff, and that Hill was actually and in good faith paying Catts $5,000 in money just as the plaintiff was paying that sum, and that the plaintiff accepted and relied upon these representations, and, but for them, although other representations had influence with him, would not have entered into the contract with the defendant Catts. He finds that what happened was this. After the contract was executed, the plaintiff and the defendant Hill each deposited his cheque for $5,000 with a solicitor to be handed to Catts on the 6th February if everything with respect to the patent was found to be all right at Ottawa. On the 6th, Catts got the cheques, and cashed the plaintiff's cheque at the Traders Bank. Hill was in the Traders Bank when Catts was there to get the money—Hill says, for identification only. Catts handed over to Hill the $5,000 he got on the plaintiff's cheque. Hill took this money to his own bank, and deposited it there to meet his own cheque at about 2.45 p.m., for which he had made no provision until then, and before 3 o'clock p.m. Catts presented Hill's cheque, got it accepted, and later got it cashed at the King Edward Hotel, and left for New York that night. The defendants pretend that at this time Hill made a *bonâ fide* sale of Porcupine-Heela stock to Catts for $5,000, and that the handing over of the money from Catts to Hill and the immediate repayment of it was not a sham. The trial Judge comes to a different conclusion, and finds, upon the evidence of the defendants' witness J. C. Cottrell, and contrary to the evidence given by Catts, that neither Johnston nor Cottrell was in Toronto at that time, or upon the other occasion referred to, or at any time with $5,000 to pay for this stock, or with any money or to make any arrangement to pay for this stock, and that neither Cottrell nor Johnston had any knowledge of it. He further points out with regard to the Porcupine-Heela stock that the company was not organised and is not shewn to have been incorporated, and when this sale is said to have been made not

ONT.
S. C.
CARRIQUE v. CATTS AND HILL.
Clute, J.

a foot of land had been acquired; a worthless location was conveyed to the company afterwards. After further dealing with the transaction, and not accepting the evidence of the defendants where it conflicts with other evidence, he finds that neither of the defendants considered that the stock was worth $5,000 or any substantial sum of money, and that Mr. Hill's cheque was issued, and that money passed from one to the other and back again, in pursuance of a dishonest scheme of the defendants to deceive and entrap the plaintiff, and to embarrass him and mislead the Courts in case of complaint, and there was no *bonâ fide* sale of stock to Catts as alleged. He further finds that the plaintiff has not ratified or affirmed the contract.

Having regard to the view taken of the evidence by the learned trial Judge, I see no ground to interfere with his finding so far as it relates to the manner in which the contract was obtained.

The question of the plaintiff's conduct after he became aware of the fraud presents some difficulty. The day after the agreement was made, the plaintiff says, the first thing Hill did was to propose to organise the company, and that he would open an office and get 15 per cent. for selling the stock. The plaintiff said it was a pretty big commission, and was in direct contravention of the syndicate agreement, which said that no commission or remuneration is to be paid to any member of the syndicate for any work done, but that the manager of the syndicate is to be paid his disbursements.

It was strongly urged on behalf of the defendants that the plaintiff is not entitled to set aside the agreement entered into between him and them, because, as he states, after he had his suspicions, and knew it was a fraud, he treated the contract as still subsisting. He insists that he never intended to affirm the contract, but, on the contrary, to disaffirm it, and that he delayed the matter only that he might get more evidence.

As to whether or not there was an election in fact depended upon the view the trial Judge took of the evidence, and he in fact finds there was not.

The learned Judge referred to the cases of *Morrison* v. *Universal Marine Insurance Co.* (1872-3) L.R. 8 Ex. 40, 197, also

ONT.

S. C.

CARRIQUE v. CATTS AND HILL.

Clute, J.

to Halsbury's Laws of England, vol. 20, p. 738; *Campbell* v. *Fleming*, 1 A. & E. 40; *Whitehouse's Case* (1867), L.R. 3 Eq. 790, 794 (*ib.*).

It is pointed out in *Ex p. Hale* that the *Whitehouse* case did not decide that the waiver of one point was a waiver of all, but that the waiver of objection that there was a discrepancy between the company's prospectus and its memorandum and articles of association amounted to a waiver of any other discrepancy.

In the present case, having regard to the facts as found by the trial Judge, and the credit which he gave to the plaintiff's evidence, I am unable to say that the plaintiff elected to affirm the contract. Fraud having been established, he was entitled to have it rescinded.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed. Mulock, C.J.Ex. Sutherland, J.

RIDDELL, J., dissented. Riddell, J.

Appeal dismissed with costs.

CHADBURN v. PIUZE.

QUE.

C. R.

Quebec Court of Review, Archibald, Saint-Pierre and Mercier, JJ. March 7, 1914.

1. BROKERS (§ II B 1—13)—REAL ESTATE—INTRODUCTION—SALE UNSUCCESSFUL—COMMISSION—INDEPENDENT NEGOTIATIONS.

Where a real estate broker has negotiated with a certain person or introduced him to the owner, but his efforts to sell to such person have proved unsuccessful and have been abandoned, he can claim no compensation on a sale afterwards made as the result of independent negotiations with which such broker was in no way connected.

[*Stratton* v. *Vachon*, 44 Can. S.C.R. 395, distinguished.]

THE judgment inscribed for review, which is reversed, was rendered by the Superior Court, GREENSHIELDS, J.

Foster, Martin, Mann, McKinnon & Hackett, for the plaintiffs.

Jos. Adam, K.C., for the defendant.

The opinion of the majority of the Court was given by

SAINT-PIERRE, J.:—Thomas A. Chadburn and A. Byron Hunt, the plaintiffs, are real estate brokers carrying on business in partnership at Montreal. St. Pierre, J.

In the course of the month of January, 1911, Piuze, the defendant, who at that time was the owner of a property situated in the eastern part of St. Catherine street which he desired to

QUE.

C. R.

CHADBURN v. PIUZE.

St. Pierre, J.

dispose of, entrusted the sale of it to Chadburn, who was an old friend of his. Upon the property, a hotel had been built which was called "The Imperial Hotel," and the property was generally known as "The Imperial Hotel property." Chadburn advertised the property, and through his advertisement, found a prospective purchaser in a man known as Morris Tannenbaum who keeps a fashionable tailoring establishment for ladies in Montreal, but who occasionally entered into speculations upon real estate in the eastern part of the city, sometimes alone, but at other times in joint venture with one Jacob Roston, his brother-in-law. The price demanded by Piuze for his property was $30,000. On February 8, 1911, Tannenbaum submitted a written offer of $27,500 for the property, said offer to be good for five days, but it was refused by Piuze. Time ran on, and the five days had long since expired, when Piuze, on the solicitation of Chadburn, was persuaded to reduce his price, first to $29,000 and later on to $28,000; but Tannenbaum would not budge from the stand he had taken. It was to be $27,500 or no sale.

Things were in that condition, when an incident took place, which had the effect of considerably decreasing the value of the property and of bringing Piuze to a more moderate view. The renewal of the hotel license for the ensuing twelve months had been refused to the tenant of the hotel, a man of the name of Archambault, and the latter, without even waiting for the expiring of his lease, was selling the fixtures which he had put up in the hotel. Piuze did not let his agent Chadburn know these facts, but contented himself with informing him that he had altered his mind, and that he was now willing and ready to accept Tannenbaum's offer of $27,500. Unfortunately, this acceptance of Tannenbaum's offer had come too late, and on being informed of Piuze's decision, Tannenbaum declared that he had disposed of his funds in some other enterprise, and that he was no longer in a position, financially speaking, to buy the property.

It is admitted that, although the sale of the property had been entrusted to Chadburn, yet Piuze had reserved to himself the right to sell it if a suitable purchaser came forward, provided, of course, that said purchaser was not one of those with whom Chadburn was then negotiating. Seeing that Chadburn's efforts to sell to Tannenbaum had proved unsuccessful, Piuze, who had

in sight the prospect of finding himself burdened with his hotel, left without a license and without a tenant for the next twelve months, concluded that the best thing he had to do was to attempt to sell it himself. He made no secret of this to anyone, not even to Chadburn. "Since you cannot succeed in selling my property," said he to him, "I shall try and see if I can sell it myself." This was about April 15. As I said before, the fixtures of the hotel had been sold, and one Debrofsky, a merchant who lived across the street, had bought the greater part of them, which he a short time afterwards sold to one Carl Rosenberg. Now, Debrofsky, who was well acquainted with Piuze and who saw that *la débacle* had already begun, thought that a good opportunity was at hand for him, either to purchase the property in his own name, if he could persuade the vendor to lower his price so as to bring it within his reach, or, in the event of his being unsuccessful in this, to find a purchaser who would pay the price demanded by Piuze, and thereby to secure a fat commission. He therefore called upon Piuze and began negotiations by making an offer of $25,000 for the property in his own name. This offer having been refused, he then fell back on his second scheme, and set to work in search of a purchaser who, being possessed of a larger share of this world's wealth than he was, might make a higher offer. He says that he had seen about a dozen people, when a second incident occurred which brought Tannenbaum back again upon the scene. Rosenberg, who had bought the fixtures of the hotel, was a great friend of Tannenbaum. The two having met together about that time, Rosenberg spoke to Tannenbaum about his recent purchase of the fixtures of the Imperial Hotel, which, he said, he required for a hotel he himself was then building in the upper part of St. Lawrence Main St.; then, bringing back to mind the fact that Tannenbaum had, some time before, made an offer for the hotel from which he had got his fixtures, he said: "By the way, Tannenbaum, you told me that you had made an offer for that property; why don't you try to get it now that the renewal of the license has been refused and the fixtures have been sold out; you could get it, at this time, for $24,000 or $25,000." Rosenberg then explained to him that he had got the fixtures through Debrofsky, who was now hunting up a purchaser for the property. He suggested that Tannenbaum might employ Debrofsky, who

QUE.
C. R.
CHADBURN
v.
PIUZE.
St. Pierre, J.

would, no doubt, obtain the property for him at that reduced price. Tannenbaum's answer was that he had disposed of his funds in some other enterprise, and that for that reason he was no longer in a position to purchase the property; but that, perhaps, his brother-in-law, Roston, might buy it. He wound up by requesting his friend to see Debrofsky and tell him that he wished to speak to him. Rosenberg, as requested, went to see Debrofsky and delivered him the message he had received from Tannenbaum. At the interview which followed between Debrofsky and Tannenbaum, the latter repeated to him what he had said to Rosenberg, that, as he had disposed of his funds, he could not now purchase the property, but that he thought that Roston had money, and that if he (Debrofsky) called upon him he might get an offer for it. Debrofsky tells us that he did not follow Tannenbaum's suggestion immediately, but called upon several other parties before seeing Roston. Whether he did or did not, however, is immaterial, and we know as a certainty that, whether immediately or a little later on, he did, as a matter of fact, call upon Roston, as suggested by Tannenbaum, and that he obtained from him a written offer for $27,000 which he brought to Piuze, and which, after some discussion, was finally accepted by the latter.

The conversation which took place between Piuze and Debrofsky in the interview they had together is of considerable interest, and constitutes an important feature in the case. When Debrofsky informed him that he had a written offer for $27,000, Piuze, at the very outset, insisted that the name of the purchaser be made known to him. Debrofsky, however, refused to give it at first. Piuze then gave his reasons why he insisted to know the name of this purchaser. He said: "I have given my property for sale to a friend of mine, and if your man is the same one with whom my friend has been negotiating, I shall certainly not sell my property through you." Debrofsky then said: "What is the name of your man?" Piuze could not pronounce correctly the name of Tannenbaum, which he only remembered imperfectly, and made an attempt to spell it, beginning with the letter T. "If your man's name begins with a T," interposed Debrofsky, "he is not my man. Here is my man: his name is Roston," he at the same time handing him the written offer which bore Roston's

signature. This appeared to have had the effect of dispelling all further scruple from Piuze's mind, and, being now convinced both by Debrofsky's protestations and by the signature at the foot of the written offer that he was dealing with a new man, Piuze accepted the offer. This was about April 20 or 22. The necessary titles and papers were at once sent to a notary by Piuze, and on May 1, which was a Monday, the deed of sale was signed at the notary's office. Piuze swears that, when he accepted Roston's offer, he knew neither Roston nor Tannenbaum. He says that he met Roston for the first time in his life on Saturday, April 29, and Tannenbaum, at the signing of the deed in the notary's office, when he was introduced to him by Debrofsky after he (Piuze) had signed the deed of sale. Debrofsky for this work, was paid by Piuze, by way of commission, a sum of $200 in cash, and was given a sewing machine worth $25. Tannenbaum being called upon, when examined as a witness, to account for his presence in the notary's office, at the signing of the deed, explains that his object in being there was to assist his brother-in-law, who is not as well versed in legal lore as he himself is, and to see that everything was done correctly and in proper form. Five or six weeks later, Tannenbaum bought from Roston the undivided half of the property for half the price paid by the latter, and upon the same terms and conditions which are to be found in the deed of May 1. Those are the substantial and leading facts of the case.

The learned Judge who pronounced judgment in the first instance found: (1) That at the time of the sale to Roston, Chadburn, the plaintiff, was still the agent of Piuze for the sale of his property, and that negotiations were still pending between Chadburn and Tannenbaum; (2) that the sale of the property, though apparently made to Roston, was in reality a sale to Tannenbaum and Roston, both being engaged in a joint venture when so purchasing; (3) that Chadburn, being the agent who had found and produced Tannenbaum who eventually had become one of the joint purchasers, was entitled to his commission as real estate agent.

I regret to have to differ from the learned Judge, but I cannot find my way to agree with him upon any of the above three propositions.

QUE.
C. R.
CHADBURN v. PIUZE.
St. Pierre, J.

In the first place, is it true that, at the time of the sale to Roston, negotiations were still going on between Chadburn and Tannenbaum, about the sale of the property? It is clear that they were not. Chadburn himself admits that, after Tannenbaum's declaration to the effect that he could not longer make good his offer of $27,500, for the reason that he had disposed of his money in some other enterprise, he (Chadburn) had made up his mind to sell the property to some other people. Piuze swears that he made him aware of his intention to sell his property himself: "Since you cannot succeed in selling my property to Tannenbaum," said he to Chadburn, "I shall try and sell it myself." That Tannenbaum did not possess the means at that time to buy the property has been proved beyond all doubt. I therefore hold that Piuze was no longer bound by Chadburn's negotiations with Tannenbaum, and that he was now free and at liberty to sell his property himself, provided, of course, he did not sell it to Tannenbaum, through a "*prête-nom*" or a "go-between," who would advance the money for him. The following rules of law which I find in the American and English Encyclopedia of Law, under the heading "Real Estate Brokers," vol. 23, come in, here, in support of my views on this point: "In order for a real estate broker to be entitled to compensation or commission," says the compiler, "he must have performed his full duty towards the employer, and have accomplished all he undertook to do; that is to say, he must, as a general rule, have found and produced a person who was ready, willing and financially able to purchase . . . at the price and upon the terms fixed by his employer." A broker is not, as a general rule, entitled to commission, "where the customer produced by him fails or refuses to consummate the sale." "Where a broker has negotiated with a certain person or introduced him to the owner, but his efforts to sell to such person have proved unsuccessful and have been abandoned, he can claim no compensation or a commission on a sale to such person some time afterwards, as the result of independent negotiations with which he (the real estate broker) was in no way connected."

The next question is: Was the sale to Roston practically one made to Tannenbaum? This is the crucial point in this controversy. The learned Judge who decided the case in the first instance assumed that it was, and apparently based

his opinion upon the presumptions which he thought should be derived from the following facts: (1) Roston was Tannenbaum's brother-in-law; (2) both of them had, on former and recent occasions, speculated together upon real estate and bought real estate property on joint venture; (3) Debrofsky, who was looking for a purchaser, was directed by Tannenbaum to call upon Roston, whom he represented to him as a possible purchaser; (4) Tannenbaum was present in the notary's office on the 1st of May when the deed was signed, and, finally, (5) five or six weeks after the sale he (Tannenbaum) had purchased a half interest in the property for half the price actually paid by Roston, and upon the same terms and conditions which had been agreed to by the latter. I am willing to admit that this chain of circumstances is, at first glance, of a nature to lead to the conclusion which the learned Judge has drawn from them; but we must not lose sight of the fact that they are but presumptions, and that such presumptions are susceptible of being rebutted, and that, as a matter of fact, they were rebutted by the positive evidence given by Tannenbaum and by Roston, who both swore emphatically that the property was bought by Roston alone, and that it was paid for with Roston's own money. That Tannenbaum may have entertained the hope or even the expectation of becoming at a later date a joint owner of the property, or of obtaining a joint interest in, it the thing was quite within the range of possibility, and is even probable; but I hold that, unless we brush aside the sworn affirmations of those two men, whose depositions have remained uncontradicted, no other conclusion can be drawn but that Tannenbaum was not a purchaser of the property, either in whole or in part. Roston might have kept it for himself had he wished so to do; and then where would the *lien de droit* be between Chadburn and Piuze, had Roston come to such a determination? It may be that, when Tannenbaum directed Debrofsky to see Roston, his brother-in-law, he might have done so with the hope, or even the expectation, of being given the privilege of buying a half interest in the property later on, but such hope or expectation could not possibly constitute him a *joint purchaser together with Roston*. In addition to this, I will say that I find nothing very extraordinary in the fact that Tannenbaum might have put a profitable bargain in the path of his brother-in-law. On the contrary, it appears to me that

QUE.
C. R.
CHADBURN
v.
PIUZE.
St. Pierre, J.

the moment he could not take up the undertaking himself, it was quite natural that he should have endeavoured to favour his relative, more particularly if he saw looming up in the distance the hope of being allowed to share with him, at some future date, the profits which were expected to be realized from the purchase of the property by Roston. In the frame of mind in which I assume Tannenbaum then was, I see nothing that might create surprise in the further circumstance that he deemed it expedient to be present at the signing of the deed of sale in the notary's office. He said he went there to assist his brother-in-law, who is less versed in legal lore than he himself claims to be, and to see that everything was correctly done. There is certainly nothing very extraordinary in this, more particularly when the transaction involved an expenditure of $27,000. For those reasons, I must say that I am unable to find my way to legitimately reach the conclusion that Tannenbaum was, either under cover of the name of his brother-in-law, or otherwise, a purchaser of Piuze's property on May 1. On the contrary, I am compelled, by the positive affirmations of Tannenbaum and of Roston, to accept the conclusion that Roston bought the property alone and with his own money, though Tannenbaum may, all the while, have entertained the hope that at some future date he might persuade his brother-in-law to sell him a half interest or any other share in the property in question.

The third question is the following one: Was it through Chadburn's work that the property was sold to Roston? Here again I am compelled to answer this third question in the negative. We have been told that Chadburn was the man who discovered Tannenbaum, and that it was through him that Roston had been put into communication, first with Debrofsky, and, through the latter, with Piuze, the vendor. This is perfectly true, but this could not constitute Chadburn the determining cause, the *causa causans* of the sale to Roston. It is true that the name of Roston was suggested by Tannenbaum as a possible purchaser, but Tannenbaum himself having ceased to be a prospective purchaser, the fact of his pointing out Roston as a party who might possibly buy the property could no more have the effect of creating a *lien de droit* between Chadburn and Piuze than any similar information might have done had it come from any other one of the

hundreds of persons who, like Tannenbaum, had obtained their knowledge of the fact that the property was offered for sale from the reading of the advertisement which had been put up by Chadburn in the public papers. In the first place, Debrofsky had learned, not from Chadburn, but from a totally different source, that the Piuze property was for sale, and as to his discovery of Roston as a possible purchaser through Tannenbaum, this could not create any right in favour of Chadburn against Piuze, for the plain reason that Chadburn had nothing to do with this discovery of Roston, whom he did not even know. "In order to entitle a real estate broker to compensation for, or commissions, on a sale or exchange of property," says the compiler of the American and English Encyclopedia of Law, "he must have been the procuring cause thereof, that is, it must have been the direct result of his exertions to bring it about. But when he is the procuring cause of the sale which has been actually made, he is always entitled to commission or compensation, even though the sale is made by the owner directly to the purchaser." In the present case, the sale was made through the exertions of Debrofsky. Now, who told Debrofsky that Piuze's property was for sale? Was it Chadburn, either through his advertising the property or otherwise? No. Debrofsky, who was living across the street and opposite the Imperial Hotel, tells us that he was made aware that the property was for sale by what was going on in the hotel itself and by the general talk in the locality, and he says that his information received a formal confirmation when he called upon Piuze directly and made an offer of $25,000, as a purchaser on his own account. At that time he had not seen Tannenbaum yet, and knew nothing of the intention which the latter had once expressed of purchasing the property. Chadburn had nothing to do with the way by which Debrofsky had come to know that the property was for sale. As I have just said, the source from which he had obtained his knowledge of the proposed sale of the property was altogether distinct from, and independent of, the knowledge acquired by Tannenbaum. Next, was it Chadburn who conveyed to Debrofsky the information that Roston might be a possible purchaser? No, Chadburn knew nothing of Roston. Debrofsky got his information from Tannenbaum, but at the time when he got this information, Tannenbaum, having made up his mind not

QUE.
C. R.
CHADBURN v. PIUZE.
St. Pierre, J.

to buy the property, was now free to point out to Debrofsky, Roston, his brother-in-law, or any one else whom he thought might be a possible purchaser. Chadburn had nothing to do with the information which Tannenbaum imparted to Debrofsky. There is more still to be said: Tannenbaum would never have thought of imparting such information to Debrofsky had he not been told by Rosenberg, a day or two before, that the property could now be bought for $24,000 or $25,000. The following rule of law, which I also find in the American and English Encyclopedia of Law under the same heading will again come in support of the opinion I hold on this point: "An owner of property, desiring to sell the same, may employ several different brokers for that purpose if he so desires. In such case, the broker through whose instrumentality the purchaser is produced, who is the procuring cause of the sale, is entitled to the entire commission, to the exclusion of all others, and the owner cannot defeat his right by actually making the sale through another broker, nor can the agent who had first found a purchaser be deprived of his right to a compensation by the fact that the property is sold through another broker to a different purchaser." Now, who found out and produced the purchaser who bought Piuze's property? It was Debrofsky. And who persuaded Roston on the one hand, and Piuze on the other, to agree to the sale of the property at the price of $27,000? Again the answer is: Debrofsky. It is clear, therefore, that Debrofsky's work was the procuring and determining cause of the sale, and that he and he alone was entitled to the commission which was paid to him by Piuze. What did the work of Chadburn consist in? He found a prospective purchaser in the person of Tannenbaum through advertising Piuze's property in the public press. Tannenbaum made an offer which, after being refused at first by the vendor, was finally accepted two months later, that is to say, at the time when Tannenbaum was no longer in a position to carry out his offer into effect; and this is all; and yet it is contended that he, Chadburn, who, as a matter of fact, effected nothing, should be given the commission, whilst Debrofsky, who discovered the purchaser and actually brought both vendor and purchaser into mutual agreement, and who finally caused the sale to be made, should get nothing.

[The learned Judge here referred at length to the case of *Stratton* v. *Vachon*, 44 S.C.R. 395.]

And continued:—

Things are different in the case under consideration. Chadburn, after discovering Tannenbaum as a prospective purchaser, failed to effect a sale with him. Then another agency, totally independent from that of Chadburn, appears on the scene, and, through this last agency, the property is sold to a purchaser absolutely unknown to Chadburn and without any participation on his part. It is clear that there exists no similarity between the case of Stratton and the one now under consideration. There might be found some points of resemblance between the two had it been shewn that Roston and Tannenbaum had actually bought the property together *in partnership or in joint venture*, but, as I have explained above, I hold that no such a fact has been proved. It has been said that Piuze, having been warned by Chadburn to be careful not to sell to Tannenbaum's partners, should not have rested satisfied with Debrofsky's statement, but should have made further inquiries about Roston. My answer is, supposing he had done so, and that he had found out that Roston was Tannenbaum's brother-in-law, would this have been evidence that they were partners, or that both of them intended to purchase his property as a joint venture? Chadburn himself is compelled to admit that he did not know who Tannenbaum's partners were, nor even whether he had any or not. Let us even go a step further and assume that Piuze had failed to make sufficient inquiries. Are we, on account of his lack of prudence, to condemn him to pay to the plaintiffs a commission to which they are not entitled, for the reason that they did not earn it? I am satisfied, however, that Piuze did act with reasonable care and prudence on the occasion in question and that his good faith cannot be questioned for a single moment.

For all those reasons, I have no hesitation in coming to the conclusion that the judgment under review must be reversed, and the plaintiff's action should be dismissed, and by the present judgment of the majority of the Judges of this Court it is reversed and annulled, and the plaintiff's action is dismissed, the whole with costs in both Courts.

ARCHIBALD, J., dissented. *Appeal allowed.*

ONT.
S. C.

Re SOUTH OXFORD PROVINCIAL ELECTION.
MAYBERRY v. SINCLAIR.
SINCLAIR v. MAYBERRY.

Ontario Supreme Court, Appellate Division, Clute, J. August 11, 1914.

1. ELECTIONS (§ II B—55)—BALLOTS—VOTER'S MARKS—PENCIL OR INK MARKING.
The direction of sec. 102 of the Election Act, R.S.O. 1914, ch. 8, that a voter shall mark his ballot "making a cross with a black lead pencil" is not imperative so as to invalidate a ballot marked in ink. [*The Wigtown Case*, 2 O'M. & H. 215, followed.]

2. ELECTIONS (§ II B—37)—BALLOTS—STAMPING—INDORSEMENTS.
Sec. 114 of the Election Act, R.S.O. 1914, ch 8, being applicable to the deputy returning officer, but not to the "returning officer," a ballot not stamped by the latter official in accordance with the imperative direction of sec. 71(2) is not to be counted.
[*The Thornbury Case*, 16 Q.B.D. 739, distinguished.]

3. ELECTIONS (§ II C—69)—BALLOTS—CANVASSING—RECOUNT.
In a recount under the Election Act, R.S.O. 1914, ch. 8, the ballot is to be looked at and not the poll book.

4. ELECTIONS (§ II B—58)—BALLOTS—MARKING—SUPERFLUOUS MARKS.
A ballot clearly marked for each candidate must be disallowed.
[*Re Halton Election*, 4 O.L.R. 347, applied.]

Statement.

APPEAL from the recount before his Honour J. G. Wallace, Deputy Judge of the County of Oxford.

The appeals were heard by CLUTE, J., as a Judge of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, pursuant to the Ontario Election Act, R.S.O. 1914, ch. 8, sec. 144.

R. McKay, K.C., for Mayberry.

E. Bristol, K.C., for Sinclair.

Clute, J.

August 11. CLUTE, J.:—Upon the recount before His Honour, it was agreed by counsel that the votes properly cast for Sinclair were 2,569 and that the votes properly cast for Mayberry were 2,566.

Appeal was taken on 47 ballots referred to in His Honour's judgment as exhibits Nos. 1 to 47 inclusive. Out of these ballots he allowed Sinclair 17, which added to 2,569 agreed upon by counsel makes 2,586 ballots which he finds properly cast for Sinclair; and out of the said ballots he allowed Mayberry 15, which added to 2,566 agreed upon by counsel, makes 2,581 which he finds were properly cast for Mayberry, leaving a majority in favour of Sinclair of 5: 13 of the 47 ballots were disallowed, 1 ballot declined, and no change was made in exhibit No. 30, which accounts for the 47 before referred to.

I shall deal with the Mayberry appeal first.

In the notice of appeal, "re objection 1," etc., corresponds with the number of the exhibit as filed on the recount before the County Court Judge and as produced before me.

Exhibit 1. Ballot marked in ink for Sinclair. It is claimed that this vote should not be counted; that sec. 102 of the present Election Act, R.S.O. 1914, ch. 8, directs that the ballot shall be marked with a black lead pencil, and that this direction is not directory but imperative. The section directs that the voter, on receiving his ballot, shall forthwith proceed into one of the compartments of the polling place, and there mark his ballot, "making a cross with a black lead pencil within the white space containing the name of the candidate," etc. I cannot yield to this contention. It does not say that he *shall* make a cross with a black lead pencil. The section further provides that, having marked the ballot, the voter "shall then fold the ballot paper," etc., "so that the initials and stamp on the back of it and the number on the counterfoil can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it," etc.

I do not think it can be successfully argued that a fault in folding a paper or unfolding it or examining the initials should vitiate a ballot paper, as would be the case if the word "shall" is to bear the meaning contended for throughout the section. Nor should, in my opinion, such effect be given in regard to the use of the pencil.

[Reference to the *Monck Case* (1876), H.E.C. 725, 734; *The Wigtown Case* (1874), 2 O'M. & H. 215, p. 223; *The Berwick on Tweed Case* (1880), 3 O'M. & H. 178, 180.]

This objection fails.

Objections 6, 8, 16, in the notice of appeal, correspond to *exhibits* 19, 20, 23, 38, 39. These also are cases of the ballot being marked with ink instead of pencil, and also fail.

Exhibits 6, 11, 12, *and* 22. The question here raised is as to the validity of a ballot not stamped by the returning officer under sec. 71(2), and affects four ballots which have been counted for Mr. Sinclair, viz., 6, 11, 12, and 22, and two ballots which have been counted for Mr. Mayberry.

ONT.

S. C.

RE SOUTH OXFORD PROVINCIAL ELECTION.

Clute, J.

The respondent relied on the *Thornbury Case, Ackers* v. *Howard* (1886), 16 Q.B.D. 739.

The *Ackers* case, while instructive, does not cover the point here in question. What the decision would have been in the absence of the official mark upon the back of the ballot papers and in the absence of the clause declaring that "any ballot paper which has not on its back the official mark . . . shall be void and not counted," it is impossible to say; but that is the question here involved.

Section 114 directs the deputy returning officer to "reject all ballot papers . . . (*a*) which have not been supplied by him . . . but no word, letter or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper, shall avoid the same or warrant its rejection." The last clause does not cure the defect here, as, under sec. 71(2), it is the returning officer, and not his deputy, that is required to stamp every ballot paper "with a stamp furnished to him for that purpose by the Clerk of the Crown in Chancery, the impression of the stamp being so placed on the ballot paper that, when the ballot is folded by a voter, the impression can be seen without the ballot paper being opened." This enables the deputy returning officer to see that the ballot paper is official.

By sec. 98, the voter shall receive from the deputy returning officer a ballot paper on the back of which the deputy returning officer has previously put his initials so placed as directed in Form 12 that when the ballot is folded his initials can be seen without opening it, and on the back of the counterfoil of which he has placed a number corresponding to that placed opposite the voter's name in the poll book.

By sec. 102, the voter, after making his mark, shall so fold the ballot paper *that the initials and stamp* on the back of it *and* the *number on the counterfoil* can be seen without opening it, and hand it to the deputy returning officer, *who shall, without unfolding it, ascertain, by examining* his *initials, and the stamp and the number on the counterfoil,* that it is the same ballot paper that he furnished to the voter, and shall then, in view of all present, including the voter, remove the counterfoil and . . destroy it and place the ballot paper in the ballot box.

Form 12, referred to in sec. 98, indicates on the back of the ballot paper the place where the initials of the deputy returning officer and the stamp of the returning officer and the number on the counterfoil are to be placed, so that when folded by the voter the deputy returning officer may identify the ballot paper by the initials, stamp, and counterfoil, as required by sec. 102.

The question here then is quite different from that decided in the *Ackers* case. It is, whether a ballot paper not duly stamped by the returning officer is a ballot paper within the meaning of the Act?

Under sec. 71 (1) and (2), every ballot paper furnished by the returning officer to his deputy shall be stamped with the stamp furnished by the Clerk of the Crown in Chancery. Is this peremptory and imperative?

"Shall" shall be construed as imperative: the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (cc); *Hunt* v. *Wimbledon Local Board* (1878), 4 C.P.D. 48, approved in *Young* v. *Mayor, etc., of Leamington* (1883), 8 App. Cas. 517, at p. 522, where Lord Blackburn quotes with approval the judgment of Lindley, L.J., in the Court of Appeal in the same case (1882), 8 Q.B.D. 579, 585; *Hoare* v. *Kingsbury Urban District Council*, [1912] 2 Ch. 452, at p. 466.

The object of the Act is to secure complete secrecy in voting. The counterfoil is destroyed as soon as the deputy returning officer identifies the number of it with the number opposite the voter's name. The clause requiring the official stamp prevents fraud and gives security to those having the right to vote by ensuring the use only of ballots issued by the returning officer, the identity of which shall be certified by the official seal furnished by the Clerk of the Crown in Chancery stamped on each ballot.

To permit ballot papers not so stamped to be used would, in the language of Lindley, L.J., approved by Lord Blackburn in the *Young* case, "in effect be repealing the Act of Parliament," and would deprive the public of that protection which Parliament intended to secure for them.

In my opinion, no ballot paper may be used which is not stamped by the returning officer, as upon a recount such ballot can only be identified by the official stamp. Without such stamp

ONT.
S.C.
RE SOUTH OXFORD PROVINCIAL ELECTION.
Clute, J.

it is discredited, and the failure of the voter or deputy returning officer to observe the defect does not cure it. The initials and number on the counterfoil, being wrongly placed there, cannot give it validity, nor do they help to identify it as issued by the returning officer.

The curative section, 114, applies only to the deputy returning officer, and does not and was not intended to apply to the returning officer. On the contrary, if the Legislature had intended that the absence from the ballot paper of the official stamp to be placed there by the returning officer should not avoid the vote, it is impossible to suppose that the part of sec. 114 covering the acts of omission and commission of the deputy returning officer would not have been extended to the returning officer. The deputy returning officer is brought within, and the returning officer is excluded from, the operation of the curative clause, 114. This evidences a clear intention of the Legislature to regard the mandatory direction to the returning officer as imperative. As was said by Hawkins, J., in the *Ackers* case: "It would be difficult to suggest a case to which the maxim . . . '*expressio unius est exclusio alterius*,' could be more justly and fittingly applied." This maxim is specially applicable when applied to the interpretation of a statute: Broom's Legal Maxims, 7th ed., p. 501; *The Queen* v. *Caledonian R.W. Co.* (1850), 16 Q.B. 19, 31; *Watkins* v. *Great Northern R.W. Co.* (1851), 16 Q.B. 961, referred to in *Caledonian R.W. Co.* v. *Colt* (1860), 3 Macq. H.L. Sc. 833, at p. 839; *Edinburgh and Glasgow R.W. Co.* v. *Linlithgow Magistrates* (1859), 3 Macq. H.L. Sc. 691, at pp. 717, 730; Maxwell on the Interpretation of Statutes, 5th ed., pp. 504, 529; Craies' Statute Law, 2nd ed., p. 249(*b*); *Whiteman* v. *Sadler*, [1910] A.C. 514, 527; *Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628, 634; *Hamilton* v. *Baker* (1889), 14 App. Cas. 209, 217; *Woodward* v. *Sarsons* (1875), L.R. 10 C.P. 733, 746; *Bowman* v. *Blyth* (1856), 7 E. & B. 26, at p. 45; *Rex* v. *Loxdale* (1758), 1 Burr. 445; *Cubitt* v. *Maxse* (1873), L.R. 8 C.P. 704, 715; *Thwaites* v. *Wilding* (1883), 12 Q.B.D. 4.

In the above cases the statutes were held to be absolute and imperative.

A case of a statute being directory merely is that of *Regina* v. *Lofthouse* (1866), L.R. 1 Q.B. 433, where a statute enacted,

for the purpose of electing a local board of health, that "the chairman shall cause voting papers, in the form in schedule A" to be distributed to the voters. The voting papers were not in the precise form given in the schedule A, as the column for the number of votes was left in blank. Held, that this omission did not vitiate the voting papers.

There seems to be no general rule as to when enabling Acts are absolute and when directory.

[Reference also to *Liverpool Borough Bank* v. *Turner* (1860), 30 L.J. Ch. 379, 380; *Howard* v. *Bodington* (1877), 2 P.D. 203, 211.]

Having regard to the object of the Act, the importance of the provision, and its necessity to reach that object, I am of opinion that sec. 71 (2) is imperative and absolute, and that non-compliance therewith renders the ballot paper void, and it is not to be counted on a scrutiny. This affects the ballot papers Nos. 6, 11, 12, and 22 cast for Sinclair, and these should be disallowed and deducted from his total, and applies also to ballot papers Nos. 17 and 10 cast for Mayberry, which are also void and should be deducted from his total.

Exhibit 14. This ballot paper was disallowed. On this ballot there were two marks in the form of a $\overline{1}$, and it was contended that the lines touched, and that under the cases—the *Wigtown Case*, 2 O'M. & H. 215; *Re North Grey* (1902), 4 O. L.R. 286; the *Cirencester Case* (1893), Day's Election Cases (Judgments) 155; and the *Bothwell Case* (1884), 8 S.C.R. 676, where it was held that a ballot marked with a "B" was sufficient —it was sufficiently marked. I think this ballot paper was properly disallowed, as I think the lines do not touch each other. This objection fails.

Exhibit 15. This ballot shews a ∨, the balance apparently being torn off. I think it was properly counted for Sinclair. See the last case and *In re Halton Election* (1902), 4 O.L.R. 345.

Exhibit 24. This ballot has the word "for" written after the cross. I do not think this voids the ballot. See *Woodward* v. *Sarsons*, L.R. 10 C.P. 733; the *Lennox Case* (1902), 4 O.L.R. 378; *Re North Grey*, 4 O.L.R. 286; the *West Huron Case* (1898), 2 Ont. Elec. Cas. 58; *Jenkins* v. *Brecken* (1883), 7 S.C.R. 247.

ONT.
S. C.
RE SOUTH OXFORD PROVINCIAL ELECTION.
Clute, J.

Exhibit 25. This ballot is properly marked for Sinclair, but on the back there is a cross opposite the deputy returning officer's initials. I do not think this vitiates the ballot. There can be no doubt for whom the ballot was marked. The objection fails.

Exhibit 26. This ballot is marked both for Mayberry and Sinclair, but it is contended that, inasmuch as there is an additional line in the Sinclair cross, this is evidence that the voter intended to erase the Sinclair cross, leaving the ballot marked for Mayberry. I do not think so. I think the test is: if there was no cross for Mayberry, would there be a good cross for Sinclair? Answering this in the affirmative, the effect of the ballot was destroyed by marking it for both candidates. Dismissed.

Exhibit 28. Here the ballot is clearly marked with a plain cross for Mayberry, but the cross is not coloured either with pencil or ink: it was probably made with a worn and defective pencil which did not give it colour.

I think this ballot should have been counted for Mayberry, and the appeal in this case is allowed.

Exhibit 30. In this case it is not disputed that there were 201 ballots properly marked, of which 87 were marked for Mayberry, but only 86 have been counted for him.

In my view, in a recount the ballot is to be looked at and not the poll book. One may surmise how the discrepancy between the number of ballots and the entry made by the officer occurred, but the ballot, being properly marked, should be allowed. Appeal allowed.

Exhibit 31. A cross for Sinclair to the right of his name, with some irregular pencil markings under his name. I agree with the Deputy County Court Judge, and do not think any of the markings are such as to identify the voter. I do not think it falls within the *Lennox Case*, 4 O.L.R. 378, 380, as contended for by Mr. McKay.

Exhibit 34. It is contended that the stroke here amounts to a ✓, and that under the cases the ballot should have been counted for Mayberry. I do not think so. The most that can be said is that a single stroke has been repeated, not quite covering the first stroke. It does not amount to either a ✓ or a cross. It was properly disallowed. Appeal fails.

Exhibit 44. In this case the ballot is clearly marked for each candidate, although the cross opposite Sinclair's name is somewhat paler than that for Mayberry. This ballot was properly disallowed. See *In re Halton Election*, 4 O.L.R. at p. 347 (6), where this point is covered.

The result is that all the appeals on behalf of Mayberry are dismissed except No. 12, ballot 28, and No. 13, ballot 30, which are allowed to be added to Mayberry's total, and ballots 6, 11, 12, and 22, which are to be deducted from Sinclair's total.

Then as to Sinclair's appeal.

Exhibits 17 *and* 10. Appeal allowed. Already dealt with.

Exhibit 18. I think this is properly allowed to Mayberry. There is a cross for Mayberry and a straight line opposite Sinclair's name apparently marked out, thus /. This vote was counted by the returning officer and allowed by the County Court Judge. I think it was properly allowed. Dismissed.

Exhibit 21. The return of the deputy returning officer shews one declined ballot. It is marked with a cross, containing three strokes in the centre of Mayberry's name, thus: Thomas R. May⋋berry. His Honour says: "This should not have been counted as a declined ballot. I think the deputy returning officer intended to count it a rejected ballot." In this I agree with His Honour. It was argued that, because it was returned in form 21, it ought not to be counted, although sufficiently marked; but sec. 117 refers to this return, and sec. 138 provides that the form may be corrected. Even without this clause, I should hold that the ballot is to be looked at, and not the return. This appeal is dismissed.

Exhibit 27. Cross for Mayberry, with the figures 93 before the deputy returning officer's initials on the back. Counted by the deputy returning officer for Mayberry, and allowed by the Deputy County Court Judge, and I think properly allowed by him. Appeal dismissed.

Exhibits 33 *and* 42. These ballots have no cross upon their face but a cross upon the back. They were both disallowed, and I think properly so. Appeal dismissed.

Exhibit 36. Straight line for Sinclair, counted by the deputy returning officer for Sinclair, and disallowed by the Deputy

ONT.
S. C.
RE SOUTH OXFORD PROVINCIAL ELECTION.
Clute, J.

County Court Judge. I think this ballot was properly disallowed. See the *Halton Case*, 4 O.L.R. 345, where an error in the head-note in the *West Huron Case*, 2 Ont. Elec. Cas. 58, is pointed out, in which it is stated that ballots so marked in that case were "allowed." It should have been "disallowed."

Exhibit 37. In this case there was a cross and a further line making a star, thus ★ for Mayberry. This was rejected by the deputy returning officer and allowed by the Deputy County Court Judge. On the cases above referred to, I think the ballot was properly allowed. Appeal dismissed.

Exhibit 41. The return by the deputy returning officer shews one declined ballot. This ballot is marked with a straight line for Sinclair. His Honour held that it should have been returned as a rejected ballot, and it was disallowed by him. With this I agree. Appeal dismissed.

Exhibit 43. A cross for Mayberry with a straight line in pencil mark under part of his name. It was counted for Mayberry by the deputy returning officer, and was allowed by the Deputy County Court Judge, and properly so, I think. This appeal is dismissed.

Exhibit 47. A straight line for Sinclair; counted for Sinclair by the deputy returning officer, and properly disallowed by His Honour.

The result is, that on Mr. Mayberry's appeal 2 votes are to be added to his total of 2,581, and 4 are to be deducted from Mr. Sinclair's total of 2,586, and all the other objections taken by Mr. Mayberry are dismissed.

On Mr. Sinclair's appeal 2 votes are to be deducted from Mr. Mayberry's total of 2,583. That is, 2 votes are added and 2 votes are deducted from Mr. Mayberry's total of 2,581, leaving that total, as found by the Deputy County Court Judge, unaltered, and 4 votes are to be deducted from Mr. Sinclair's total of 2,586 as found by the said Deputy County Court Judge, leaving a total for Mr. Sinclair of 2,582. Thus leaving a majority in favour of Mr. Sinclair of one vote.

As each appeal has partly succeeded and partly failed, and one of the principal points involved was the non-compliance of the returning officer with the requirements of the statute, there should be no costs to either party.

TARIO v. WEST CANADIAN COLLIERIES.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 29, 1914.

1. TRIAL (§ III D—220)—JURY — JUDGE'S CHARGE TO — DISCUSSION OF FACTS — OPINION OF JUDGE — DISCRETION OF JURY.

The trial judge may properly discuss the facts in his charge to the jury in order to assist them, and, in doing so, it is not error for him to express a definite opinion upon the evidence so long as the jury are left quite aware of their own discretion and authority to make an independent finding.

2. MASTER AND SERVANT (§ II B 3—143)—DEFECTIVE INSTRUMENT—NEGLIGENCE — KNOWLEDGE OF DEFECT — APPRECIATION OF DANGER — ACCEPTANCE OF RISK.

To place in the hands of an employee an instrument for his use which owing to a defect in it is likely to cause him injury is negligence but if, at the moment he takes the instrument to use, he has knowledge of the defect and appreciates the danger and the risk and, notwithstanding this, he voluntarily decides to use it, there is no negligence towards him as he is to be regarded as *volens*.

[*Thomas* v. *Quartermaine*, 18 Q.B.D. 685; *Smith* v. *Baker*, [1891] A.C. 357, applied.]

APPEAL from the verdict at trial.

Appeal dismissed.

Wm. Campbell, K.C., and *J. C. Brokovski*, for plaintiff.

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

The judgment of the Court was delivered by

STUART, J.:—The plaintiff was a coal miner in the employ of the defendant. On July 17, 1912, he was employed with a fellow workman in operating a drill against the face of the coal. This drill was attached to and supported by a horizontal bar which extended from one side of the passage to the other. The ends of this bar had to be forced into the coal at each side so as to make it firm and thus establish a solid fulcrum upon which the drill could work. In order to force the ends of this horizontal bar into the coal at each side, the bar was so constructed as to consist at one part of a screw, the turning of which would lengthen the bar and so force the ends against the coal. In order to turn this screw there were four holes in the horizontal bar and into these holes the workmen placed the end of another smaller iron "jack" bar. They then turned the screw by grasping the outer end of this smaller iron bar and pulling upon it. The plaintiff was engaged in this operation on the day in question and the smaller bar suddenly came out of the hole with the

Stuart, J.

ALTA.

S. C.

TARIO v. WEST CANADIAN COLLIERIES.

Stuart, J.

result that the end of it hit the plaintiff in the eye, so injuring it that he lost the sight of it. He sued the defendants for damages. The case was tried by Mr. Justice Scott and a jury at MacLeod. At the close of the case the following questions were submitted to the jury and they gave the following answers:—

1. Q. Was the bar supplied by the defendant to the plaintiff reasonably fit for the purpose for which it was applied? A. No. 2. Q. If not, was the defendant guilty of negligence in not remedying the defect? A. No.

Foreman of the jury: We thought the company were partly responsible for not supplying a proper bar. We did not consider that we could have answered in any other way than "No." 3. Q. Was the plaintiff guilty of contributory negligence? A. Yes.

4. Q. Did the plaintiff undertake the employment with a knowledge of the risk? A. Yes.

5. Q. Did the plaintiff with such knowledge voluntarily undertake the risk? A. Yes.

Subsequently the learned Judge directed the judgment to be entered for the defendant with costs and by consent of counsel for both parties, he fixed the compensation under the Workmen's Compensation Act at $550. The plaintiff now moves to set aside the judgment and for a new trial upon various grounds. The first ground is that questions 2, 4, and 5 were improperly submitted by the jury against the objection of the plaintiff's counsel at the trial. Objection was in fact taken to the form of these questions but was overruled by the trial Judge.

It seems to me that it is evident that if questions 4 and 5 were properly expressed and if the affirmative answers returned to them by the jury furnish in law a defence to the plaintiff's claim, there can be no necessity for considering any other objection because the plaintiff's action must then fail in any case unless, of course, there is something in the contention raised by the notice of appeal that the learned trial Judge went too far and further than he was legally justified in going, in his charge to the jury, in practically directing them, as it is alleged, as to what answers they should return to questions 4 and 5, and unless there was no evidence to support the findings. In considering this question and in examining the precedents to which we were referred, the first essential is a clear perception of the actual facts of the particular case before us and of the actual facts in the cases cited.

ALTA.

S. C.

TARIO v. WEST CANADIAN COLLIERIES.

Stuart, J.

The charge against the defendants is that they placed in the hands of their employee a defective tool, namely, the smaller bar in question. Now, it is obvious that in such a case the proper application of the maximum *volenti non fit injuria* must depend upon very different considerations from those which would arise where there is charged a defect in the premises or general negligence on the part of fellow workmen. It is obvious that there is a much greater probability that the injured plaintiff had the danger or risk plainly brought before his eyes than in the other cases. The acceptance of the risk of negligence by fellow workmen was the basis of the old doctrine of common employment which has, of course, now been abrogated, but the cases of defective premises obviously offer a wider opportunity to a plaintiff to claim that he neither knew nor voluntarily accepted the risk than a case in which a defective instrument which he himself is to operate has been placed in his very own hands to use. Unless the defect is a secret and latent one, it must necessarily be easier to charge him with knowledge of, and voluntary acceptance of the risk than where the defect is alleged to exist in the premises or machinery or operations around him, etc. This distinction is one of which Lord Watson was thinking in *Smith* v. *Baker*, [1891] A.C. p. 357, when he said: [The Judge here read an extract from *Smith* v. *Baker*, *supra*.]

After examining the authorities, I am unable to conclude that in so far as the general rule is concerned, questions 4 and 5 disclose any very serious ground for criticism. It is clear that many of the cases turn upon the absence of any direct finding of a voluntary assumption of the risk as distinguished from the knowledge of it. But here the defendants have a direct finding of the jury on that point. Neither can I discern much ground in the precedents for drawing a fine distinction between knowledge and appreciation in regard to the risk. Of course knowledge of a defect is quite different from knowledge of the risk involved in the defect. I think the appellant's argument in this regard would have been entitled to great weight if question 4 had asked merely as to knowledge of the defect. But that is not how the question was put. It speaks of knowledge of the "risk," that is, of the danger, and when we reach that point, I cannot

ALTA.
S. C.
TARIO v. WEST CANADIAN COLLIERIES.
Stuart, J.

discern any reasonable distinction between "knowledge" and "appreciation" of danger unless it is assumed that the former is confined to the new fact of danger while the latter extends to its degree and extent. But to the extent to which there is knowledge, I think there must be appreciation. Any lack of appreciation must, I think, be lack of knowledge.

The only ground for complaint which it seems to me the appellant can have is that question 4 as it stands may not have brought home to the mind of the jury with sufficient clearness, the degree of knowledge that must be shewn nor the distinction between mere knowledge that there was a risk and full and complete knowledge of the extent of it. It is this latter which I think must be shewn in order to give a defendant the benefit of the maxim "*volenti*, etc."

This leads me to a further observation which I think ought to be made. Although the operation in which the plaintiff was engaged was a very simple one and although the whole matter lies within a very narrow compass, yet simple as it was it presented some details which just on account of the very simplicity of the operation were necessary to be kept in mind in determining exactly the character of the risk involved and the probability of the plaintiff's fully appreciating it. The jack bar was used as a means of turning the screw on the cross bar or column. The end of it had to be inserted in a hole in the cross bar. The hole in the cross bar was only about an inch in diameter. The jack bar for most of its length was about one inch and a half in diameter. The end which was inserted in the cross bar was tapped or pointed and it was only thus that it could be inserted at all. It would only go in two or three inches, that is the point at which the circumference of the jack bar was equal to the circumference of the hole was only two or three inches from the end. As was pointed out by the witness, Aspinwall, there would only be one point of contact and that just at the entrance to the hole. He said such a bar was improper because it was bound to pull out. Now, the real danger and the danger from which the accident actually happened was that although the jack bar was inserted nearly vertically, and the upper end of it was about as high as the workman's head, it was liable to

pull out with the first pull he gave and hit him in the face. That was a more serious danger than the danger, for instance, which would be involved in its liability to pull out when it reached on the turn, more nearly the horizontal and after it had passed the workman's face. Here was the situation. The workman was standing upright with his face to this bar. He stretched out both of his hands to pull it towards him. Owing to the defective character of the bar, there was a danger of it pulling out of the hole into which it had been inserted for two or three inches with the first pull he gave. In detail, that is the exact danger which existed. The question which the jury had to consider was whether he had a full knowledge and appreciation of that danger and yet voluntarily gave that unfortunate pull. I confess that it was only after reading Aspinall's evidence that I could myself understand why there should at that moment be any danger of the bar pulling out at all. The bar was inserted as far as it would go. At least that is the uncontradicted evidence and it is naturally true because the mere weight of the bar itself would make it settle to its place unless it was held up by the workman's hand and the pull began before it had come in contact at all, but there is no evidence of this. I think therefore, that the question which was presented to the jury was just this question in detail:—Did the plaintiff have full knowledge and appreciation of the danger or risk that the bar was liable while still opposite his face to pull suddenly out of the hole and strike him and yet voluntarily give the pull which injured him?

That being so, the point is whether the questions 4 and 5 as framed, fairly presented the matter to the jury. Now, while it is evident that these questions did not express the problem in its exact detail it seems to me that we must remember that the jury had listened to all the evidence and that they had seen either the bars in question or models of them. We must assume, I think, that the jury were men of fair intelligence and common sense and that they were able to interpret the questions and put to them in the light of the details of the evidence they had listened to; in other words, on these questions of fact, they were in as good a position as we are (perhaps in a better, because they had

ALTA.
S. C.
TARIO
v.
WEST CANADIAN COLLIERIES.
Stuart, J.

the exhibits before them which we have not), to understand what the exact risk or danger was to which the questions referred and which had been spoken of repeatedly throughout the evidence. Then, also, they had the Judge's charge to guide them in their consideration of the questions. In his charge he used the following language:—

Even if the bar had been defective—was not the proper bar for the purpose and the accident was caused by the fact of its being not the proper bar for the purpose—it seems to me the main question for you to consider is whether he was aware or should have been aware of the fact that there was a danger of it slipping and injuring. It seems to me that the whole case turns upon that—was he aware or should he have been aware of the fact that it might slip at some time when used in the ordinary course? Now, he says himself that when he first went into the mine and saw this bar he asked if that was the bar they were using there and if it was the only bar they had, and he was told that it was the only bar they used. He says himself in explanation of that that he had never seen a bar like that before—had never used one like that before. It seems to me there is nothing in his statement at that time that although it was a strange kind of a bar to him that he knew, or the fact of his making that statement would go to shew that he knew it was a dangerous bar. All that could be taken from the remark he made at that time was that it was a bar the like of which he had never seen used before in that kind of machine. That is the effect of his statement, and nothing beyond that, it seems to me. Now, Mr. Bradley for the defendant also states that it was not the proper kind of bar. He also says that one that would slip only once in eight days would not be dangerous. Well, if you come to the conclusion it seems to me that you must in light of the admissions made by the defendant's counsel that the bar did slip and had hit this man in the eye, that it did become dangerous on that occasion, because it inflicted the injury of which the plaintiff complains. And he says also that if it was properly made it would not slip out. It did slip out, if you believe the evidence of the plaintiff and his partner, it did slip out and cause the injury. In view of what I have already stated to you, it seems to me that the main question you have to determine is "Was the plaintiff aware or should he have been aware of the fact that the bar had a tendency to slip out and might slip out on any occasion and that they should guard against the danger of it slipping out." You will have to use your own common sense in considering that question, upon the evidence, and what you consider under the circumstances would be the reasonable conclusion to arrive at, and decide that question in your own way. There is one thing I forgot to mention. There was some discussion between the counsel for the plaintiff and myself as to the law on the subject—I do not think you could come to any other conclusion than that the defendant voluntarily accepted employment with that machine. No other reasonable conclusion could be arrived at—that he knew what he was doing when he accepted that employment. The only question is "did he know the risk he was assuming?" If he knew the risk and accepted the employment knowing the risk then he has no claim for damages for his

injury. But if he accepted the employment and did not know the risk, and there was a risk, then he is entitled to recover. I think that is putting it as plainly as it possibly can be put.

After they had listened to these words from the Judge and heard the contest during the taking of the evidence, I am unable to see how there could have been any lack of understanding on the part of the jury as to the significance of the questions asked, and I therefore cannot see that the objection to them can be sustained. They were proper in form unless it was improper not to add the words "fully appreciate" in the fourth question. But as I have pointed out, that seems to be merely a question of emphasis. There might indeed be cases in which care ought to be taken to distinguish between partial knowledge and complete knowledge, but considering the simplicity of the operation in question here, I cannot see that such a distinction was necessary. Owing to the nature of the case any knowledge at all by such an experienced workman as the plaintiff must have been complete knowledge.

Then it was contended that there was no evidence upon which the jury could reasonably find that the plaintiff knew the risk and voluntarily assumed it. It is true that he stated repeatedly that he did not know the danger, but it is to be observed that he did refer to the other end of the bar as being "more dangerous" and that he had been using bars for that purpose for many years and had long experience in such work. The jury had the models before them and had a right to use their own common sense, as the Judge told them, in deciding whether a man with such experience did or did not really know that the bar was liable to slip out. This certainly constituted some evidence for the jury to consider and that is all for our present purposes that is necessary.

Objection was also taken to the strength of the opinion upon the question of fact which was expressed by the learned trial Judge in his charge. I cannot see any reason for disturbing the verdict on this ground. It is obvious from the charge as above quoted that the jury were made fully to understand that the matter was entirely for them to decide. I do not know that juries are so subservient in this country as to surrender their own judgment entirely to that of the Judge, particularly when

ALTA.
S. C.
TARIO v. WEST CANADIAN COLLIERIES.
Stuart, J

the result is to give a verdict not against but in favour of a corporation. It is always considered in our Courts proper for a Judge to discuss the facts in his charge to the jury in order to assist them and in doing that, it is not always possible to avoid expressing a definite opinion. Nor do I see anything wrong in it as long as the jury are left quite aware of their own discretion and authority which was the case here.

Having come to this conclusion with respect to questions 4 and 5, it seems unnecessary to refer to any other objections. It was upon the answer to those questions that the action was dismissed. Having been properly asked the answers form a complete defence to the action. The objections to the other questions are immaterial.

The appeal must be dismissed with costs.

CAN
S. C.

RICARD v. LA VILLE DE GRAND'MERE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. June 22, 1914.

1. MUNICIPAL CORPORATIONS (§ II D—146) — CONTRACTS — MUNICIPAL COUNCIL—EXCLUSIVE LIGHTING FRANCHISE—ESTABLISHMENT OF MUNICIPAL LIGHTING SERVICE—VALIDITY OF.

A contract with a municipal council for an exclusive lighting franchise for 10 years with a proviso that the municipality would give the contractor the preference over any other person tendering at the end of the term at the rates quoted in the competing tender for another ten years, is not a bar to the council establishing its own electric lighting plant on the expiry of the first ten years pursuant to statutory authority conferred meanwhile; the municipal by-law establishing a municipal lighting service for the citizens having been ratified by the legislature *pendente lite*, a resolution of the municipality passed in conformity with the validated by-law was declared valid and the judgment below varied accordingly.

[*Ricard* v. *Grand'Mere*, 23 Que. K.B. 97, varied.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, Q.R. 23 K.B. 97, varying the judgment of Tourigny, J., in the Superior Court, District of Three Rivers, by which the plaintiff's action was dismissed with costs.

Appeal dismissed with costs; cross appeal allowed in part without costs.

P. N. Martel, K.C., and *Aimé Geoffrion*, K.C., for the appellant.

Lafleur, K.C., and *Rinfret*, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK:—This action was wrongly conceived.

If at the expiration of the first ten-year period the contract was at an end, as was obviously the case, the action of the municipality in refusing to give effect to the "*pacte de préférence*" might give rise, in a proper case, to a claim for damages, but certainly does not give the plaintiff a right to the relief asked for in this proceeding.

The impugned by-laws have been ratified and confirmed by the legislature and, except in so far as they affected the plaintiff in his contractual relations with the municipality, they are declared to be valid to all intents and purposes. It is quite true that the appellant alleges an interest as a ratepayer, but he can no longer, in view of the validating Act, invoke an interest as such in these proceedings.

Sir Charles Fitzpatrick, C.J.

I would dismiss the appeal with costs here and below.

Dealing now with the cross-appeal, I am of opinion that the judgment appealed from should be modified and that the resolution of August 28, 1912, should be declared good and valid, the whole without costs.

IDINGTON, J.:—The appellant, in January, 1902, obtained from the respondent municipality an exclusive privilege of furnishing electricity in said municipality. The first two clauses of the contract were as follows:—

Idington, J.

1. La Corporation de la Ville de Grand'Mère accorde à J. O. H. Ricard, écr., médecin, de la Ville de Grand'Mère, le privilège exclusif, pendant dix ans, de fournir l'électricité pour les fins d'éclairage, chauffage, pouvoir moteur, électrolyse, travail des métaux, locomotion, et généralement toutes les fins auxquelles peut ou pourra se prêter l'électricité.

2. Le dit privilège sera exclusif pour dix ans avec préférence sur tout autre concurrent, au bout des dix ans, au prix du dit concurrent pour dix autres années.

The questions raised by this appeal turn upon the meaning to be given the second of said clauses.

The first ten years of the privilege were duly enjoyed by the appellant. The municipality was enabled, during said term of ten years, by the legislature, to enter upon the business of electric lighting. It had always been enabled by law to do its own lighting, but was, perhaps, not at liberty or enabled to supply lighting to the public generally. The municipal council decided, at the expiration of said ten years, to exercise both its old

CAN.
S. C.
RICARD
v.
LA VILLE DE GRAND'-MERE.
Idington, J.

and its new powers and, in executing such purpose, passed by-laws which were attacked by the appellant.

It is not necessary to dwell upon the details of what was done, for the legislature confirmed these by-laws with a provision in the Act of confirmation that, if the appellant was in law entitled to insist upon the extension of his privilege and contract, as he claimed to be under said second clause of the contract, then the respondent was thereby bound to expropriate his electric light property. It is to determine whether or not such right to extension exists that this appeal was brought.

I am unable to find in said second clause anything in the way of a binding contract of such nature as claimed. Indeed, the entire contract was, as framed, *ultra vires* the powers of the respondent.

The respondent cannot be said ever to have bound itself to refrain from exercising its own undoubted powers at the expiration of ten years. It seems only to have said that if it followed the policy of letting the contract for town-lighting to others at the end of ten years to give the appellant a preference. It has not let any contract to others and, hence, there is no semblance of ground upon which the proposed preference can become operative.

The appeal must, therefore, be dismissed with costs.

There is a cross-appeal which, admittedly, involves nothing but costs, save what relates to a resolution of the council passed in execution of the purposes of the confirmed by-law. I see no objection to the modification of the judgment so as to affirm the validity of such resolution, but it should be without costs and also without giving respondent any relief as to the costs involved in what is sought in the cross-appeal.

The costs involved in the appeal relative to the neat point first above referred to are all the costs in these proceedings which ought to be borne by appellant.

Duff, J.

DUFF, J.:—I think the appeal fails. There is neither express nor implied obligation resting on the respondent corporation not to exercise the powers now vested in it for the advantage of the inhabitants according to the best judgment of the council. And these powers having been exercised in such a

way that the contract with the appellant is inapplicable, the appellant has no ground of complaint capable of vindication in a Court of law.

ANGLIN, J.:—I think it is abundantly clear that the appellant had not a contractual right to the renewal of his lighting contract with the respondent municipality. He may have some reason to complain of the treatment he has received, but I find nothing in the record which supports his claim that he was entitled to a renewal of his contract.

I would dismiss the appeal with costs.

BRODEUR, J., concurred in the result.

Anglin, J.

Brodeur, J.

SMART-WOODS v. CANADIAN PACIFIC RY. CO.

Board of Railway Commissioners. July 20, 1914.

CARRIERS (§ III J—485)—CONNECTING—BILL OF LADING—TOLL—THROUGH—INLAND DESTINATION—JURISDICTION—CARRIAGE—CONDITIONS.

A bill of lading issued by a steamship company containing the inland destination and the through toll thereto is made a through bill of lading although it does not contain the conditions of carriage by rail.

By Order No. 7562, dated July 15, 1909, the Board prescribed the form of bill of lading for inland carriage from a Canadian seaport. Section 2 of the Order provides that the carrier issuing the bill of lading shall be liable for any loss, damage or injury sustained to the goods carried under such bill of lading, but the delivering carrier is not made liable unless it be so de facto.

Where a shipment was carried under a through bill of lading issued by a steamship company from India to Boston, Mass., and thence to final destination at Winnipeg, where delivery was made by the last connecting carrier, the Board has no jurisdiction over the steamship company nor over the initial carrier at Boston, and the delivering carrier is not liable for the shortage of goods received by it "short" from its connections.

APPLICATION to make the delivering carrier responsible for goods received short from its connecting rail carriers.

Statement.

Smart, for the applicant.

L. J. Reycraft, for the respondent.

July 20, 1914. THE CHIEF COMMISSIONER:—The complaint is that the delivering carriers at Winnipeg disclaim responsibility for the shortage of goods received by them "short" from their connections, although they are willing to assist in obtaining redress from the defaulting carrier.

The Chief Commissioner.

The complaint was heard at the sittings of the Board at Winnipeg on May 26th, 1914.

Complainants' goods (burlaps) came from India, via Boston, Mass., and, being consigned "to order," the bills of lading, pro-

CAN.
Ry. Com.
SMART-WOODS v. CANADIAN PACIFIC R. CO.
The Chief Commissioner.

perly endorsed, have to be given up to the delivering carrier by the consignees as their proof of ownership. This rule obtains everywhere, and is, of course, a proper one, since the last carrier, for the time being, holds the goods in trust for the shipper or the bank; but because the bill of lading has to be so surrendered is no reason, as the complainants contend it is, why the onus of the delivering carrier, with respect to short deliveries, should be greater than in the case of straight consignments.

Over-seas importations may be covered by a joint ocean and rail bill of lading, containing the conditions of carriage appertaining to water and land respectively, or by a ship's bill of lading containing the ocean conditions only. As a rule, the latter terminates at the seaport on this side, in which case the initial railway company issues, or is supposed to issue, an inland or rail bill of lading—the American uniform bill of lading from United States ports, and that prescribed by this Board from Canadian ports. In some cases the local ocean or ship's bill of lading is, in effect, made a through one by showing the inland destination and the through rate thereto, notwithstanding that it does not contain the conditions of carriage by rail Those filed by the complainants with the Board in this case are on ship's bill of lading forms.

The main question is the responsibility of the several rail carriers, as this Board has—as I pointed out at the hearing—no jurisdiction over the steamship companies; and I think the conditions of rail carriage settle it. As regards carriage from a Canadian seaport, section 2 of the Board's Order No. 7562, dated the 15th day of July, 1909, is as follows:—

Section 2—"In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage, or injury to such goods from which the other carrier is not by the terms of this bill of lading relieved, caused by or resulting from the act, neglect, or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff, or over whose line or lines such goods may pass in Canada or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines

the loss, damage, or injury to the said goods shall have been sustained the amount of such loss, damage, or injury as it may be required to pay hereunder, as may be evidenced by any receipt, judgment, or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier."

Paragraph 4 of section 4 of the same order provides that "Notice of loss, damage or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable."

But it does not make the delivering carrier liable unless it be so 'de facto.'

Section 2 of the Conditions of the uniform bill of lading approved by the Interstate Commerce Commission, which governs from Boston, is as follows:—

"In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

"No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed."

And paragraph 3 of sec. 3 provides that

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

Here, again, the Board is without jurisdiction over the initial carrier at Boston.

I am of opinion that the complaint should be dismissed.

MR. COMMISSIONER GOODEVE concurred.

Com. Goodeve.

ALTA.

S. C.

GREAT WEST SUPPLY CO. v. G.T.P.R. CO.

Alberta Supreme Court, Walsh, J. December 16, 1914.

1. WAREHOUSEMEN (§ II—9)—RAILWAY COMPANY AS CONSIGNEE—BREACH OF CONTRACT—THEFT—LIABILITY.

Where it was a part of the contractual obligation between the consignee of a car-load of cement and the railway, in respect of its warehousing duties, that the railway should keep the car on the bonded spur line, as in fact it was bound under customs regulations to do until the customs duties were paid, but the railway, without authority, removed the car to another track, from which its contents were stolen, the railway company is liable for the loss.

[*Lilly* v. *Doubleday*, 7 Q.B.D. 510, followed.]

2. WAREHOUSEMEN (§ II—9)—RAILWAY COMPANY—BREACH OF CONTRACT—LOSS OF GOODS — OPERATION OF RAILWAY — RAILWAY ACT, CAN.—ACTION BARRED, WHEN.

Where the railway company, in breach of its contract as a warehouseman, used its rolling stock and its employees to put the goods warehoused with it in a place where, under the terms of the contract, they should not have been put, the resultant loss is not one occasioned by "the operation of the railway" within sec. 242 of the Railway Act, Can., and is not barred by failure to bring suit within one year.

[*C.N.R.* v. *Robinson*, [1911] A.C. 745, referred to.]

Statement

ACTION to recover price of goods stolen from freight car which had been wrongfully removed by the railway company.

G. G. Dunlop, for the plaintiff.

O. M. Biggar, K.C., and *S. W. Field*, for defendant.

Walsh, J.

WALSH, J.:—On August 5, 1912, a carload of cement in bond consigned to the Western Home Builders Co., Ltd., reached Edmonton over the defendant's line in a N.Y. Central car. The plaintiff is admittedly, by some process not explained to me, entitled to stand in the position of this consignee with respect to this consignment and the events following its arrival in Edmonton. The plaintiff was at once advised of its arrival by notice which it received at 1 p.m. on the same day, but it did nothing with respect to it until September 27, 1912, when, having found a purchaser for the cement, it paid the customs duty on the same and the defendant's charge for demurrage on the car in which it was then supposed to be, and re-billed it in the same New York Central car to the purchaser at Imrie, paying the freight on this re-shipment The cement not having reached this purchaser in due course, he so advised the plaintiff, who took the matter up with the defendant, with the result that the plaintiff later on was informed by the defendant that the cement had been unloaded from the car whilst it was in Edmonton.

The payment of the demurrage and the freight to Imrie was

made by the plaintiff and accepted by the defendant under the mistaken idea on the part of both of them that the cement was still loaded in the car in which it came to Edmonton, and that this car was then standing on the bonded spur in the defendant's yards. As a matter of fact the cement had been removed from this car more than a month before this, and the empty car had more than three weeks before this started on its return journey to the east. It was established to my satisfaction at the trial that this car loaded with this cement stood on a Canadian Northern spur at Edmonton known as the Bellamy spur from at least the 9th until the 21st of August, that on August 22, on its way back to the defendant's yards, it reached the transfer track of the Canadian Northern empty, that it afterwards reached the defendant's tracks from this transfer track, and that on September 5 it went east as an empty. The Bellamy spur served the plaintiff and three other dealers in the same block, and was used by them for unloading into their premises adjoining the spur goods consigned to them. There is nothing to shew how the car got to this spur. It undoubtedly should have remained on the bonded spur in the defendant's yard at least until the duty was paid. The customs authorities do not seem to have consented to its removal from that spur, nor does the plaintiff appear to have asked or instructed that it be so removed. The only inference I can draw from the facts is that the defendant's employees by mistake carried it to the Canadian Northern transfer track, from which it was by that railway carried to the Bellamy spur. Neither is there anything to shew what became of the cement. I am satisfied that the plaintiff did not get it, and I so find. I think the conclusion is inevitable that the cement was stolen and removed from the car on August 21.

The defendant admits that it has no right to retain the money paid to it under the mistake of fact to which I have referred for demurrage and for freight to Imrie, and it brings the amount of the same into Court, but the plaintiff insists that the defendant is liable as well for the full damage resulting to it from the loss of this cement, namely, the cost price of the same to it at Edmonton, plus the duty.

I think it is clear that if the defendant is liable to the plaintiff at all it is so *qua* warehouseman and not *qua* carrier. It is in the

ALTA.

S. C.

GREAT WEST SUPPLY CO. v. G.T.P. R. CO.

Walsh, J.

former capacity that the plaintiff seeks to attach liability to it. The contract of carriage to Edmonton was properly performed. Notice of the arrival of the goods in Edmonton was promptly given to the plaintiff. A reasonable time for the clearance of the car through the customs and for the removal of the cement expired long before the theft of it took place. And these are the conditions which, in the absence of special agreement to the contrary, convert a carrier's liability into that of a warehouseman.

A warehouseman is not an insurer of goods committed to his charge. His obligation is that of a bailee, and he is bound only to use ordinary diligence in his care of them, but he must on demand deliver them up to the owner unless he has in law a good excuse for not doing so. If they are not forthcoming the onus is upon him to shew circumstances negativing negligence on his part, though he need not account for the loss or prove that he knows how it happened: *Ultzen* v. *Nicols*, [1894] 1 Q.B. 92; *Bullen* v. *Swan Electric Co.*, 23 T.L.R. 258; *Phipps* v. *New Claridge's Hotel*, 22 T.L.R. 49; *Sutherland* v. *Bell*, 3 A.L.R. 497.

The defendant has failed to deliver these goods to the plaintiff. It has satisfied me that they were stolen whilst the car was standing on the spur to which it had in error been taken by its employees. The only negligence urged against it in argument was the placing of the car on that spur instead of keeping it on the bonded spur in its own yards. The simple question, therefore, upon this head is whether or not the act to which I have referred constitutes negligence on the part of the defendant.

I have not been able to satisfy myself that it does. It is, of course, obvious that the cement must have remained in the car which brought it to Edmonton until the plaintiff cleared it at the customs. This had not been done at the time of the theft, so that the cement was then of necessity still in that car. There is nothing in the evidence at all suggestive of any increased risk through the placing of the car on the Bellamy spur instead of the bonded spur. I would be inclined to think that of the two the former would be the safer. It is located well within the business area of the city, alongside the premises of the plaintiff and three other shippers, where thieves would be in great danger of detection in so large an operation as that involving the handling of 800 sacks of cement. There is no magic in the bonded spur as a protection

against burglars. It is designed for the convenience of the customs officers. Upon it bonded cars are grouped so that they may be kept under the eyes of the officers and their supervision of them rendered more efficient. It is not suggested that the interests of the consignee of a bonded car are in any way safeguarded by the fact that it stands on this bonded spur until the duty is paid. I therefore cannot find negligence against the defendant.

There is, however, another ground upon which I think the defendant is liable. There was no express contract of bailment, and therefore no express agreement that the goods should be warehoused in any particular place; that is, that the bonded car should be kept at any specified spot. But upon the evidence before me I am satisfied that it was the duty of the defendant to keep the car on the bonded spur at least until it had been cleared through the customs, and the performance of this duty formed, I think, a part of the contractual obligation which the defendant was under to the plaintiff. Both parties acted upon this understanding, for, as I have said, the matter was dealt with by them on the re-billing to Imrie on the assumption that the car ever since its arrival in Edmonton had been and then was on the bonded spur.

Lilley v. *Doubleday*, 7 Q.B.D. 510, referred to. Though this is but the judgment of a Divisional Court, its correctness, so far as I have been able to ascertain, has never been questioned, and it has very often been followed. I think that it is of close application in principle to this case, and I have no hesitation in following it, with the result, of course, that the plaintiff is, in my judgment, entitled to succeed.

This action was not commenced until November 5, 1913, which was considerably more than a year after the plaintiff's cause of action arose. Mr. Biggar contends that it is barred under sec. 242 of the Railway Act. I cannot agree with this contention. One of the defendant's locomotives was undoubtedly used to haul this car to the place to which it was improperly taken, and to that extent "the operation of the railway" was involved in the damages sustained by the plaintiff.

I do not think, however, that that is sufficient to bring the case within that phrase as interpreted by the Privy Council in *C.N.R. Co.* v. *Robinson*, [1911] A.C. 739, at 745, namely, "the

ALTA.

S. C.

GREAT WEST SUPPLY CO. v. G.T.P. R. CO.

Walsh, J.

process of working the railway as constructed." It would, I think, be an undue widening of the term to hold that because the defendant, in breach of its contract as a warehouseman with the plaintiff, used its rolling stock and its employees to put the goods warehoused with it in a place where under the terms of the contract they should not have been put, the resultant loss was occasioned by the operation of the railway.

The plaintiff is entitled to a judgment for the cost to it of the cement and sacks at Edmonton, the duty paid on the same, the demurrage, and the freight to Imrie. I have not the exhibits with me, but these respective amounts can be ascertained from them by the clerk. The money in Court may be paid out to the plaintiff on account.

Judgment accordingly,

CAN.

Ry. Com.

PORT HOPE TELEPHONE CO. v. BELL TELEPHONE CO.

Board of Railway Commissioners. March 30, 1914.

1. TELEPHONES (§1—3)—DOMINION AND PROVINCIAL COMPANIES—JURISDICTION—DISCRETION—UNJUST DISCRIMINATION—COMPETITIVE AND NON-COMPETITIVE—DUPLICATION—7 & 8 EDW. VII. CH. 61, PART 1, SEC. 1 (*b*).

Under sub-sec. b of the interpretation clause, sec. 1 of 7 & 8 Edw. VII. ch. 61, Part 1, a provincial company cannot invoke the jurisdiction of the Board to prohibit, on the ground of unjust discrimination, a Dominion company from, in the exercise of its discretion, making an agreement with one non-competitive provincial company and refusing it to another, which is alleged to be similarly situated, in order to prevent competition, or more correctly speaking duplication in telephone service.

2. JURISDICTION (§ I-2)—TOLLS—LONG DISTANCE SYSTEM—COMPENSATION—JUST AND EXPEDIENT—7 & 8 EDW. VII. CH. 61, SECS. 4 (5, 6), 5.

The scope of the Board's jurisdiction, under sec. 5, being concerned with tolls, it is given power, under sec. 4 (5, 6), to order one company, subject to its jurisdiction, to afford to another, whether subject to its jurisdiction or not, the use of a long distance system upon such terms as to compensation as it deems just and expedient.

3. JURISDICTION (§ I-2)—ORDERS—ON TERMS AND DECLARATORY—STATUS.

The Board has jurisdiction to make an order upon terms, but not to issue a declaratory order as to the status of the applicant or respondent.

Statement

APPLICATION for a ruling that the applicant is not a competitive company and for a long distance connection except as to those portions of its line as may be found competitive.

E. H. McLean, for the Applicant.

H. L. Hoyles, for the Respondent.

Com. McLean

March 30, 1914. MR. COMMISSIONER MCLEAN:—It is unnecessary to examine into the merits of the present application, unless the Board has jurisdiction.

By 7-8 Edward VII, Chap. 61, the jurisdiction of the Board in regard to telephones is defined The jurisdiction which is given follows in a general way that given in regard to railways. It is, however, recognized by the exclusion of certain sections of the Railway Act that the provisions of the Railway Act applicable to railways are not applicable to telephones in their entirety. The fact that there is not an identity of conditions as between telephone and railway service is further emphasized by section 5 of 7-8 Edward VII, chap. 61, which, after setting out certain sections of the Railway Act which do not apply to telephones, continues by saying that, subject to such exceptions—

"the several provisions of the Railway Act . . . in so far as reasonably applicable and not inconsistent with this Part or the Special Act shall apply to the jurisdiction of the Board. . ."

A consideration of the scope of the jurisdiction as set out in section 5 above mentioned shows that it is primarily a rate jurisdiction which is here conferred upon the Board. Further limitations appear on further analysis. The jurisdiction so set out is to—

"apply generally to companies within the purview of this Part."

Sub-section b of the interpretation clause of this legislation states—

"Company.....includes.....telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct a..... .....telephone system or line and to charge.....telephone tolls."

It appears, therefore, that the provisions of the Railway Act are applicable only, in so far as companies are concerned, to companies within the legislative authority of the Parliament of Canada. It follows, therefore that a telephone company not within such authority cannot invoke the power of the Board on an allegation of discriminatory treatment on the part of a telephone company subject to the Board's jurisdiction. That is to say, the Bell Company may make an agreement with one Provincially chartered company, while it may refuse to make an agreement with another which is alleged to be similarly situated.

There has been worked out, and is available, a form of agreement for "non-competing" companies. It should at the same

CAN.

Ry. Com.

PORT HOPE TELEPHONE CO. v. BELL TELEPHONE CO.

Com. McLean.

time be pointed out that there is nowhere in the Railway Act any definition of a competing company in so far as a telephone company is concerned. It is true that in the decision of the Board which granted connection on terms to certain "competing" companies, the word "competition" is used:

"One of the outstanding matters and one that presents the greatest difficulty in connection with this question is the position taken by the Bell Telephone Company that they would refuse to enter into any contract with a local company where that local company was in competition with the Bell Company."

Judging from the context, the word "competition" as used in the judgment was equivalent to "duplication." In the course of the hearing, the following discussion took place:

"Hon. Mr. Mabee: We have never had any doubt, Mr. Sylvan, about the absurdity of duplication of plants. It is not exactly competition."

"A. It is not."

The word "competition" as used in the judgment appears to have been used in a descriptive, not in a definitive sense. The words "competing" and "non-competing," as describing telephone companies, are not words of legal precision. As the situation presents itself to me, they have been brought before the Board as the result of the business practice of the Bell Company. They, in reality, are concerned with differentiating two sets of companies—companies with which the Bell Company has made agreements, and companies with which it has not made agreements; and while the Bell Company may have made a distinction in practice based on the question of competition—no matter how it may have defined this word—it does not follow that this was the sole consideration on which this company would refuse to enter into an agreement. Certainly its discretion in this respect is not limited by statute.

The Board is given power under ss. 5 and 6 of section 4 of the legislation of 1908, already cited, to order a company, subject to its jurisdiction, to afford to another company, whether subject to its jurisdiction or otherwise, the use of its long distance system upon such terms as to compensation as the Board deems just and expedient. How the Bell Company may exercise its discretion in the matter of an agreement, the Board is not concerned, so

far as these sub-sections are concerned, in advance of an application. The condition precedent to application being entertained and action taken by the Board under these sub-sections is the inability of the applicant to arrive at an agreement, in respect of long distance connection, with the company owning, controlling or operating the long distance system.

The jurisdiction of the Board is to make an order on terms, not to issue a declaratory order as to status.

The ASSISTANT CHIEF COMMISSIONER and MR. COMMISSIONER GOODEVE, concurred.

Assist. Chief Commissioner, Com. Goodeve.

LUMBER MANUFACTURERS' YARDS v. MOOSE JAW FLOUR MILLS.

SASK.

S. C.

Saskatchewan Supreme Court, Elwood, J. December 24, 1914.

1. DISCOVERY AND INSPECTION (§ I—2)—DOCUMENTS—PRODUCTION OF—ENFORCEMENT—DEFENDANT IMPROPERLY JOINED.

Production of documents will not ordinarily be enforced against a defendant objecting that he is improperly joined as a party until that question is determined.

2. DISCOVERY AND INSPECTION (§ I—2)—DOCUMENTS—PRODUCTION OF—PLACE—DISCRETION OF JUDGE—MAY BE OUTSIDE JURISDICTION.

The place at which documents referred to in an affidavit on production are to be produced for inspection is within the discretion of the judge of first instance, and may under special circumstances be a place outside of the jurisdiction.

[*Bustros* v. *Bustros*, 30 W.R. 374, followed.]

3. DISCOVERY AND INSPECTION (§ I—2)—PARTY RESISTING—RESTRICTIONS—INSUFFICIENCY OF GROUNDS—COSTS.

The party resisting discovery is not restricted to the grounds set forth in his affidavit of documents when an application is made to force him to produce, but the insufficiency of the grounds alleged will be considered on the question of costs.

4. PLEADING (§ III B—305)—MORTGAGE—REDEMPTION—VALIDITY OF FIRST MORTGAGE—JOINING PRIOR MORTGAGEE—ACTION TO ENFORCE SECOND MORTGAGE.

Where the validity of the prior mortgage is not attacked there must be an offer to redeem either expressly or impliedly in the pleadings in order to justify the joining of the prior mortgagee as a party to an action brought to enforce the second mortgage.

[*Elmer* v. *Creasy*, L.R. 9 Ch.D. 69, and *Wickenden* v. *Rayson*, 6 DeG. M. & G. 210, distinguished.]

APPEAL from a local master.

The appeal was allowed.

H. J. Schull, for the plaintiff.

G. E. Taylor, K.C., for the defendant, Webster.

ELWOOD, J.:—This is an appeal from an order of the local master at Moose Jaw ordering the defendant Webster to pro-

Elwood, J.

SASK.

S. C.

LUMBER MANUFACTURERS' YARDS v. MOOSE JAW FLOUR MILLS.

Elwood, J.

duce at Montreal, in the province of Quebec, for the plaintiff's inspection, a certain promissory note endorsed to the defendant Webster and the debentures of the defendant the Moose Jaw Flour Mills Co., Ltd., to the amount of $250,000, and directing that the defendant should undertake to pay any additional costs which the Judge at the hearing of the action might hold to have been reasonably incurred by reason of the production of the above at Montreal, instead of at Moose Jaw, and ordering the defendant to pay the plaintiff's costs of the application in any event of the action, on the following grounds, namely: That the said local master had no power to order production of the said documents at a point outside the jurisdiction of the Court or to order the same to be brought from a point outside the jurisdiction of the Court into the jurisdiction of this Court, or to impose on the defendant any terms or conditions whatever; and upon the further ground that the said Webster is not a proper party to the plaintiff's action, it having been alleged by the defendant in the pleadings that he is not a proper party thereto, and that until the said issue be determined in favour of the plaintiff the plaintiff is not entitled to require production for inspection of the documents from this defendant.

This action was brought by the plaintiff for payment of a mortgage made by the defendant the Moose Jaw Flour Mills, Ltd., in favour of the plaintiff, and *inter alia* the statement of claim states as follows:—

8. That the defendant Prudential Trust Co. is the holder of a mortgage upon said premises for $250,000 dated the 2nd day of June, 1913, and registered in the Land Titles Office for the Moose Jaw Land Registration District on the 4th day of July, 1913, at 3.50 o'clock in the afternoon of said day, as number V. 937; that said mortgage was executed for the purpose of securing the payment of certain debentures intended to be issued by the said defendant, Moose Jaw Flour Mills, Limited, aggregating in amount the said sum of $250,000; that the defendant, Prudential Trust Co. is made a party to this action not only on behalf of itself, but as trustee for all persons who may thereafter have become holders of said bonds.

13. That the defendant Lorne C. Webster claims to be the holder of certain of the bonds for which said mortgage in favour of the Prudential Trust Co. was executed as security and the said defendant Lorne C. Webster is made a party hereto for the purpose of determining his rights under said mortgage held by the Prudential Trust Co. by virtue of said bonds.

15. That the plaintiff is informed and believes and states the fact to be that said bonds of the Moose Jaw Flour Mills, Limited, aggregating in amount $250,000 were delivered to the defendant Lorne C. Webster as collateral security for certain advances made by the defendant Lorne C. Webster, the exact amount of which said advances is unknown to the plaintiff; that the defendant Moose Jaw Flour Mills, Limited, have been endeavouring and are now endeavouring to dispose of the entire issue of said bonds at a sum considerably below par and there is grave danger of said bonds being disposed of at a price considerably below par, and a charge thereby made operative upon said premises vastly in excess of that now existing and in an amount in excess of the value of said premises unless the said defendant Moose Jaw Flour Mills, Limited, be restrained by order of this Court from in any manner disposing of said bonds; that the defendant Moose Jaw Flour Mills, Limited, are now insolvent and are wholly unable to meet their obligations and if the said bonds are disposed of and placed in the hands of purchasers thereof, the security of the plaintiff will be greatly diminished and rendered valueless by reason of the fact that the said mortgage held by the Prudential Trust Co. will become a subsisting charge upon said premises for $250,000 prior to that of the plaintiff.

In the prayer for relief the plaintiff claims:—

(a) Judgment against the defendant the Moose Jaw Flour Mills, Ltd., for the amount of its mortgage; (b) A declaration that the said sum constitutes a valid lien upon the mortgaged premises; (c) That accounts be taken for the purpose of determining the amounts, if any, due to the defendant Lorne C. Webster under the bonds claimed to be held by him; (d) An order for payment into Court by the defendant the Moose Jaw Flour Mills, Ltd., of the amount due to the plaintiff; (e) In default of such payment, an order for the sale of the mortgaged premises and the proceeds of the sale to be applied, after payment of the costs incurred thereby and the costs of this action, in payment of the plaintiff's claim; (f) That the balance, if any, be paid into Court to abide the further order of the Court; (g) An injunction restraining the Moose Jaw Flour Mills Ltd., its officers, agents, etc., from making any further disposition of the above bonds, and for an order of cancellation of all of the said bonds not theretofore issued and disposed of.

In view of the conclusion that I have come to, it is not necessary that I should express any opinion as to some of the objections raised on behalf of the defendant Webster.

In the case of *Whyte* v. *Ahrens*, 50 L.T.R. 344, at 346, I find the following:—

SASK.

S. C.

LUMBER MANUFACTURERS' YARDS v. MOOSE JAW FLOUR MILLS.

Elwood, J.

In some cases it may be perfectly right when there is a plea which, if sustained, would prevent the necessity of discovery, or which would then be a bar to the right to the discovery, that that should be settled first.

Rule 274 of our Rules of Court provides as follows:—

If the party from whom discovery of any kind or inspection is sought, objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

The defendant Webster contends that he is not a proper party to this action, and that, not being a proper party, he cannot be compelled to produce the documents in question for inspection. A number of cases were cited to me as holding that in an action of this kind the defendant Webster is not a proper party. It will be noticed that the defendant Webster is not a mortgagee, and he can only be joined as a party, I apprehend, because the plaintiff is of opinion that as the holder of the bonds he is interested in the mortgage held by the Prudential Trust Co. as security for the bonds, and it will be perceived that that mortgage is a charge on the property prior to the mortgage to the plaintiff. The law in my opinion seems to be well established that where the validity of the prior mortgage is not attacked, there must be an offer to redeem either expressly or impliedly in the pleadings in order to justify the joining of the prior mortgagee as a party to the action. See *Gordon* v. *Horsfell*, 5 Moore P.C. 393, 13 E.R. 542; *Hughes* v. *Cook*, 34 Beav. 407; *Jefferys* v. *Dickson*, L.R. 1 Ch. App. 183; *Rogers* v. *Lewis*, 12 Grant 257; Fisher on Mortgages, Can. ed., pars. 1377 & 1378. The cases of *Elmer* v. *Creasy*, L.R., 9 Ch. 69, and *Wickenden* v. *Rayson*, 6 DeG. M. & G. 210, were cited on behalf of the plaintiff as authority for the proposition that a prior mortgagee was a proper party to the action. The former case, however, was a redemption suit, and the latter was an administration suit which *inter alia* asked for directions to redeem the prior mortgage, so that those cases are quite distinguishable from the present. I am therefore of the opinion that this defendant was not a proper party to the action. There was no question raised by the

pleadings as to the validity of the documents, production of which is sought, but merely a request for an account to be taken of the amount due. It seems to me, therefore, that under r. 274 above referred to, no production should have been ordered until the question of whether or not the defendant was a proper party to the action had been determined.

The plaintiff's counsel objected that as the affidavit of documents did not raise the objection which is taken here, discovery could only be resisted on grounds contained in the affidavit of documents. I cannot find any authority for that proposition. I can find authority for the proposition that the affidavit of documents is conclusive as against the party seeking discovery, but I cannot find any authority for the proposition that it is conclusive as against the party making the affidavit, but that the party resisting discovery is restricted to the grounds set forth in the affidavit when an application is made to force him to produce. The fact that sufficient grounds are not stated in the affidavit might, however, be a question to be considered when dealing with the question of costs. The defendant's counsel asked me to turn this application into a motion for judgment under rule 442. Counsel for the plaintiff, however, stated that if an order were made striking out the defendant Webster he would apply to amend by offering to redeem. I think, in view of this, that I shall not deal with the application to order judgment on the pleadings as they are at present, but leave it to either party to make a substantive application, either to set down for hearing the question of whether or not there is a cause of action against the defendant, or to apply to amend the claim by offering to redeem.

There was a cross-appeal on behalf of the plaintiff claiming to be entitled to production of the documents in Moose Jaw rather than in Montreal. In view of the conclusion I have come to, it will be unnecessary for me to deal with the cross-appeal, but I may say that I think the local master was quite correct in ordering the production of the documents in Montreal, and in the case of *Bustros* v. *Bustros*, 30 W.R. 374, it was held that the place at which documents should be produced was a matter purely within the discretion of the Judge of the first

SASK.

S. C.

LUMBER MANUFACTURERS' YARDS v. MOOSE JAW FLOUR MILLS.

Elwood, J.

instance, and that the Court of Appeal ought not to interfere with this discretion. Therefore in no event would I have interfered with the discretion of the local master in ordering the production at Montreal instead of at Moose Jaw. I think, however, that he erred in making any order as to the costs of production in Montreal rather than at Moose Jaw. However, it is not necessary that I should express any decided opinion upon that point.

The result will be that the appeal will be allowed and the application to the local master to compel production of the documents mentioned therein dismissed, the defendant Webster to have in any event of the action his costs of that application and of this appeal. In the event of the plaintiff amending its statement of claim and offering to redeem, the result of this appeal will of course be no bar to the plaintiff's right to make a fresh application if it is necessary.

N. S.

S. C.

PETER v. LABA.

Nova Scotia Supreme Court, Graham, E.J., Russell, Longley and Drysdale, JJ. December 18, 1914.

1. DAMAGES (§ III B 4—75)—SALE OF GOODS—SHIPPED BY BOAT—NON-DELIVERY—BILL OF LADING TO BE SIGNED.

In an action by the buyer against the seller for non-delivery of goods which were to have been shipped by boat, it is incumbent upon the seller to shew that there was a signed bill of lading, or to prove the delivery itself to the carrier; an unsigned bill of lading is not enough.

Statement

APPEAL from the Halifax County Court. This was an action claiming damages for the non-delivery of goods purchased by plaintiff from defendant at Halifax to be shipped by defendant to plaintiff at Jeddore in the county of Halifax by the steamer "Margaret." Plaintiff claimed the amount paid for the goods and damages for their non-delivery. The cause was tried before His Honour W. B. Wallace, Judge of the County Court for District No. 1, with a jury and on the finding of the jury judgment was entered for defendant.

The present appeal was from the judgment of the learned Judge of the County Court refusing with costs plaintiff's application for a new trial.

Appeal allowed.

W. C. Macdonald, for appellant.

W. J. O'Hearn, K.C., for respondent.

N. S.

S. C.

PETER v. LABA.

Graham, E.J.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an appeal from the judgment of the County Court Judge, Halifax, refusing a new trial in an action for damages for the non-delivery of goods.

The goods were bought and paid for in Halifax and were directed to be shipped from Halifax to the plaintiff at Jeddore by the steamer "Margaret." The purser of the vessel was not called at the trial before the County Court Judge. The only evidence produced was the bill of lading and the manifest of the goods. Leaving aside the question as to whether these documents are evidence or not, the bill of lading shews that it is not signed by the purser, and if it proves anything it proves that the package of goods was not received by him. It is the duty of the shipper to prove that it was signed or that there was delivery. The evidence shews no delivery. The manifest shews only that a line of it was erased, and neither it nor the purser's books shews delivery of the goods to the purser of the vessel. There is some evidence given on the part of the defendant that a parcel similar to this was seen on a wharf at Jeddore, but this circumstance is not sufficient to shew that there was a delivery to the carrier or to the purchaser of the goods.

Under these circumstances there should be a new trial, and the plaintiff's appeal is therefore allowed. Costs to abide the event.

THE KING v. PAULSON.

CAN

Ex. C.

Exchequer Court of Canada, Cassels, J. April 15, 1914.

1. MINES AND MINERALS (§IB—10)—COAL MINES—DOMINION LANDS—LEASES—FAILURE TO BEGIN OPERATIONS—FORFEITURE.

Where the lessee of coal mining rights in Dominion lands has failed to begin active mining operations within one year, as stipulated in his lease from the Crown, and it is further stipulated that such failure shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown, the Crown, by leasing the mining rights to another, makes a sufficient re-entry to terminate the prior lease in exercise of the right of forfeiture if the prior lessee is not in occupation.

Statement

INFORMATION exhibited by the Attorney-General of Canada to obtain a declaration that a certain lease of coal-mining areas in Dominion lands had been properly cancelled by the Crown; or if this was not so, then in the alternative for a declaration that a subsequent lease was issued improvidently, and should be cancelled.

CAN.
EX. C.
THE KING
v.
PAULSON.
Cassels, J.

R. G. Code, K.C., for the plaintiff.

E. D. Armour, K.C., and *J. Travers Lewis*, K.C., for the defendant Paulson.

E. Lafleur, K.C., and *A. Falconer*, K.C., for the defendant the International Coal and Coke Company, Ltd.

CASSELS, J.:—The information sets out clauses 12 and 17 of the lease. Clause 12 reads as follows:—

That the lessee shall commence active operations upon the said lands within one year from the date of the commencement of the said term and shall work a mine or mines thereon within two years from that date, and shall thereafter continuously and effectually work any mine or mines opened by him unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister.

. . . . . .

My view is that the plain grammatical meaning of clause 12 confines the latter part, namely, "unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister," to what the lessee has to do after two years from the commencement of the term; but the Minister could not excuse the lessee from commencing within a year or from working the mine or mines thereon within two years from that date.

The R.S.C. 1886, ch. 54, provides that the school lands shall be administered by the Minister under direction of the Governor in Council. Section 47 provides that lands containing coal or other minerals whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by Governor in Council by regulations made in that behalf.

By Order in council of June 11, 1902, in virtue of the provisions of sec. 47 of the Dominion Lands Act, the issue of leases of school lands in Manitoba and the Northwest Territories for coal-mining purposes was authorized for the development of coal mines underlying such school lands, subject to the following terms and conditions:—

1. Leases of school lands for coal mining purposes shall be for a period not exceeding ten years, etc.

3. The lessee shall, in addition to the ground rent, pay a royalty of ten cents per ton on all coal taken out of the mine, etc.

6. Failure to commence active operations within one year and to work

the mine within two years after the commencement of the terms of the lease, or to pay the ground rent or royalty as before provided, shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

These regulations will be found in the Dominion Statutes of 1903, 3 Edw. VII., XXIX.

Section 47 of the Dominion Lands Act was repealed by ch. 15 of 55 & 56 Vict., sec. 5. There is no material difference with the exception that the lease may be granted for 20 years instead of 5 years.

My own view of the grammatical meaning of this clause 12 would confine the power of the Minister to excuse to a period after the expiration of the two years. Then this construction is greatly fortified by the fact that the Governor in Council by their regulations provided that the mines must be opened and worked within two years. It was strongly contended by Mr. Lewis before me that sec. 24, which provides that the school lands shall be administered by the Minister, gave power to the Minister as part of his administration to grant a lease on terms different from the provisions and regulations passed by the Governor in Council. I cannot adopt that view. [Reference to *Quebec Skating Club* v. *The Queen*, 3 Can. Ex. 398.].

It was strenuously pressed before me both by Mr. Armour and Mr. Lewis, that no forfeiture arises without first re-establishing their title by information of intrusion or some other proceeding. And the contention is that the rent had been received prior to the forfeiture which estopped the Crown from taking advantage of this forfeiture. An instructive case on this point is the case of *Emerson* v. *Maddison*, 34 Can. S.C.R. 533, [1906] A.C. 569. A reference to the judgment of the Privy Council at p. 575 would shew that the Crown is to be considered always in possession. The facts of that case were different in that the Crown had granted the lands to another person who had entered into occupation. In the case before me, the lease is of mining rights, and Paulson was not in occupation of what was leased to him at the time of the lease to the Coke and Coal Company.

[Reference to Robertson's Civil Proceedings against the Crown, Ed. 1908 at p. 183; *Baylis* v. *LeGros*, 4 C.B.N.S. 539; *Dumpor's Case*, 1 Sm. L.C. 44; *Davenport* v. *The Queen*, L.R. 3 A.C. 115.]

The contention put forward is that on July 8, 1909, a marked

CAN.
EX. C.
THE KING
v.
PAULSON.
Cassels, J.

cheque for $96 payable to the order of the Deputy of the Minister of the Department of the Interior, in payment of the rental for the year ending July 15, 1910, for coal-mining purposes of the east half of section 29, was sent to the department. A letter was written on July 14, 1909, signed by Mr. Keyes, ex. No. 40, in which he states that he begs

> to acknowledge the receipt of your letter of the 9th instant, enclosing your cheque for $96 in payment of the rental for the year ending the 15th July, 1910, for coal mining purposes of the east half, sec. 29, township 7, range 4, west 5th meridian, which is leased to Mr. Paul A. Paulson, for coal mining, and to say that the amount in question is accepted conditionally, pending a decision in regard to the extension of time asked for by Mr. Paulson, which cannot be settled until the Minister's return.

On September 13, 1909, a letter was written to Mr. Paulson addressed to him at his place of residence mentioned in the lease; and a similar letter was also written to Messrs. Lewis & Smellie of the same date, by which they were notified that the lease to Paulson had been cancelled. Messrs. Lewis & Smellie were transacting the whole business in connection with this lease and acting for and on behalf of Paulson; and it is conceded that they received this letter. I also think that the subsequent correspondence indicates that Paulson duly received the notice. It seems to me impossible to contend under the provisions of the statute and of the order in council, to which I have referred, that such a receipt of rent would be treated as waiver. If the Minister himself had no power to waive, *a fortiori* a subordinate was equally without power. I think that the lease having been cancelled there was no power on the part of the Minister to revive the lease, and that the contention, if it is essential to the determination of the case, put forward in the information on the part of the Crown, is well founded.

Moreover, I think a careful perusal of the correspondence, coupled with the declaration of Paulson, shews that there never was a *bonâ fide* intention on the part of Paulson of mining the lands in question unless he could obtain the consent from the defendants the International Coal and Coke Co., Ltd. In one letter it is stated that he has a controlling interest in that company; but at the trial it was stated by counsel that that statement is not correct. The coke company and Mr. Paulson are at daggers drawn, and absolutely refuse and decline to confer upon Paulson any right to utilize their property for the transmission of the coal.

CAN.
EX. C.
THE KING
v.
PAULSON.
Cassels, J.

In order to mine the property leased to Paulson it would, according to his contentions, be necessary to go down about 2,000 feet, a matter that would make it absolutely impracticable commercially to mine on the location in question. It is to my mind absolutely clear that what the defendant Paulson was seeking to do was to hold his lease without complying with the terms of it, with the view to compelling the coke company to buy him out. The earlier representations in the correspondence shew that the excuse put forward for obtaining further extension of time was the fact that the property in question could not be mined until the coal company who had mining rights on either side of Paulson's concessions reached his location, and was always upon the representation that it would be impossible for him to commence operations until the coke company approached his location that the delays were obtained.

I think the Crown is entitled to a declaration that Paulson's lease was properly cancelled for the reasons I have stated. Had the proper course been pursued and the Crown waited until a petition of right for damages, if a fiat were granted, had been brought, Paulson's damage would have been nothing or merely technical. I think, under the circumstances of the case, each party should bear their own costs.

Judgment accordingly.

REX v. PRENTICE.

ALTA.
S. C.

Alberta Supreme Court, Stuart, Beck and Simmons, JJ. October 23, 1914.

1. WITNESSES (§ II C—47)—PRIVILEGE—AUTHORIZATION OF SOLICITOR'S ACT.
The authorization or direction to a solicitor to send a letter on behalf of the client is not within the privilege between solicitor and client, and the latter, called as a witness in a criminal case in which he was the complainant, cannot on that ground decline to answer a question put by counsel for the accused whether he, the witness, had not authorized his solicitor, at or about the time the accused brought civil proceedings against the complainant, to write a particular letter which the solicitor had sent to the solicitor for the accused.

2. TRIAL (§ I C—10)—DISCRETION—RE-CALLING WITNESS ON COLLATERAL ISSUE AS TO CREDIT.
The Judge trying a criminal case without a jury has a discretion to refuse to re-call one of the accused who had given evidence on his own behalf for the purpose of giving further evidence tendered merely to confirm the credibility of one of his own witnesses as to a circumstance brought out on the latter's cross-examination which was not relevant to any fact in issue.

3. FALSE PRETENCES (§ I—10)—FRAUDULENTLY INDUCING EXECUTION OF VALUABLE SECURITY.
A cheque on a bank is a "valuable security" within the statutory definition of that term under Cr. Code, sec. 2 (40), although not covering

ALTA.
S. C.
REX
v.
PRENTICE.
Stuart, J.

the entire fund against which it is drawn, as regards the offence under Cr. Code, sec. 406, of inducing the execution of a valuable security by fraud.

[*R.* v. *Wagner*, 6 Can. Cr. Cas. 113; *R.* v. *Hope*, 17 Ont. R. 463; *R.* v. *Rymal*, 17 Ont. R. 227, referred to.]

CROWN Case reserved on a trial before SCOTT, J.

E. B. Cogswell and *A. G. MacKay*, K.C., for the prosecution.

O. M. Biggar, K.C., for defendant Prentice.

Frank Ford, K.C., for defendant Wright.

STUART, J.:—I agree, for the reasons given by my brother Beck, in the answer he proposes to give to the first question reserved. With regard to the second question, however, I feel compelled to take a different view.

The accused was charged with the crime of forgery. The complainant was one Brown, who was a chief witness for the Crown at the trial. The defence attempted to attack the credibility of Brown by shewing bias or improper motive. This the defence was, of course, entitled to do, but it must be remembered that the existence or non-existence of bias or improper motive was a mere subordinate issue. The decision of that issue was only of importance for the purpose of affecting the credibility of Brown. Then, when evidence of conduct on the part of Brown tending to shew bias was given, a still more subordinate issue of fact appeared, because the conduct alleged was denied. It was with respect to this subordinate issue of fact, viz., whether the alleged conduct tending to shew bias had in fact occurred, that there was a conflict of testimony and a subordinate question of credibility again arose. The way in which the matter arose was this: Brown, in cross-examination, denied having had an interview in his office with two men named Jacinsky and Miller, and denied having at such interview asked Jacinsky to make representations to Wright (one of the accused) that if Wright could give evidence against Prentice, he (Brown) would be ready to take him (Wright) into his (Brown's) employ and see that he (Wright) got off all right. Miller was called as a witness for the defence, and gave evidence that Brown had told him and Jacinsky that if Wright would come down to him and explain the whole thing to him, he would put him all right. Miller added that he took from this that Brown was going to go after Prentice. The defence afterwards applied to allow Wright to be recalled for the purpose of giving evidence as to his conversation with Jacinsky. This the trial Judge refused.

The exact questions proposed to be put to Wright upon his recall are not stated in the case, and if we confine the matter strictly to what is before us, it seems to me that we cannot possibly interfere with the decision of the trial Judge. Every subject of conversation, no matter of what kind, between Wright and Jacinsky would certainly not be *ipso facto* admissible in evidence. It was stated to us, however, that the conversation proposed to be proven was to the effect that Jacinsky had in fact conveyed such a message to Wright as was suggested in Miller's testimony. I assume that the evidence of Miller was capable of bearing the construction that Brown was suggesting to Miller and Jackinsky that they or one of them should go and tell Wright what he said.

It seems to me the case stands somewhat like this: Jacinsky was not called as a witness, for what reason we do not know. But, suppose he had been called and had said that Brown had told him to go and give Wright the message referred to, and suppose counsel had then asked, "and did you go and give the message to Wright?" would not that question have been excluded as irrelevant? I think it would have been, strictly speaking, inadmissible, although, doubtless, little objection would in such a case be made. The fact was not relevant to either the main issue or the subordinate issue of bias. In Jacinsky's own mouth the last five words of such a sentence as "Brown told me to tell Wright that, *and I told him, too*," could only be self-confirmatory.

Then, instead of that situation, we have *Miller* swearing that Brown sent a message by Jacinsky, we have Jacinsky not called at all, and then Wright, one of the accused, who had listened to Miller's testimony, proposed to be recalled to say that Jacinsky had delivered the message. The delivery of the message was not relevant to any fact in issue, but was only suggested as confirmatory of Miller's story that a message had been sent, the sending of the message being the only really relevant fact. Certainly, if Jacinsky could not tell about his conveyance of the message, there seems little reason why the accused should listen to Miller and then jump up and say "yes, and I received that message from Jacinsky," and ask that evidence to be considered as having any probative force in confirming the testimony of his witness Miller. If a third and disinterested person had testified to having heard Jacinsky give the message, it is possible that

ALTA.

S. C.

REX v. PRENTICE.

Stuart, J.

his evidence might be technically admissible. But it seems to me that in the actual situation it was at least a matter for the trial Judge's discretion.

Moreover, I think we reach here ramifications which have become too detailed. Wigmore on Evidence, at par. 951, in referring to the question of the admissibility of the details of a quarrel out of which bias is alleged to have arisen, says:—

> "In two ways inconvenience may ensue: (1) The detailed inquiries, the denials, and the explanations are liable to lead to multifariousness and a confusion of issues."

The other inconvenience is not relevant here, but the author goes on to say that it is commonly held that the details of a quarrel or other conduct may be excluded in the trial Court's discretion. Although we have not here a question of details of a quarrel, yet the situation was not dissimilar. The matter was reaching into ramifications both of issues and credibility. The trial Judge may well have thought that the matter had gone far enough. There being no jury there, he may have decided that the proposed evidence of the accused Wright tendered merely to confirm the credibility of one of his own witnesses, whose testimony he had already listened to would be of no real value or assistance to him in any case. I think the evidence, if admissible at all, which I doubt very much, was only admissible in the trial Judge's discretion. I cannot see that that discretion was improperly exercised in the circumstances of the present case or that any wrong was done to the accused. I would, therefore, answer the second question in the affirmative.

I would also answer the third question in the affirmative. The charge was one under sec. 406 of the Criminal Code. The documents in question were cheques on the Bank of B.N.A. The question reserved is whether the definition of a "valuable security" contained in sec. 2, sub-sec. 40, of the Code is sufficiently wide to bring documents of the kind in question within it in the absence of allegation or evidence that each covered the whole of the deposit.

In my opinion, we do not need to rest upon the first part of the definition of a valuable security. The second part says that

> "valuable security" . . . also includes any debenture, deed, bond, bill, note, warrant, order or other security for

ALTA.

S. C.

REX v. PRENTICE.

Stuart, J.

money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom, or of any British colony or possession, of any foreign state."

The only reason urged why these cheques should not be considered as "bills or orders for the payment of money" was that the true interpretation of the clause quoted is that the documents described must be documents "of," *i.e., issued by,* Canada or any province thereof, etc., and that the clause does not mean merely "money of Canada, etc.," in the sense of defining the currency, because, so it was said, the inclusion of the words "or of any province thereof" could not have any meaning in such a case, inasmuch as a province does not control or issue currency. But it seems to me that the reference is clearly to currency. Both the definition and the crime go at least as far back as the Larceny Act, 32-33 Vict. ch. 21, sec. 95 and sec. 1. That was in 1869, just two years after confederation, when the provinces ceased to have the right to control currency. The reference to the provinces was obviously put in in order to cover any belated case of reference in the document to old currency and the retention of the words is simply a survival. The cases of *Rex* v. *Wagner*, 6 Can. Cr. Cas. 113, *Reg.* v. *Hope*, 17 O.R. 463, and *Reg.* v. *Rymal*, 17 O.R. 227, all dealt with documents not issued by any government, but merely by private persons, and in none of those cases was the present argument advanced at all. It was apparently tacitly assumed that the reference in the definition was merely to currency and to nothing else. For these reasons I think the documents came within the meaning of the portion of the definition to which I have referred.

I agree that a negative answer to the first question involves the necessity of a new trial. If we had all the evidence before us, it is perhaps possible that we might conclude that no substantial miscarriage of justice or wrong had been done, but, as the case is stated, I think we must decide that the exclusion of relevant evidence touching the credibility of an important witness must be treated as a substantial wrong to the accused.

Beck, J.

BECK, J.:—The first question raises this point: Can a witness, on the ground of privilege, be allowed to refuse to answer the question whether he authorized or directed his solicitor to make a certain communication to the solicitor for the opposite

ALTA.
S. C.
REX
v.
PRENTICE.
Beck, J.

party in anticipated or pending litigation. The learned Judge's ruling is distinctly placed on the ground of privilege in the witness, not on the ground that the question was irrelevant or vexatious (Rule 199). The whole question of privileged communications between client and solicitor is discussed at great length in Wigmore on Evidence, ch. LXXX. The rule is there formulated, par. 2292, with, I think, sufficient accuracy:—

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the client waives the protection."

It surely is beyond question that the contents of the communication itself from the witness' solicitor to the solicitor for the opposite party which, in order to avoid confusion I shall call the letter, do not come under the privilege, for the contents of the letter were *ex hypothesi* intended to be made known to a third party in adverse interest, and therefore neither the contents nor the actual letter itself can possibly be said to have been communicated by the client to the solicitor in confidence. It seems almost, if not equally, plain that the authorization or direction to send the letter does not come under the privilege, for the mere authorization or direction is not a statement made for the purpose of obtaining advice. The question of fact whether or not the authorization or direction was given "is not within the mischief which that rule is intended to guard against; and therefore, is not within the rule": *Desborough* v. *Rawlins*, 3 Myl. & Cr. 515, 40 E.R. 1025. I, therefore, think the ruling of the learned trial Judge in respect of the first question reserved was wrong.

The second question raises some difficult points: The evidence of a person present and hearing a communication made by another to a third party clearly is equally admissible with the evidence of the person by or to whom the communication was made. The fact that the communication is suggested to be an authorization or direction cannot affect the question. Miller's evidence was, therefore, admissible. His evidence, however, fell short of what the question to Brown suggested it would be. Miller's evidence was to the effect that Brown had said to him

and Jacinsky that if Wright (one of the accused) would come to Brown and explain the whole affair to him, he would put him all right, and that from this statement of Brown's he inferred that Brown was intending to prosecute Prentice (charged jointly with Wright in this prosecution). The question to Brown suggested that Brown had requested Jacinsky to convey to Wright what Brown had said. It seems to me that, under the circumstances, it was quite open to counsel for the accused to contend that by implication there was such a request on Brown's part or at least an authorization. If this is so, would the evidence of Wright to the effect that Jacinsky did in fact convey to him such a message as coming from Brown be admissible, although but for some proof of Jacinsky's authority to convey it, it would clearly not be admissible? It seems to me that it was admissible as going to the credit of Brown in relation to his denial of the conversation, and therefore to his evidence generally. It is true that the general rule is that a witness cannot be contradicted with regard to matters irrelevant to the issue, but to this there is an exception if the matter suggested by the question, though irrelevant, would tend to shew that the witness was biased against the opposite party: Phipson on Ev., 5th ed., pp. 477-8. It seems to me that if Brown were shewn to have made the statement which he denied, bias against Prentice would be shewn or could be inferred. The evidence excluded was tendered by Prentice's counsel. But then it may be urged that this goes no further than to say that Miller's evidence on that point was properly received; but I think it goes further than that. I think that had the evidence of Wright upon this point been admitted, it would have been a not improper observation of the trial Judge to make to the jury, had there been one, to have said:—

> "Gentlemen,—The credibility of Brown has been attacked; it is urged that he has a strongly antagonistic feeling towards Prentice. In considering whether this is so, it will be proper to consider in what respects Brown has been contradicted by other witnesses. He has been contradicted by Miller with regard to a conversation said to have taken place between Brown, Miller and Jacinsky, and, in trying to determine whether you believe Brown or Miller, it will be proper for you to advert to the fact that (assuming such evidence had

ALTA.

S. C.

REX v. PRENTICE.

Beck, J.

been given) what Wright says Jacinsky did in fact tell him agrees with Miller's evidence about the conversation with Brown."

It seems to me, therefore, that the evidence of Wright was admissible as confirmatory of the evidence of Miller for the purpose of shewing bias on the part of Brown against the accused Prentice, and that, as the question before us is apparently intended to raise the substantial ground of the admissibility of the evidence—(Wright was proposed to be called before the conclusion of the evidence for the accused)—the learned Judge's ruling should be held to have been wrong.

The third question is substantially whether a cheque on a general current account is a "valuable security."

The interpretation which counsel for the accused seek to put upon the words of sec. 2, sub-sec. 40, of the Criminal Code, interpreting "valuable security," is this: That, whereas the opening words are "any order, exchequer, acquittance or other security entitling or evidencing the title of any person to *any share or interest in* any public stock or funds, etc., or in any fund of any body corporate, company or society, etc.," and then says: "Or to any *deposit* in any savings bank or other bank," the use of the words "any share or interest in" in the first case shews that, these words not being repeated before the word "deposit," the intention was not to cover any share or interest in a deposit, but a deposit as a totality. I think this argument not sound. The answer to it could be put in more ways than one; but perhaps the clearest is this: The expression "share or interest" does not mean merely any kind of an interest, share being taken in the sense of an interest only coupled with the idea of proportion, but means a share—in the sense in which it is used in speaking of a share in the capital stock of a company—or other interest of a like nature, such as stock, funded exchequer bills, or funded securities guaranteed by the Government. In this view the comparison or contrast is between "deposit" and "share or interest," not "any public stock or fund," and "any share or" other "interest" of a like nature is then seen to be in the same category as "any deposit," and each is a totality in the same sense, and then, as the greater includes the less, and the whole includes all its parts, to both "any share or interest" and to

ALTA.

S. C.

REX v. PRENTICE.

Beck, J.

"any deposit" may be added the words "or any part thereof or interest therein." I think, therefore, the learned Judge's ruling on this point was right.

Having held that certain evidence tendered on behalf of the accused was improperly not received, I think there should be a new trial. I think the evidence rejected may reasonably be supposed to be of such a character that, if given, it might have affected the mind of the trial Judge in deciding whether or not the defendant was guilty. The Judge himself says that he cannot say whether it would or not. I think, therefore, "some substantial wrong or miscarriage was thereby occasioned on the trial" (sec. 1019). See *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57.

Simmons, J.

SIMMONS, J., also agreed for reasons given in writing, that the ruling of the trial Judge was incorrect and that there should be a new trial.

New trial ordered.

N. S.

S. C.

JAMES v. TOWN OF BRIDGEWATER.

Nova Scotia Supreme Court, Graham, E.J. December 22, 1914.

1. DAMAGES (§ III E—135)—TORTS—RIPARIAN OWNER—DAM ABOVE—ACCUMULATED WATER—FLOODING LAND.

A lower riparian proprietor may recover damages against the upper proprietor who dams up the water of the river and then releases the accumulated water in large volumes whereby the plaintiff's land is overflowed and crops damaged.

[*Miner* v. *Gilmour*, 12 Moo. P.C. 131; *Fletcher* v. *Rylands*, L.R. 3 H.L. 330; *McKee* v. *D. and H. Canal Co.*, 125 N.Y. 355, referred to; *McDougall* v. *Snider*, 15 D.L.R. 111, 29 O.L.R. 448, and *Hudson* v. *Napanee*, 31 O.L.R. 47, distinguished.]

ACTION for damages and an injunction.

Judgment for plaintiff.

McLean, K.C., and *Margeson*, for the plaintiff.

Arthur Roberts, K.C., for defendant town.

Graham, E.J.

GRAHAM, E.J.:—By the Acts of 1897, ch. 103, a company known as the Bridgewater Power Co. Ltd., was incorporated with power to acquire water powers situate on the Petite Reviere Stream, near Hebbs Mills a few miles out of Bridgewater, to establish and maintain reservoirs and keep back the water, etc., to produce a continuous power for the purposes of the company. By sec. 20, provision was made for compensation by agreement or otherwise by arbitration for, among other things,

N. S.

S. C.

JAMES v. TOWN OF BRIDGEWATER.

Graham, E.J.

rights of flowage, backflowage and storage of water and easements and privileges upon the Petite Reviere.

By the Acts of 1900, ch. 93, an Act for supplying the Town of Bridgewater electric light and control of water for water supply, the town was authorized to purchase the undertaking of the Bridgewater Power Co. and the franchises, rights, privileges, etc. By section 2 the town in addition to any lands, easements, control of water supply, powers, privileges, rights or other privileges of the Petite Reviere stream acquired by the first section was authorized to acquire, among other things, pond rights of flowage and water power upon the said Petite Reviere stream. Among other things, for the purpose of providing the town with control of water for a water supply for domestic, fire or other purposes, and if the parties could not agree for the purchase of the same, the town was authorized to acquire the same by the procedure set out in sec. 20, ch. 103 of Acts of 1897. In 1901, ch. 116, an Act for supplying the town of Bridgewater with water was passed. In addition to the powers already mentioned in the Acts of 1900, extension powers were given to the town to provide a sufficient supply of water for the town. Also provisions for compensation were made.

The first five sections of this Act appear for the most part to have been copied from the Act to supply the town of North Sydney with water: ch. 44 of the Acts of 1896. I mention that circumstance because those sections were under consideration in the case of *Leahy* v. *North Sydney*, 37 Can. S.C.R. 464.

The town council now has on the Petite Reviere a concrete dam, 133 feet long, with earthwork dams at either end. In the concrete dam are five spillways 5 feet in width, with splashboards which can be adjusted to lower or increase the water level. Also at one end a sluice with a hoist gate through which a private owner obtains by means of a canal, water to cover when required, his cranberry bog. The plaintiff is a riparian owner on the Petite Reviere just below the dam holding 5 acres of land with house and barn, which property was acquired in 1906. In the latter part of the month of May, 1913, there was a considerable rainfall. On May 23, the rainfall in that locality

was one inch and 65/100 of one inch. And on May 30 two inches and 60/100 of an inch.

On May 30, Maurice Hebb, the superintendent whose duty it was to look after the water supply removed three of the splash boards which are 6 inches wide, one from each section. The next day, by his direction, his brother Clarence Hebb, took out a splash board from each of the three sections of the dams. And on the next day or the day after, Maurice Hebb took out some more of the splash boards. He also (for the system consists of three lakes, Hebbs Lake, 2,100 acres and above that Milipsigate Lake, 2,400, and above that Melankey Lake, 3,100 acres in extent) went to Milipsigate Lake and put an extra top of 9 inches to hold back the water at that place. This was on the second or third day of the days I have mentioned. The escaping water overflowed part of the plaintiff's lot and remained there for a period of 8 or 9 days. It appears that the bed of the river below is too narrow to carry off such a large volume as had accumulated, and was let loose. From the water lying on the land the grass was injured in its growth, also some cabbage plants which had been set out and the soil had been removed. The plaintiff's action is for damages and an injunction because of flooding the plaintiff's land by accumulating the water and releasing it in large volumes. And also because of negligence in the manner of allowing the water to escape. I think that the general law creating the duty of one riparian owner to one below him, *Miner* v. *Gilmour*, 12 Moore P.C. 131, 156, and the well-known principle established in *Fletcher* v. *Rylands*, L.R. 3 H.L. 330, 339, would enable the plaintiff to succeed in this action unless the provisions for acquiring land and rights and privileges and giving compensation therefor mentioned in this statute take the case out of those principles.

Until the defendant satisfied the requirements of those statutes they were simply wrongdoers in respect to the plaintiff's land. They had no right to dam up the water of the river and then allow the accumulation to escape upon the plaintiff's land overflowing it: *McKee* v. *Delaware and Hudson Canal Co.*, 125 New York 355. Let us see what they did in respect to the acquisition of and compensation for the plaintiff's rights. As

N. S.

S. C.

JAMES v. TOWN OF BRIDGEWATER.

Graham, E.J.

I said the plaintiff did not acquire this land until 1905 and there had not been in respect to the part now in question any acquisition from or compensation to any predecessor in title of the plaintiff. The plaintiff did not apparently at first learn of the plaintiff's rights. There was, however, a complaint made in June, 1910, not of flooding this land but of withholding water. On October 21, 1911, the plaintiff and her husband for the sum of $50 released all the past damage and in respect to the future this provision was made. I copy it.

> And further that they the said Amanda E. James and R. Melbourne James do and each of them doth hereby release, remise, convey and confirm unto the said town of Bridgewater, its successors and assigns the full right, power, privilege and authority to flood and overflow with the waters of said Petite Reviere River any and all of the said lands of said Amanda James at Hebbville aforesaid at any time and at all times in and during the months of October, November, December, January, February, March and April in each and every year hereafter providing however that the said flooding or overflowing is not made any greater or higher than it has been at any time heretofore from or caused by the waters of the said river together with the right and privilege to which the said Amanda E. James and R. Melbourne James do and each of them doth hereby consent and agree to and for the said town at any and all times hereafter of diverting and changing the course and waters of the said Petite Reviere River in any manner or as the said town may wish providing however that the same shall not be diverted except the overflowing hereinbefore provided for over or on the lands now owned by the said Amanda E. James or any part thereof. And the easements and appurtenances to the same belonging, or in anywise appertaining. To have and to hold the same unto and to the use of the said town. Later there was a case of overflowing in a month not covered by this instrument and without prejudice the town paid and the plaintiff accepted in full of all claims to date, that is the 19th of February, 1913, the sum of $15.

Now, the overflowing complained of in this action took place in May, 1913, and therefore is not covered by the instrument I have quoted from. The statute as to acquisition and compensation have not been satisfied and the defendant is therefore a wrongdoer. Under the case of *Leahy* v. *North Sydney*, 37 Can. S.C.R. 464, in such case an action may be maintained for damages and an injunction. In my opinion, this injury does not come within the rule as to the Act of God. Taking this evidence as a whole I did not get the impression that it was an unprecedented rainfall, and in the following year in May, there was another overflow very nearly as great. The releasing of the water

N. S.
S. C.
JAMES
v.
TOWN OF
BRIDGE-
WATER.
Graham, E.J.

was voluntary here. The trouble seemed to have been caused by the superintendent commencing late to release the water at the lower dam and not raising the upper dam earlier and in not releasing the water more gradually. It appears from the distance of the lakes above, that it takes some time for the increased volume of water to reach Hebbs' dam and this gives notice.

I think the case is not within the decisions of the appellate division in Ontario: *McDougall* v. *Snider*, 15 D.L.R. 111, 29 O. L.R. 448, and *Hudson* v. *Napanee*, 31 O.L.R. 47.

In my opinion there should be judgment for the plaintiff and I assess the damages at the sum of $30, and I grant an injunction as prayed.

FREDERICTON & GRAND LAKE COAL AND R. CO. v. HARDING.

N. B.
S. C.

New Brunswick Supreme Court, Sir Frederic Barker, C.J., White, Barry, and McKeown, JJ. November 21, 1913.

1. CONTRACTS (§ V A—98)—DESCRIPTION UNCERTAINTY—TERMS OF CONTRACT—ELECTION.

Uncertainty of description of the subject matter in the sale of land may be aided by a right of election vested by the terms of the contract in the purchaser whereby the latter is given the power of rendering certain that which before was undetermined, and so make the sale enforceable by a decree for specific performance.

[*Duckmanton* v. *Duckmanton*, 5 H. & N. 219; *Hobson* v. *Blackburn*, 1 Myl. & K. 571; *Rumble* v. *Heggate*, 18 W.R. 749; *Jenkins* v. *Green*, 27 Bev. 437, referred to.]

APPEAL by the defendant from the judgment of McLeod, J., in the plaintiff's favour ordering specific performance of an agreement by defendant to sell land to the plaintiff.

Appeal dismissed.

J. D. Phinney, K.C., and *F. A. Peters*, for the defendant.

A. J. Gregory, K.C., and *R. B. Hanson*, for the plaintiff.

Barker, C.J.

BARKER, C.J.:—I think this appeal must be dismissed with costs. The only question which seems to me of any importance is as to the selection of the road to the station. The learned Judge held that under the contract sought to be enforced the right of selection was in the plaintiff subject to this that the right must not be exercised unreasonably or in a manner oppressive to the owner or so as to cause him unnecessary inconvenience in the use of the remainder of his land. The Judge

N. B.

S. C.

FREDERICTON & GRAND LAKE COAL AND R. CO. v. HARDING.

Barker, C.J.

based his decision on the cases of *Jenkins* v. *Green* (1858), 27 Beav. 437 (much more fully reported in 5 Jur. N.S. 304), and *Rumble* v. *Heygate*, 18 W.R. 749, in which the Court applied the rule that the right of selection is in the party who has the first act to do. It does not seem to me necessary to resort to any technical or arbitrary rule of construction in order to determine the question as to the right of selection, for it is apparent not only from the terms of the contract itself but from the nature of the transaction and the property involved, that the right was in the plaintiff. The contract in question is partly printed and partly written. The printed part is a general form of agreement used by the railway company for execution by the owners of the land through which the plaintiff's railway was to run to secure to them the right to locate and construct their railway and later on to obtain from the owners formal conveyances of the lands when located. By this agreement the defendant licensed and permitted the company by its engineers, contractors, servants and agents to enter his land and to survey, lay out, locate, build, maintain and operate a line of railway thereon. The defendant also for the consideration mentioned, granted, bargained, sold, assigned, transferred, conveyed and set over to the plaintiff the right of way for the said line of railway in, over and across his said land, and all and so much of the land as the company by its engineers, contractors, servants and agents might survey, lay out, locate and construct and as the same might be laid out and marked off, not exceeding the width provided by law. The agreement also contains a covenant on the part of the defendant that he will at the request of the company make and execute any other deed and conveyance "of the lands, tenements and hereditaments so surveyed, located and marked off for the said line of railway," that the company might require, and that in the meantime the defendant so far as any title to the lands so surveyed, located and marked off, might remain in him, should stand seized thereof in trust for the use of the company "for the purpose of building, operating and maintaining" the railway and to permit the company and its engineers, contractors, servants and agents to enter thereupon and "locate, construct, operate and maintain the said line of railway." This agreement, which

is executed under the defendant's hand and seal, is not only a license for a valuable consideration, to the plaintiff to take, use and occupy that part of his land taken and selected by the company for the location, construction and operation of the railway, but it is an equitable conveyance of the land itself which may be taken and selected for the purposes of the company. In addition to this the agreement contains a covenant by the defendant to execute any further conveyance which the company may require, and that in the meantime, that is, between the date of the agreement and the execution of the further conveyance, any title which might remain in the defendant in the land taken and selected for the purposes of the railway, should be held by him in trust for the company. This is the effect and purport of the agreement so far as it is printed, and it seems beyond all doubt that the location of the road and the selection of the land required for the purpose of its location, construction and operation were to be made by the plaintiff and not directly or indirectly by the defendant. The subject matter of his equitable conveyance and his covenant for further assurance related solely to lands to be taken and selected by the company for the uses and purposes of its railway.

At the end of the printed part of the agreement and immediately before the testimonium clause these words are added in writing:

> Including if required, land for station grounds up to but not exceeding 200 feet in width and for a distance of 600 ft. in length of which not more than 100 ft. from the centre line of the railway, shall be on the south-western side; also the land for a road from the highway to the said station grounds up to but not exceeding 50 ft. in width.

The effect of this clause in my opinion is that the land to which the printed part of the agreement relates and which admittedly was to be selected by the company for the purposes of the railway and which was conveyed equitably by the agreement and to form the subject matter of the conveyance sought by this suit includes the lands for a station and road to the highway and for the purposes and objects of the agreement they were all to be considered and dealt with alike. The words used in the printed part describing the lands which were to be used, selected and conveyed to the plaintiff by the defendant, were made by the

N. B.

S. C.

FREDERICTON & GRAND LAKE COAL AND R. CO. v. HARDING.

Barker, C.J.

agreement itself to include land for a station house and land for a road to the station. Unless this is so the added words are meaningless and useless, for there would be nothing to indicate what was to be done in reference to the station ground and road. It is in my view altogether immaterial whether or not the company could expropriate the land required for the road, because the company have bought it and promised to pay for it. And where the parties said as they did by their agreement that the lands to be acquired were to include what was required for the station house and road, the lands became a part of the lands to be located and surveyed by the railway company and which are included in the equitable transfer made by the agreement itself and of which the formal conveyance was to be afterwards made. The company was to have the location and survey of all these lands—including the land for station house and road—and the power to select is included in the power to locate. And there is nothing to indicate error on the learned Judge's part in holding that the evidence failed to establish any oppressiveness or unreasonable exercise of the power.

The appeal I think should be dismissed with costs.

Barry, J.

BARRY, J.:—The questions for determination upon this appeal may be reduced to two. Was the contract sought to be enforced so certain and definite as that specific performance thereof could be decreed; and, secondly, the defendants having by their agreement of May 17, 1912, contracted with the plaintiff for "land for a road from the highway to the station grounds up to, but not exceeding, 50 ft. in width" without delimiting the location of the proposed road, is the plaintiff entitled to the right of selection of the site of the road. The plaintiff did in fact on June 8, select the site, and afterwards built the road upon the site selected, from the highway road through about the centre of the defendants' farm to the station grounds.

Evidence was given on the part of the defendants in an endeavour to shew that this selection was particularly injurious to the farm, and an interference with the privacy of the defendants' dwelling. The defendants always wanted the road constructed along the lower line—the Miles side of the farm—and at the time the contract was entered into the defendant, James

P. Harding intimated to the president of the plaintiff company that he desired the road there; but the president at once said that that would not do, that the company wanted the road along what was called the farm road; and it is this latter location which has been selected by the plaintiff company. From a perusal of the evidence I think it may be fairly enough concluded that even if the defendant James P. Harding did not in terms acquiesce in the site of the road selected by the plaintiffs, he did not, at all events offer any very strenuous objections to the site chosen, because we find him afterwards asking that a slight deviation be made in the course of the road, so as to avoid destroying some ornamental trees on the farm, a request which was acceded to by the plaintiff company.

In contracts of this kind it is essential that the description of the subject matter should be so definite as that it may be known with certainty what the purchaser imagined himself to be contracting for, and that the Court may be able to ascertain what it is; and *id certum est quod certum reddi potest.* "Uncertainty of description of the subject matter may be got over by the election of one party to the contract, where the effect of the contract is to give such a right of election." Fry Spec. Perf., 5th ed., sec. 346. In discussing patent ambiguities, it is said in Broom's Legal Maxims, 8th ed., 467, that although a patent ambiguity cannot be explained by extrinsic evidence, it may in some cases be helped by a right of election vested in the grantee or devisee, the power being given to him of rendering certain that which was before altogether uncertain and undetermined. And see *Duckmanton* v. *Duckmanton* (1860), 5 H. & N. 219. Thus where a general grant is made of ten acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground the choice of such ten acres is in the grantee; per Leach, M.R. in *Hobson* v. *Blackburn* (1833), 1 Myl. & K. 571, 575. See *Richardson* v. *Watson* (1833), 4 B. & A. 787.

Jenkins v. *Green* (1858), 27 Bevan 437, and *Rumble* v. *Heygate*, 18 W.R. 749, cited by Mr. Justice McLeod in the Chancery Division, are authorities for saying that an agreement to give as much of a thing as may be necessary for a specified purpose con-

N. B.

S. C.

FREDERICTON & GRAND LAKE COAL AND R. CO. v. HARDING.

BARRY, J.

fers a right of a nature known to the law, and is not open to the objection of uncertainty; and that under an agreement to give as much of a specified piece of land as may be necessary for a specified purpose, when the quantity has been determined, the right of selecting the piece to be given belongs to the promisee. In *Rumble* v. *Heygate, supra*, the objections were that neither quantity nor site was fixed. James, V.C., in the course of his judgment, at page 730 of the report says:—"I am of the opinion that these objections are mere shadows which vanish when examined by the light of common sense. The one as to quantity is no more than occurs in many cases, as, for instance, in 'estovers.' You are to take as much as is necessary, that is, as much as you require, not exceeding what is necessary. Then as to the site, the quantity being ascertained, the question is, who has the election of the site. Three quarters of an acre is admitted to be not more than necessary. Now in Co. Litt., 145 (*a*) it is said: 'In case an election be given of two several things alwaies he which is the first agent, and which ought to do the first act, shall have the election.' And, 'if I give you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seizure of one of them.' Other illustrations of the same principle may be found in Comyn's Digest and Viner's Abridgement. I am of opinion that in this case, on that principle, the person to do the first act would have been the purchaser." See also *Padbury* v. *Clarke* (1850), 32 Maen. & G. 298; 19 L.J. Ch. 533; *Sanderson* v. *Cockermouth & Worthington Ry.* (1849), 11 Beav. 497; *Wylson* v. *Dunn* (1887), 34 Ch. D. 569.

Something was said at the argument about the question of non-mutuality—that the contract was not binding upon the plaintiff, and being unenforceable against the company, it was also unenforceable against the defendants, but I can find no objection of this kind in the notice of this appeal. Also it is objected on behalf of the appellants, that the defendant James P. Harding signed the agreement under a mistake as to the price he was to receive for the lands required by the respondents; that he really did not know the effect of what he was signing. But this objection was swept away by the judgment of the learned trial Judge, who finds that before the defendant signed the agree-

N. B.

S. C.

FREDERICTON & GRAND LAKE COAL AND R. CO. v. HARDING.

ment, it was handed to him and he looked it over. The defendant himself says he read the printed but not the written part of the agreement, but, says the learned Judge "he heard the written part dictated by Sir Thomas Tait. So I think there can be no doubt the defendant understood that he was to receive $250 for the right-of-way and station grounds and road-way." And, for myself, I think the evidence fully sustains that view.

Barry, J.

Being of opinion that the contract is an enforceable one, and the right of selection of the site of the road-way in the plaintiff; and the trial Judge having found that the selection made by the plaintiff was the logical and natural place for a road to the station grounds, and that such selection does not bear oppressively upon the defendants, I would dismiss this appeal, with costs.

White, J. McKeown, J.

WHITE and MCKEOWN, JJ., agreed that appeal should be dismissed with costs.

MOUNT ROYAL TUNNEL AND TERMINAL CO. v. BROWN

QUE.

S. C.

Quebec Superior Court, Archibald, Weir and Beaudin, JJ. October 27, 1914.

1. COURTS (§ II A 1—150)—COURT OF REVIEW, QUEBEC—DEPOSIT BY COMPANY—JURISDICTION TO REDUCE—STATUTORY POWERS.

The Court of Review, Que., has jurisdiction on appeal to reduce the amount ordered by a Judge of the Superior Court in Chambers to be deposited by a tunnel company before excavating under private property in pursuance of its statutory powers.

[*C.P.R. v. Little Seminary*, 16 Can. S.C.R. 606; *Richelieu Ry. v. Menard*, 7 Que. K.B. 486, referred to.]

ACTION to reduce amount of security.

Order accordingly.

Lafleur, MacDougall, MacFarlane & Pope, for appellant.

Beaubien & Lamarche, for respondent.

The judgment of the Court was delivered by

ARCHIBALD, J.:—This is a review which was before us of an order of a Judge of the Superior Court in Chambers compelling the Mt. Royal Tunnel & Terminal Co. to deposit for the security of respondents the sum of $35,000 as a condition of being permitted to continue excavation under the respondents' property situate upon McGill College Ave.

Archibald, J.

The quantity of property belonging to respondents which is affected by the tunnel is exceedingly small and the Tunnel

QUE.

S. C.

MOUNT ROYAL TUNNEL AND TERMINAL CO. v. BROWN.

Archibald, J.

Co. have, in virtue of a clause of their Act, notified the respondents of the works which were intended to be made for the purpose of protecting the respondents' property from any damages whatsoever.

The sum of $35,000 appears to me greatly exaggerated, and if we have jurisdiction here to revise this judgment at all, I should be disposed to give appellant relief by reducing the amount deposit to a sum not at the highest exceeding $10,000.

But a serious question is raised as to the jurisdiction of this Court to interfere with the order of the Judge in Chambers. The matter depends on art. 72 of the Code of Civil Procedure:

> Decisions rendered by the Judge in Chambers upon matters within the jurisdiction assigned to him, have the same force and effect as judgments of the Court and are in like manner subject to review, appeal or any other remedies against judgments.

The principal argument of the respondents upon this article is: that under the provisions of the Railway Act, a Judge in giving an order such as that in question in this case, is not really acting as a Judge but as a *persona designata*, who might as well be any other person and would not necessarily be a Judge at all, and that, therefore, art. 72 must be taken to apply to a Judge acting in the ordinary course of a regular proceeding specified in the Code of Civil Procedure, and not to a Judge designated for certain purposes under certain legislative acts. The main authority for this position is contained in the case of the *C.P.R.* v. *The Little Seminary of Ste. Therese*, 16 Can. S.C.R. 606. In this case, a sum of $4,000 had been deposited by the Railway Co. seeking expropriation, in a bank, and an award of arbitrators had been rendered for a sum exceeding $4,000. The expropriated party petitioned the Judge in Chambers for the payment of the said sum of $4,000, which petition was granted. The judgment granting the order went into the Queen's Bench and was maintained. Subsequently, an appeal was taken from the Queen's Bench to the Supreme Court and there it was held that the order in question having been made by a Judge sitting in chambers and further acting under the statute as a *persona designata*, the proceedings had not originated in the Superior Court within the meaning of sec. 28 of the Supreme and Exchequer Court Acts and the case was, therefore,

QUE.

S. C.

MOUNT ROYAL TUNNEL AND TERMINAL CO. v. BROWN.

Archibald, J.

not appealable. There is no holding in the case that a Judge acting under the Railway Act did not act as a Judge but as *persona designata*, but that opinion is expressed by several of the Judges in rendering their decisions. Taschereau, J., said:

> This appeal must be quashed on two distinct grounds: (1) the so-called judgment rendered in the first instance was merely an order by a Judge in Chambers. Now, no appeal lies to this Court but from a judgment rendered in first instance by the Court. A Judge in Chambers does not constitute a Court. (2) Under the Railway Act, the Judge, and not the Court, has exclusive jurisdiction in the matters now in contestation.

This second reason of Taschereau, J., would undoubtedly deny to the Court the right to revise the decision of the Judge in Chambers upon such points. Patterson, J., at p. 617 said:

> In my opinion it is most doubtful whether the matter was properly before the Court of Queen's Bench or is properly before us.

And upon p. 619:

> From these considerations, as well as from the language of the statute, it is plain that the Judge acts as *persona designata* and does not represent the Court to which he is attached.

It is, however, plain that these expressions of opinion are *obiter dicta* and did not contribute to the judgment and that the appeal was actually quashed as to jurisdiction in consequence of the provisions of the Supreme Court Act which limited appeals to that Court to matters originating in the Superior Court not including the decisions of Judges in Chambers. The judgment just above referred to is of date 1889. In 1898, a judgment was rendered by the Court of Appeals of this province in the case of *East Valley of the Richelieu R. Co.* v. *Menard*, 7 Que. Q.B., 486. In this case there were two dissidents, Blanchet and Bosse, JJ. The judgment was rendered by Sir Alex. Lacosts, C.J. The Chief Justice said:

> The law before the new Code of Procedure did not in general permit an appeal from the decision of a Judge in Chambers to the Court of Queen's Bench, but article 72 of the Code declared that there should be an appeal from a decision of the Judge in Chambers in the same way as an appeal from the Superior Court. Now, art. 43 is that there is an appeal to the Court of Queen's Bench from every judgment of the Superior Court unless it is otherwise provided.

From which we must conclude that there is an appeal to this Court from every judicial decision of the Judge in Chambers unless it be otherwise provided. The Chief Justice then went on to point out that thus giving an appeal from the decision of

QUE.

S. C.

MOUNT ROYAL TUNNEL AND TERMINAL CO. v. BROWN.

Archibald, J.

the Judge in Chambers in many summary matters would be of inconvenience, but the Judge added:

> We cannot ignore the new rule of the Code which creates an absolute right of appeal and we cannot draw distinctions where the law draws none. Besides, on what could we found a distinction? How could we choose between the numerous references to the Judge found in our statutes, those which are susceptible of appeal in summary procedure and those which are not susceptible of appeal.

I believe that in general the law wishes that one shall proceed summarily in cases where there is no appeal. But the summary character of the procedure does not itself hinder the right of appeal, for example: in the case of capias. Non-contentious procedures are summary, nevertheless in very many cases they are susceptible of appeal. In fine, "says the Judge,"

> It is added that the Judge in a matter of expropriation is only a *persona designata* and that the articles 71 and 72 of the Code of C.P. have no application.

Nevertheless, art. 70 says that the Judge in Chambers has jurisdiction in all matters which are referred to him by the law. Now, the statute concerning expropriations forms part of the law. The respondent cites a judgment of the Supreme Court in the case of the *C.P.R.* v. *Le Collège de Ste-Thérèse*, 16 Can. S.C.R. 606. That Court, basing itself upon the Supreme Court Act which defines its jurisdiction, declared that there was no appeal from a judgment of the Court of Appeal confirming a decision of the Judge in matters of expropriation, under the Federal Act, because there was no appeal to the Supreme Court except in cases which have originated before the Court and four of the Judges expressed the opinion that the Judge in such matters was only a *persona designata*. However it may be, if the Judges of the Supreme Court desired to express by the words *persona designata* that the Judge had a jurisdiction exclusive of that of the Court, I think they were right; but if they desired to say that the Judge was acting outside of his functions as a Judge, in my humble opinion they have not rendered the true expression of law. The Judge outside of his judicial functions would not have any of the powers necessary to fulfil the mission which is confided to him. He could not conduct the case nor order the witnesses to appear and to speak. The two English precedents which have been cited do not apply;

QUE.

S. C.

MOUNT ROYAL TUNNEL AND TERMINAL CO. v. BROWN.

Archibald, J.

but in this case the Judge acts as a Judge and not outside of his attribution. The argument in this case of the Chief Justice and the holding of the Court apply with equal force to the case now before us. Besides that, a motion has already been presented to the first division of the Court of Review which motion has been rejected and we cannot now declare ourselves without jurisdiction nullifying the action of our own Court. I am of opinion that the judgment rendered in the last case was sound on the merits and that an appeal does lie in the matter in question; and even if it did not, I would decline to consider the question of jurisdiction after the same has been considered and established by this Court. I am, therefore, of opinion that the decision of the Judge fixing the amount of deposit to be given to the sum of $35,000, should be modified and reduced to a sum not exceeding $10,000. [A similar question was decided by the Supreme Court of Canada *Re Canadian Northern Ontario Ry. Co. & Rowland Smith*, in December, 1914. The judgment of the Superior Court, is reported in 15 Q.P.R. 168, and the judgment of the Court of Appeals in 23 K.B. 472.]

SHORE v. MEAD

SASK.

S. C.

Saskatchewan Supreme Court, Newlands, Lamont, Brown, and Elwood, JJ. July 15, 1914.

1. BILLS AND NOTES (§ V A—111)—PROMISSORY NOTE — ENDORSEE AFTER MATURITY AND DISHONOUR—HOLDER IN DUE COURSE, WHEN.

The endorsee of a promissory note after maturity and dishonour is a holder in due course if the endorser from whom he took it obtained it for value before maturity and without notice of any equity attaching to the note in favour of the maker.

APPEAL by defendant from judgment at trial.

Appeal dismissed.

J. F. Hare, for the appellant.

P. M. Anderson, for the respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—This is an action brought to recover from defendant a promissory note for $950 and interest given by defendant to one Lamb on account of the purchase-price of certain bar fixtures sold by Lamb to the defendant. The promissory note before maturity was endorsed by Lamb to Lasby and McGirr in payment of the sum of $800 due from Lamb to Lasby and McGirr

SASK.

S. C.

SHORE v. MEAD.

Elwood, J.

for commission in connection with the said sale to the defendant; and, as to the balance of $150, Lasby and McGirr paid that to Lamb at the time of the endorsation. Lasby and McGirr, after maturity and dishonour of the note, assigned it to the plaintiff. The evidence shews that this promissory note and three others were given by the defendant to Lamb in consequence of certain representations made by Lamb to the defendant with respect to the above-mentioned bar fixtures; and the Chief Justice at the trial found those representations to have been false; and I am of opinion that the effect of his judgment is to hold that the representations were fraudulently made by Lamb. At any rate, I am of the opinion that the evidence would have justified the Chief Justice in finding that the representations of Lamb were not only false, but fraudulent. Shortly after the receipt by the defendant of the fixtures he called Lamb's attention to the condition of the fixtures, and as a result the matter between them was settled by Lamb taking back the fixtures and receiving from the defendant $250 and returning to the defendant the three notes which Lamb then held. As to the fourth note, Lamb told the defendant that he could not return it to Mead because he had transferred it to Lasby and McGirr, and he told Mead that as to the fourth note he (Lamb) would not pay it. Some efforts were made to obtain this note from Lasby and McGirr, but they refused to give it up, stating that they had given value for it. At the time of the sale to the defendant of the bar fixtures they were in crates and boxes at a warehouse. They had been shipped from Nelson, in British Columbia, to Lamb, and a sale to Lasby and McGirr had been talked of, but never consummated. The Chief Justice gave judgment against the defendant, holding that the compromise entered into between Lamb and Lasby precluded the defendant from setting up a defence to this note, and further in effect holding that the plaintiff was the holder in due course.

It was urged on the part of the defendant that Lasby and McGirr were present at the time that all of the negotiations between Lamb and the defendant took place; that they were the agents of Lamb; that they were to receive a commission on

the sale; and that they were a party to the representations. The evidence shews, to my mind conclusively, that at the time of the sale Lasby and McGirr had never seen the goods in question; that when they did see them they were in the crates and boxes above-mentioned; that the defendant was present when they were seen, and he had as good an opportunity as Lasby and McGirr to see whether or not the goods were as represented. The defendant knew that Lasby and McGirr had never seen the goods, and knew or must have known that their knowledge of the goods was derived either from what Lamb had told them or from what they were able to see from the same inspection which he made of the goods. Even if any representations were made, I am thoroughly satisfied from the evidence that they were not made, so far as Lasby and McGirr were concerned, either with knowledge of their falsity or with reckless indifference as to whether they were true or false. They were made innocently; and the evidence shews that the defendant went to inspect the goods at the instigation of Lasby. The answer to question 349, is this: —

> Why, these fixtures were shipped down here from Nelson to sell to me, and I had sold the hotel out to Mr. Mead, and I told Harry "you had better buy these fixtures; you had better go down and have a look at them.

It was in consequence of this that the parties, as I have said above, went down and looked at the fixtures. It is unnecessary for me to refer to the different portions of the evidence which to my mind shew that any representations which were made by Lasby and McGirr were made innocently. Suffice it to say that I am of the opinion that any representations which were made were made innocently, and that the defendant knew that Lasby and McGirr had no more knowledge of the fixtures than he had. The note was transferred to Lasby and McGirr for value and before maturity, and, that being so, the plaintiff was a holder for value without notice.

Therefore, without dealing with the other reason which the Chief Justice gave for giving judgment for the plaintiff, I am of the opinion that this appeal should be dismissed, on the ground that the plaintiff is a holder in due course.

The plaintiff should have his costs of appeal.

QUE.

K. B.

LACHINE, JACQUES CARTIER & MAISSONEUVE R. CO. v. REID.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 25, 1914.

1. EMINENT DOMAIN (§ II A—93) — EXPROPRIATION—RAILWAY CO.—NOTICE—SERVICE OF—OWNER AT TIME OF DEPOSIT OF PLAN—SUBSEQUENT PURCHASER—RIGHTS OF.

A railway company taking expropriation proceedings for its right of way under the Railway Act, R.S.C. 1906, ch. 37, is not entitled to proceed upon a notice to treat served upon a person who was the owner at the time of the deposit of its plan, profile and book of reference, to the exclusion of a purchaser whose title was already registered at the time the notice to treat was served on his vendor; the purchaser is entitled to have an offer made to him which he can either accept or refuse and it is not sufficient that the purchaser was offered the opportunity of taking the vendor's place in the arbitration proceedings.

2. MOTIONS AND ORDERS (§ II—5)—RAILWAY CO.—EXPROPRIATION PROCEEDINGS—ORDER RESTRAINING ARBITRATORS—RIGHTS OF OWNER.

Prohibition lies at the instance of the purchaser to restrain arbitrators in expropriation proceedings under the Railway Act, Can., from proceeding upon a notice to treat served upon his vendor who had ceased to have any title to the land in dispute upon the registration of the purchaser's deed prior to such notice to treat.

Statement

APPEAL from the Superior Court, 45 Que. S.C. 56, directing prohibition to arbitrators.

Henri Jodoin, K.C., for appellant.

Brown, Montgomery & McMichael, for respondent.

Cross, J.

CROSS, J.:—This is a writ of prohibition taken by petitioner-respondent against the respondents under the following circumstances: When a railway company intends to acquire land by way of expropriations, it must follow the formalities of the law, that is by sections.

The judgment appealed from, 45 Que. S.C. 56, has directed a prohibition to the appellant and to three arbitrators forbidding them to proceed in arbitration proceeding in an expropriation under Railway Act (R.S.C., ch. 37).

The general ground of the prohibition is that the expropriation had been commenced and was proceeding as between the appellant and one Joseph Lebeau as owner of the land in question, whereas the respondent, and not Lebeau was owner.

It is not disputed that Lebeau sold the land, part of which is in question, to the respondent in January, 1912, by deed registered on February 8, 1912, about two months and ten days before the notice of expropriation, that is, the notice to the party provided for by sec. 193 of the Act was served on Lebeau,

except that mention was made at the hearing of a reservation made by Lebeau in the deed and to which reference will be made later on.

The main contention on the part of the appellant is to the effect that, its location plan and book of reference having been duly deposited before the date of the sale by Lebeau to the respondent, the proper party to be specially notified and served with the expropriation notice is the person named as owner in its book of reference, namely Lebeau. It argues that it was not under obligation to take notice of mutations of title occurring after deposit of the location plan and book of reference.

There is a second contention to the effect that Lebeau did not in fact entirely divest himself of the land by sale to the respondent and that the notice of expropriation even to a part owner or an unpaid vendor is an effective notice. A third contention to the effect that the arbitrators were not subject to the control of the Superior Court by way of writ of prohibition and a fourth contention that in any event the case is not one for prohibition. In view of the nature of the controversy, it is opportune to state briefly the purport of the statutory provisions respecting the plan and book of reference.

The company is required to obtain the sanction of the "Commission," that is, of the Board of Railway Commissioners, to a "plan, profile and book of reference of the railway." The plan is to shew *inter alia*, "the property lines, and owners' names and the book of reference is to describe the portion of land proposed to be taken in each lot to be traversed, giving numbers of the lots and the area, length and width of the portion of each lot proposed to be taken, and names of owners and occupiers so far as they can be ascertained."

The Board by such sanction, shall be deemed to have approved merely the location of the railway and the grades and curves thereof, as shewn in such plan, profile and book of reference, but not to have relieved the company from otherwise complying with this Act (secs. 158, 159).

There is to be a deposit with the registrar of deeds (sec. 160). The railway may be made upon the lands shewn, though through error, the owners' name has not been entered in the book of reference and where, if the name of a wrong person has been so entered (sec. 161), errors or omissions may be corrected by cer-

QUE.

K.B.

LACHINE, JACQUES CARTIER & MAISSONEUVE R. CO. v. REID.

Cross, J.

tificate of correction issued by the Commission on application of the company. Thereupon, the company may proceed to construction (secs. 161, 163). But a plan of the completed railway is also to be deposited (sec. 164).

The Commission may sanction construction beyond the located line for public advantage without requiring deposit of a deviation plan, but not beyond a distance of 300 feet (sec. 167).

There are provisions to facilitate voluntary conveyance of lands by persons under legal incapacity and to give statutory effect to agreements for conveyance made in advance of deposit of the plan (secs. 183, 191).

Coming to the matter of taking lands without consent of the owners, it is enacted that

> The deposit of a plan, profile and book of reference, and the notice of such deposit shall be deemed a general notice to all parties of the lands which will be required for the railway and works.
>
> 2. The date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained (sec. 192).
>
> Provided, however, that if the company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained. (3 Edw. VII. ch. 88; and 8-9 Edw. VII., ch. 32, sec. 3).

That is a general notice, but there is to be also a special notice to the party.

> The notice served upon the party shall contain: (*a*) A description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described; and (*b*) A declaration of readiness to pay a certain sum or rent, as the case may be, as compensation for such lands or for such damages (sec. 193).

Next follow the provisions for the appointment of arbitrators and the conduct of the arbitration.

Defects of form are not to invalidate the award if the Act has been substantially complied with,

> and if the award states clearly the sum awarded and the lands or other property, right or privilege for which such sum is to be the compensation.
>
> 2. The person to whom the sum is to be paid need not be named in the award. (sec. 205).

The company may pay the compensation into Court and deposit a copy of the award or agreement and: Such conveyance or award or agreement shall thereafter be deemed to be the title of the company to the land therein mentioned.

QUE.

K. B.

LACHINE, JACQUES CARTIER & MAISSONEUVE R. CO. v. REID.

Cross, J.

Proceedings as in a case of confirmation of title are thereupon had and the money is distributed by the Court.

Next follows sec. 213, which provides that the compensation "for any lands which may be taken without the consent of the owner, shall stand in the stead of such lands" the distribution of the money by the Court bars all claims against the company, claims or interests are converted into claims to the compensation "as against the company."

And the company shall be responsible accordingly, whenever it has paid such compensation or any part thereof, to a person not entitled to receive the same saving always its recourse against such person (secs. 213 and 214).

Earlier in the Act (sec. 155), the company is made liable to make "full compensation to all persons interested" for all "damage by them sustained by reason of the exercise of its powers, and it results from sec. 191 and following that the persons entitled to be compensated are the owners of lands or persons empowered to convey lands or interested in lands which may be taken or which suffer damage."

The word owner means a person who under the general or special Act, is enabled to sell and convey lands to the company.

Lastly, it is enacted (sec. 215), that: upon payment or legal tender of the compensation, whether awarded or agreed upon or deposit thereof in Court, the requirement of article 407 C.C., being satisfied the award or agreement shall vest in the company the power to take possession, and (secs. 216-218), if there be resistance, the Judge may grant a warrant of possession upon application and after specified notice to the owner of the lands, or the person empowered to convey the lands or interested in the lands sought to be taken or which might suffer damage, etc.

Such being the purport of the enactments, we have to see what, if any, ground they afford for saying with the appellant that the deposit of the approved plan, profile and book of reference has the legal effect of enabling the expropriating company to treat as its adverse "party" the person whose name appears in the book of reference as owner or occupier of the land intended to be taken.

In a general way, the respondent is entitled to say, upon exhibiting his title deed, that the person who should be treated with and compensated is surely the owner.

QUE.

K. B

LACHINE, JACQUES CARTIER & MAISSONEUVE R. CO. v. REID.

Cross, J.

That being so, it rests upon the appellant, the company which is taking the land, to shew warrant in law to support its contention that it can treat with somebody else than the owner, namely, in this case, with Lebeau who was, but is no longer, owner. How far, in that direction, do the provisions of the Act carry the appellant? It is clear that the appellant is to be taken to have given a general notice to everybody, and of course to the respondent of the lands intended to be taken. It is also clear that no land owner can impair the effect of that notice by alienating his land at least if the land be in fact taken within the year. The acquirer takes, subject to the general notice. It is likewise clear that the compensation or damages is or are to be ascertained as at the date of the deposit of the plan, profile and book of reference. There can be no swelling of the claim by improving, sub-dividing, etc., after the deposit if the land be taken within a year.

I consider further that there is ground for saying that, if the subsequent notice to treat has in fact been given to the ostensible or apparent owner, the validity of the expropriation is not destroyed by the fact that the apparent owner may turn out not to have been sole owner. We have seen that the essentials of an award are that it states clearly the sum awarded and the land compensated for, and that the person really entitled to the compensation need not be named.

The proceeding is of a petitory clear action and directed against the land, though, if the company decides to pay voluntarily instead of depositing in Court, its responsibility remains if it pays to a person not entitled to receive compensation, but that is a responsibility for payment of ascertained compensation and not for wrongful or legally ineffective taking of land.

It would also seem to be an effect of the Act that the deposit in the registry office, does away for the future, with the rules of the code respecting priorities which would result from non-registration or prior registration.

But while all that is so, I consider that the Act does not extend so far as is necessary to support the appellant's contention. The appellant relies strongly upon the legal effort of sanction of the plan, profile and book of reference by the Com-

mission and upon the power of that body to sanction conviction of errors by an expressly specified mode of procedure.

It is to be observed that such correction is provided for specifically, upon application by the company, and that fact makes against the appellant's argument notwithstanding the full jurisdiction given by sec. 26 to hear and determine any application on behalf of any party.

Moreover, there is no provision for any process of verification by the Commission, of individual titles to land or of decision of matters of conflicts of title, such as there should be if the result of the sanction is to amount to a decision that the persons named in the book of reference as owners or occupiers are to be the proper and necessary parties to the expropriation inquiry. In fact the names so entered are the "names of owners and occupiers so far as they can be ascertained," that is, ascertained by the *ex parte* action of the person who prepares the book of reference. And, as pointed out by the learned Judge, the sanction is deemed to have approved merely the location of the railway and the grades and curves as shown.

There still remains the requirement that there shall be an individual notice to treat, that is, a notice "to the party."

It is in that notice that mention of a sum of money is made for the first time, though it is true that the sum is not required to be offered to any person in particular. In law, it is only upon previous payment or tender of indemnity that one can be required to relinquish his property. If Lebeau had accepted the terms of the expropriation notice, the appellant could have got no title from him.

I consider that it would have needed an express enactment to authorize the notice to treat to be given to the person named in the book of reference instead of to a person who, at the date of the notice, had become owner of the land. Parliament has not so enacted.

Neither can we say that the deposit can be considered a commencement of proceedings, such as to make it a case for reprise d'instance. It is by the notice to treat that two parties are first brought face to face. Till then there is no "instance" to be taken up or continued. The company may never take the land.

QUE.

K. B.

LACHINE, JACQUES CARTIER & MAISSONEUVE R. CO. v. REID.

Cross, J.

If it allows a year to elapse without having acquired the land it must pay compensation for the land as it is at the date of the taking and not as at the date of the deposit. The appellant argues that the intent of the Act is that, after having obtained the sanction, the company is not to be put to the trouble of taking notice of mutations of title which may be registered in the registry office. Against that it may be said that Parliament had good reason not to put "hors du commerce" lands which might never be taken for a railway.

I therefore consider that the respondent had the right to be treated as the adverse party at the date of the notice to treat and that the appellant was in error in proceeding to treat with Lebeau without notice to the respondent, unless Lebeau could still be considered ostensible or apparent owner or occupier.

Second ground:

For the appellant, it is contended that Lebeau was ostensible owner or occupier by the combined effect of two facts,—first, that he admittedly was owner at the date of deposit of the book of reference, and secondly, because he reserved an interest in the farm, by a recital in the deed worded as follows:

"Ledit vendeur se réserve spécialement et expressément de ladite terre présentement vendue comme sa propriété absolue et non compris dans la présente vente, un emplacement de deux arpents en superficie lequel emplacement ne mesurera pas plus d'un arpent de front sur le chemin public de ladite Côte Saint-Laurent par la profondeur nécessaire pour former ladite quantité d'un arpent en superficie, le tout mesure française, lesquels deux arpents en superficie seront ensemble et contigus pour ne former qu'un seul morceau de terre et lequel emplacement présentement réservé sera choisi par ledit vendeur de manière à ne pas empêcher ledit acquéreur de faire un plan convenable de subdivision officielle qu'il pourra faire de ladite terre, et lequel emplacement présentement réservé ledit vendeur devra choisir si possible et par préférence de la manière suivante; d'abord à l'endroit où se trouve la maison actuelle dudit vendeur, etc." (the further wording is not material to the question being considered).

The question whether this piece of land which was to front

on the highway for a width of an arpent and to measure two arpents in area, to be taken out of a farm of over sixty arpents, could have any relation of identity with any part of the parcel intended for the railway could easily have been cleared up. The appellant is relying upon such an exceptional contingency and should have made proof that the deed admitted of the two arpents being so selected as to take in some of the proposed railway line. It made no such proof. Lebeau declared before the arbitrators that he had ceased to have any interest.

I consider that Lebeau could not be regarded as either ostensible owner or as occupier.

It was also argued that Lebeau's large interest as unpaid vendor of the farm, made him the proper party to be notified to treat. Unlike a mortgage under English law, however, he became by deed of sale to the respondent, a money creditor and ceased to be a person "interested" in the land.

Third question:

Had the Superior Court authority to decree prohibition?

I consider that it can be said shortly that the arbitrators are not subjected to control or supervision, in their acts as arbitrators, by the Commission or by any statutory authority other than the great Court of original jurisdiction in the province. The jurisdiction of that Court over the action of the arbitrators is not taken away. On the contrary, it is impliedly recognized in such enactments as those of sections 46, 54, 220. It is not as if the Superior Court had been asked to make an order, the carrying out of which might affect the structural existence of the railway. It is rather a case in which the power of the Superior Court to control a body exercising a judicial function is denied on the ground that one of the parties to the controversy happens to be a railway company.

Fourth ground:

It is argued for the appellant that there was no case for prohibition.

It is said that the arbitrators were named by a Judge under specific statutory authority and that they did not overstep their jurisdiction. It is also said that there should be no prohibition, because of the existence of other adequate remedy, particularly a right of appeal from the award.

QUE.

K. B.

LACHINE, JACQUES CARTIER & MAISSONEUVE R. CO. v. REID.

Cross, J.

The arbitrators were proceeding to decide what compensation should be paid in respect of the taking of the respondent's land. In the view which I have above expressed, they were proceeding to decide that matter in an issue between the taker of the land and another person who was not entitled to compensation. The Act gives validity to an award even if the person entitled to the compensation be not named in the award.

There was, therefore, on foot, an operation which might determine the respondent's right. An appeal from an award would not avail him to make out a case which had to be made out before award. Neither is it a sufficient answer for the appellant to say that the respondent could have taken Lebeau's place before the arbitrators and was in fact offered the opportunity to do so. He was not heard upon the appointment of arbitrators as he had a right to be. His complaint in effect is that the notice to treat has been misdirected and is null and could not give jurisdiction to arbitrators.

For reasons above indicated, I consider that that ground is well taken, that the arbitrators overstepped their authority and have been rightly subjected to prohibition.

I would dismiss the appeal.

Trenholme, J.

TRENHOLME, J.:—This is another railway case arising under the provisions of the Railway Act of Canada regarding the expropriation of a property and involving the same provisions, to some extent, as were involved in the case of *C.N.O.R. Co.* v. *McAnulty*, 23 Que. K.B. 472.

The question here, however, is different in this respect:

The arbitrators had been appointed in this case, and they were proceeding in the case after giving notice to the respondent, and they were proceeding with the expropriation. Reid, as owner, claiming to be owner of a lot of land, proposed to be expropriated took a writ of prohibition to restrain the arbitrators from proceeding with the expropriation on the ground that he had not been notified properly. He was a proprietor and was entitled to notice, and had not got it, and the arbitrators had no jurisdiction to give him such notice.

At the time, the arbitration proceedings to take the land were proceeding.

QUE.

K. B.

LACHINE, JACQUES CARTIER & MAISONEUVE R. CO. v. REID.

Trenholme, J.

Now, the claim is, that the previous owner was properly notified, and the claim is even that notice at the time of making the plan and profile and book of reference, spoken of by the statute as a preliminary to the right to expropriate was sufficient. There are two notices, one to establish the right to locate the road in a particular place, which is a general notice to the whole world of the location of the road, and the other notice, as I said, is a notice which must be given to the parties interested in the line to be taken, and which is subsequent to the first notice, and which must be special to every owner.

Now, a man named Lebeau was owner of the property when notice of the deposit of the plan was made, but between that time and the taking of the proceedings against the indivdual proprietors, Reid became owner, and he says "I am owner at the time you are proceeding to deal with the owners of the land, and I am owner of this property and you have not given me the notice and made me the offer to which I am entitled," and he takes a writ of prohibition on that ground.

The Court below has upheld that position, and the majority of this Court think it is well founded, for the reason that he was entitled to the notice, and an offer, and the arbitrators or the Railway Company did not comply with the essential preliminaries to entitle them to proceed with the expropriation of the land in which he was interested under the circumstances.

If you will look at the statute, you will see it is very particular in requiring notice to be given to the individual owners of the land and to the parties interested in the land, as a preliminary to proceeding with the expropriation, so much so that if they cannot find an owner they are bound to call him in by notice in the public press.

In this case, if they had looked, they would have found that Reid was the registered owner for some months before they proceeded to expropriate. He says: "You should have given me a notice, and you should have made me an offer and put me in a position to either accept or refuse."

We therefore confirm the judgment.

Appeal dismissed.

CAN.

Ry. Com.

RANDALL, GEE & MITCHELL v. CANADIAN PACIFIC RY. CO.

Board of Railway Commissioners. November 19, 1914.

1. CARRIERS (§ IV A—519)—TARIFF—CARRIAGE OF TRAFFIC — OPENING — SERVICE—ILLEGAL—RAILWAY ACT, SEC. 261.

The carriage of traffic (other than for construction purposes) before the railway has been authorized to be opened therefor, under section 261, is illegal, and no legal toll or tariff applies to such traffic.

2. CARRIERS (§ IV A—519)—TARIFFS—REFUNDS—SERVICE—LEGAL.

Refunds apply where the railway company, performing a legal service, charges a greater toll than allowed by appropriate tariff on file with the Board.

[*Baker, Reynolds & Co.* v. *Canadian Pacific Ry. Co.*, 10 Can. Ry. Cas. 151, followed.]

Statement

APPLICATION to direct a refund to be made of the difference between construction tariff tolls, and through grain tolls from Torquay and Outram, respectively, to Fort William.

The facts are fully set out in the judgment of the Chief Commissioner.

The Chief Commissioner.

November 19, 1914. THE CHIEF COMMISSIONER:—This complaint was made by Randall, Gee & Mitchell, Limited, grain commission merchants, of Winnipeg, Manitoba.

It arose out of the refusal of the Canadian Pacific Railway Company to consider seven claims presented by the complainants for a refund of the difference between construction charges and through grain rates from Torquay and Outram respectively to Fort William, Ontario.

The complaint raises a question that has been on different occasions already considered by the Board.

As pointed out by the late Chief Commissioner in *Baker, Reynolds & Company* v. *Canadian Pacific Railway Company*, 10 Can. Ry. Cas. 151, sec. 261 of the Act provides that no railway or portion thereof shall be opened for traffic other than for the purposes of the construction of the railway by the company until leave therefor has been obtained from the Board.

The Board, as a result of the Act, recognizes no right existing in the railway company to carry traffic until the provisions of section 261 have been first complied with.

These provisions require the company to make an application to the Board for authority to open the railway, or the portion of it under consideration, supported by an affidavit shewing

that the railway, or such portion, is sufficiently completed for the safe carriage of traffic, and ready for inspection. Before granting authority to operate, the Board is obliged to have an inspection made of the line that is proposed to be opened, and the application may be granted if the Board's Inspecting Engineer reports that, in his opinion, the road under consideration may be operated for the carriage of traffic reasonably free of danger to the public using it.

As a result of the application to open for traffic, the question of rates for the first time becomes important.

Under the Board's practice, a tariff of standard rates to apply to the section to be opened must be filed with the Board before sanction to operate is given. This action is, of course, necessary, as railway companies are obliged to carry traffic under the tariffs filed with the Board, and can only collect such rates as the tariff allows.

The result is that construction rates so-called are illegal as is construction traffic, which is expressly forbidden by the Act.

It has been represented by railway companies that settlers along new lines, before such lines are in a condition to be opened for regular traffic under the Act, ask that produce and merchandise should be carried on the ground that it is essential and necessary for the district to be served by the new line. Applications have from time to time been received by the Board for orders directing railway companies to accept traffic before lines have been properly completed.

The position in this regard that has been taken by the companies is that it does not pay the company to accept traffic while the road is under construction; that traffic under such conditions can only be moved at relatively large expense and in small volume, as otherwise the construction work of the line might be delayed, or that the traffic would be attended with expense owing to the unfinished condition of the line.

While it is perfectly obvious that it would be in case of farmers desiring to get produce out to direct railway companies to carry it over a line not yet open for traffic, even at an unusually high rate, rather than to continue to haul it for long distances, such applications have been refused for the very suffi-

CAN.

Ry. Com.

RANDALL, GEE & MITCHELL v. CANADIAN PACIFIC R. CO.

The Chief Commissioner.

cient reason that such traffic is illegal, and that the Board has absolutely no jurisdiction to order or to countenance it.

Similar action has been taken where railway companies have made similar application desiring, as they say, to accommodate settlers; but the Board cannot legislate, and while it is possible districts might be benefited by construction rates on certain classes of freight, although carried at an increased rate, no authority can be given either directly or indirectly for the practice.

In the case in question, the grain carried was carried before the road was opened for traffic. Farmers or grain merchants interested were not entitled to the service, and the railway company was prohibited from giving it.

Not only was the service illegal, but there was no rate or tariff which applied to it. The result is that the whole matter is one which the Board cannot countenance one way or the other.

It is no case for a refund. Refunds apply where the company, performing a legal service, charges a greater rate than that allowed by the appropriate tariff on file with the Board. Here there was no legal service and there was no legal tariff. The whole transaction is illegal.

MR. COMMISSIONER MCLEAN agreed in the position taken by the Chief Commissioner as to the legal position of the application.

CAN

Ex. C.

SYDNEY, C. B. Etc. STEAMSHIP CO. v. H. C. OF MONTREAL.

Exchequer Court of Canada, Dunlop, D.L.J. September 17, 1913.

1. STATUTES (§ II A—95)—CONSTRUCTION OF—EXCHEQUER COURT—ACTION IN—BOARD OF COMMISSIONERS—NEGLIGENCE—AUTHORITIES PROTECTION ACT, 1893.

The six months' prescription imposed by the Public Authorities Protection Act, 1893 (Imp.) 56 & 57 Vict. ch. 61, does not apply to an action in the Exchequer Court of Canada against a board of harbour commissioners for alleged negligence resulting in injury to a ship.

[*Sydney, etc., Co. v. Harbour Commissioners*, 11 D.L.R. 814, reversed.]

Statement

APPEAL from the judgment of the Mr. Justice Dunlop, Deputy Local Judge of the Quebec Admiralty District, *Sydney v. Harbour Commissioners*, 11 D.L.R. 814.

A. R. Holden, K.C., for the appellant, submitted that the Public Authorities Protection Act (U.K.) 1893, is not in force

CAN.

Ex. C

SYDNEY, C. B., ETC., STEAMSHIP CO. v. H. C. OF MONTREAL.

Argument

in Canada *ex proprio vigore*, and Rule 228 of the general rules and orders regulating the practice and procedure in Admiralty cases in the Exchequer Court cannot be held to invoke its provisions. The subject-matter of the Imperial Act is a right and does not fall within the domain of "practice." (See Bouvier's Law Dictionary, *verbo* "Practice;" Stroud's Judicial Dictionary, *verbo* "Practice;" Encyclopædia of The Laws of England, vol. 10, p. 284; *Re Osler*, 7 Ont. P.R. 80; *Attorney-General* v. *Sillem*, 10 H.L. Ch. 704; Beal's Cardinal Rules of Legal Interpretation, 2nd ed., p. 392).

Sir A. R. Angers, K.C., and *Arnold Wainwright*, K.C., for the respondent, contended that under section 2 of the Colonial Courts of Admiralty Act, 1890, the jurisdiction of the Exchequer Court of Canada was the same as that of the High Court in England. That the Public Authorities Protection Act, 1893, (U.K.) applied to Admiralty proceedings in the High Court is apparent from the language of that statute itself, and is established by cases decided in England. (*The Ydun*, (1899), Prob. 236; *Williams* v. *Mersey Docks*, [1905] 1 K.B. 804; *The Johannesbury* (1907), Prob. 65).

The point is absolutely disposed of by the provisions of Rule 228 of the Admiralty practice in the Exchequer Court of Canada:—

> In all cases not provided for by these Rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

This case is not provided for by the Canadian rules, and the English practice comprehends the provisions of the Public Authorities Protection Act, 1893.

There is no question that the subject-matter of that statute is procedure; and "practice" and "procedure" are interchangeable terms in the law. See Webster's International Dictionary, *verbo* "Practice."

CASSELS, J.:—This is an appeal from the judgment of Mr. Justice Dunlop, Deputy Local Judge, allowing the demurrer of the defendants and dismissing the action with costs. Cassels, J.

Since the hearing of the appeal I have carefully considered the arguments of the counsel, both oral and wrtten, the statutes

CAN.

EX. C.

SYDNEY, C. B., ETC., STEAMSHIP CO. v. H. C. OF MONTREAL.

Cassels, J.

relating to the case, and the reasons for judgment of the learned Judge below. As the learned Judge states, the question to be decided is not without difficulty. Having the greatest respect for the opinion of the learned Judge I am reluctantly unable to bring my mind to the same conclusion that he has arrived at.

The Colonial Courts of Admiralty Act, (1890), (53-54 V. (U.K.) ch. 27), is intituled An Act to amend the law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

[The Judge here cited sec. 2 sub-secs. 1 and 2.]

The statute provided (sec. 7) for making of rules of Court "for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act." Subsequent to the passage of this Act Admiralty rules were drafted and after being approved of by Her Majesty in Council came into force on June 10, 1893.

The Dominion statute, ch. 29, 54-55 Vict. was assented to July 31, 1891.

It is conceded by the learned Judge in his reasons that at the time of the passing of the Colonial Courts of Admiralty Act, 1890, and until the first of January, 1894, there was no limitation of time within which an action such as the present should be brought. It is in each case a question of diligence.

The plaintiffs on the other hand invoke the limitation in the Civil Code of Quebec. This is a question to be determined at the trial. If the Code governs, the action is commenced in time. It is a question of diligence. Then the facts will appear at the trial. I do not give any decision on this question.

The learned Judge's decision rests upon the ground that an Imperial Statute, ch. 61, 56-57 Vict., is applicable to Admiralty proceedings in Canada, and bars the action after a lapse of six months.

This statute is intituled An Act to generalize and amend certain statutory provisions for the protection of persons acting in execution of statutory and other public duties.

At the time of the enactment it would have been easy to have made it applicable to Canada, had Parliament so intended.

Instead of so enacting it is limited to actions, prosecutions and proceedings commenced in the United Kingdom; and it enacts that the action shall not lie or be instituted unless it is commenced within six months.

It is not correct to state that sec. 27 of the Imperial Harbours Act, 1814, is repealed.

Sec. 2 of ch. 61 states: "There shall be repealed as to the United Kingdom, etc."

This sub-sec. 2 clearly indicates, if it were not otherwise clear, that the enactment was only intended to apply to the United Kingdom. Therefore unless there is other ground for making it applicable to Admiralty proceedings in Canada it clearly does not apply.

Proviso (*a*) to sub-sec. 3 of sec. 2 of the Colonial Courts of Admiralty, 1890, is invoked as drawing in the provision of the Public authorities Protection Act, 1893.

This proviso (*a*) is as follows:—

> Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession shall be read as if the name of that possession were therein substituted for England and Wales.

It is unnecessary to consider the question whether this section applies to future legislation or merely to legislation existing at the time of the coming into force of the Colonial Courts of Admiralty Act, 1890.

The words "United Kingdom" in the Public Authorities Protection Act, 1893, are not the same as "England and Wales," referred to in proviso (*a*); and I cannot bring my mind to the conclusion that a statute can be construed on the theory that the greater includes the less.

I am of the opinion that the Public Authorities Protection Act, 1893, is not in force here by virtue of this proviso (*a*).

It is said further that under Rule 228 of the Admiralty Rules this statute (the Public Authorities Protection Act, 1913, is in force).

Rule 228 reads as follows:—

> In all cases not provided for by these Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

CAN.

EX. C.

SYDNEY, C. B., ETC., STEAMSHIP CO. v. H. C. OF MONTREAL.

CASSELS, J.

The Colonial Courts of Admiralty Act, 1890, by sec. 7, provided, as I have pointed out, for the making of rules regulating the procedure and practice in the exercise of the jurisdiction conferred.

It will be noticed that Rule 228 only refers to the "practice."

In the *Ydun case* (1899), p. 236, it was hardly in contest that the provisions of the Public Authorities Protection Act were applicable as a defence to an action commenced in the United Kingdom. The question involved was whether it was retroactive, and the Court there held it was, being a matter of procedure.

If under the word "practice" in Rule 228 this statute can be brought in, a plaintiff who had a good cause of action on the 1st of June, 1893, and entitled under the jurisdiction conferred to invoke the aid of the Court say on the 2nd January, 1894, would have found his claim absolutely taken away.

I cannot bring my mind to the conclusion that any such effect can be given to Rule 228.

In the House of Lords in *Attorney-General* v. *Sillem*, 10 H.L. at pp. 720, 723, 724, Lord Westbury remarks:—

> A power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction . . . Here the word "practice" is used in the common and ordinary sense, as denoting the rules that make or guide the *cursus curiae* and regulate the proceedings in a cause within the walls or limits of the Court itself. . . . The right to bring an action is very distinct from the regulations that apply to the action when brought, and which constitute the practice of the Court in which it is instituted.

On the whole case after the best consideration I can give to it, I am of opinion that the demurrer fails.

The appeal is allowed with costs including the costs in the Court below. *Judgment accordingly.*

ALTA.

S. C.

CAMBRIDGE v. SUTHERLAND.

Alberta Supreme Court, Scott, J. June 19, 1914.

1. SEDUCTION (§ I—3*a*)—WIDOW — ACTION BY: FOR OWN — DAMAGES — CONSOLIDATED ORDINANCES (ALTA.)—UNMARRIED FEMALE.

An action by a widow claiming damages for her own seduction must be dismissed as Con. Ord. ch. 117 enables only an "unmarried female" to sue in her own name and is intended to apply only where the female had never been married.

[*Kirk* v. *Long*, 7 U.C.C.P. 363, followed; *Ward* v. *Serrell*, 3 A.L.R. 138, and *Trimble* v. *Hill*, 5 A.C. 342, applied.]

ACTION for damages.

Judgment for plaintiff.

H. A. Mackie, for plaintiff.

H. H. Robertson, for defendant.

SCOTT, J.:—The plaintiff, who is a widow, claims damages for her seduction by the defendant. The only authority for the bringing of such an action by the person seduced is sec. 4 of ch. 117, of the Consolidated Ordinances which is as follows:—

> Notwithstanding anything in this Ordinance, an action for seduction may be maintained by an unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort, and in any such action she shall be entitled to such damages as may be awarded.

The first three sections of the Ordinance are identical with the statute of Upper Canada, 7 Wm. IV. ch. 8, which appears in the several consolidations of the Ontario statutes. (See R.S.O. 1907, ch. 69) and those sections are undoubtedly adopted therefrom. In the first section of that Act the term "unmarried female" is used, and in *Kirk* v. *Long*, 7 U.C.C.P. 363, that term was held applicable only to a female who had never been married.

In *Peterson* v. *Hulbert*, 6 Terr. L.R. 114, I referred to a rule of construction of statutes which prevails in the United States, viz., that where a statute is adopted by one state from that of another state it should receive the construction placed upon it by the Courts of the latter and I suggested that this rule should be followed here. In *Ward* v. *Serrell*, 3 A.L.R. 138, the Court *en banc* afterwards held that in the absence of strong reasons to the contrary, it should be followed. In England it has been held that where an Imperial statute is adopted by a colony it should receive the construction placed upon it by the English Courts. (See *Trimble* v. *Hill*, 5 App. Cas. 342) and *Cotteral* v. *Sweetman*, 9 Jurist 951).

I see no reason why the term "unmarried female" in the fourth section of the Ordinance should not receive the construction that was placed upon it by the Ontario Court and I therefore give judgment for the defendant with costs to be taxed according to second column of schedule.

Judgment for the defendant.

B. C.

S. C.

McCRIMMON v. B.C. ELECTRIC R. CO.

British Columbia Supreme Court, Macdonald, J. September, 23, 1914.

1. RAILWAYS (§ II A—10)—CONSTRUCTION OF ROAD — STATUTORY POWERS —NEGLIGENCE—DAMAGE.

A railway company constructing its road under statutory powers will notwithstanding be liable for a negligent user of such powers; the powers granted by statute are to be exercised reasonably and with due care so as not by negligence to cause damage to others.

[*Manley* v. *St. Helen's Canal*, 27 L.J.Ex. 159, followed.]

2. RAILWAYS (§ V—115)—OBSTRUCTION OF WATER — CULVERT — NEGLIGENCE—DAMAGES.

A railway company is liable for the negligent manner of building a culvert placed in an embankment constructed for the railway if the culvert was not deep enough to carry the water where there had previously been a natural watercourse.

3. LIMITATION OF ACTIONS (§ II G—66)—INJURY TO PROPERTY CULVERT—PERIODICAL FLOODING OF LAND—CONTINUING DAMAGES—STATUTES OF LIMITATION.

Damages against a railway for so constructing an embankment for its road with an insufficient culvert where a natural watercourse existed, that adjoining lands previously drained by the watercourse are periodically flooded, are continuing damages as regards the application of statutes of limitation (Water Clauses Act, B.C. sec. 124; B.C. Railway Act, sec. 42.).

Statement

ACTION for damages for trespass to lands.

Judgment for plaintiff.

W. J. Whiteside, K.C., for plaintiff.

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

Macdonald, J.

MACDONALD, J.:—Plaintiff is the owner of north west quarter section 22, township 16, in the district of New Westminster, and seeks to recover damages from the defendant company for trespass upon her land and removal therefrom of a quantity of gravel and timber; also for the closing up of a gazetted road and the flooding of her land from the negligent construction of a culvert under its railway. It appears that in the construction of the railway about 800 cubic yards of gravel were taken from the plaintiff's land and used for railway purposes. This is not denied and the sum of $120 was paid into Court as full satisfaction. There was no general demand for gravel in that particular locality and a market could only be obtained by transporting it some distance at considerable cost. The only customer for this gravel was the railway company and when the question of price came up for discussion it was agreed that a fair price should be paid. I find that the amount paid

B. C.

S. C.

McCrimmon v. B. C. Electric R. Co.

Macdonald, J.

into Court answers this agreement being at the rate of 15c. per cubic yd. The plaintiff is thus entitled to the amount paid into Court but on this issue should bear any additional costs incurred subsequent to payment in of the money. As to plaintiff's claim for breaking down and removing fences and damage to ditches, I find her claim is not sustained. Regarding the timber alleged to have been cut and carried away, defendant company is not liable therefor. The husband of the plaintiff admitted that this matter was dealt with by the contractor engaged in constructing the railway, and payment was sought to be obtained from him. As to the closing up of the gazetted road, the documents filed and the plaintiff's actions therewith, in my opinion, debar her from having any right of action.

The most important cause of complaint on the part of the plaintiff is that, while a right may have existed for the construction of the railway across her land, in the course of such work a culvert, inserted in the embankment forming the roadbed of the railway, was constructed in such a negligent manner as to flood her land and depreciated its value and usefulness. I find that notwithstanding criticism at the time of the placing of this culvert, and objection made to the engineer in charge, it was so negligently constructed as not to answer the purpose intended. The culvert was not deep enough to carry off the water. It did not drain the land of the plaintiff on the east side of the railway. Before the construction of the railway it had been drained by the natural fall of the land and a natural watercourse. The embankment of such culvert is so negligently constructed as to block the flow of water and 20 to 30 acres of the plaintiff's property became injured thereby. The railway was being constructed under statutory powers and if there was a negligent user thereof and damage results a cause of action arises:—

> Powers granted by a statute are to be exercised reasonably and with due care so as not, by negligence, to cause damage to others. *Manley* v. *St. Helen's Canal*, 27 L.J.Ex. 159 at 164.

It is contended, however, that the defendant company is not liable for what might be termed the nuisance thus created, as

B. C.

S. C.

McCRIMMON v. B. C. ELECTRIC R. CO.

Macdonald, J.

the plaintiff's right of action is barred by statute; also that plaintiff should have sought redress through expropriation proceedings and not by action at law. It was stated by counsel for the defendant that the railway was constructed by the Vancouver Power Co., but, except for the protection which might be thus afforded, the question of liability was not to be affected; or, in other words, the plaintiff, if entitled to succeed against the Vancouver Power Co. should also be entitled to succeed in this action. A writing shewing this agreement between counsel was not filed at the trial but the fact that, subsequent to the trial, both counsel filed a memorandum referring to the Water Clauses Act (which governs the Vancouver Power Company) would indicate that I am correct as to the understanding between the parties.

Sec. 130 of the Water Clauses Act, ch. 190, R.S.B.C. 1897, provides that the procedure for the expropriation and acquisition of land by an incorporated company in the exercise of its powers shall be governed by the provisions of the Land Clauses Consolidation Act (1897), and that the rules and procedure therein laid down shall apply to such an incorporated company. I do not think that the procedure thus afforded an incorporated company to acquire land in any way controls the plaintiff in the present action. It is not suggested that at the time when the right of way was obtained for the railway across her property she waived any right that might accrue to her in the future from the negligent construction of such railway.

By the construction of the defendants' railway without sufficient openings, those flooded waters could not spread themselves as formerly and were penned up, and flooded over the bank on the plaintiff's land. *Prima facie* this would give the plaintiff a cause of action; and the question is whether the company are protected by their Act. . . . The company may have been at liberty under the Act to construct their railway across the lowlands in the manner they have done; but it does not follow that, in case an unforeseen injury arises to any one from the mode in which it is constructed, they are not liable to an action. *Lawrence* v. *Great Northern Railway Co.* (1851), 16 Q.B. 643, at 653 and 654.

The declaration is for wrongfully, that is, without lawful excuse, causing the water to flow on the plaintiff's land and against his house by means of an embankment and to injuring his premises . . . The distinction is now clearly established between damage from works authorized by statute (where the party generally is to have compensation and the

B. C.

S. C.

McCrimmon v. B. C. Electric R. Co.

Macdonald, J.

authority is a bar to an action), and damage by reason of the work being negligently done, as to which the owner's remedy by action remains. *Brine* v. *Great Western Railway* (1862), 31 L.J.Q.B. 101 at 104 and 105.

It is contended, however, that in any event plaintiff's right of action is barred by statute. Sec. 124 of the Water Clauses Act provides that:—

> All actions for indemnity for any damage or injury sustained by reason of the tramway, or the works or operations of the power company, shall be commenced within twelve months next after the time when such supposed damage is sustained, or if there is continuance of damage, within twelve months next after the doing or committing of such damage ceases, and not afterwards, and the power company and any other defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

Sec. 126 of the Act states that in the absence of any provision in this part of the Act relating expressly to the subject-matter of any such clause, the British Columbia Railway Act shall, as to certain clauses, be incorporated with this part of the Act and apply to any power company formed hereunder —which includes among its objects of incorporation the construction or operation of tramways, when and so soon as the power company in exercise thereof proceeds to construct or operate a tramway. Amongst the clauses so incorporated is sec. 42, which provides that:—

> All actions for indemnity for damage or injury sustained by reason of the railway shall be instituted within one year next after the time of the supposed damage sustained, or if there be continuation of damage, then within one year next after the doing or committing such damage ceases, and not afterwards; and the defendants may plead not guilty by statute, and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

I do not think either of these sections prevent the plaintiff recovering in this action. I consider that the damage sustained through the negligent construction of the culvert still continues. As to the amount of damage to be allowed the plaintiff: The estimate of damage given by the witnesses, as usual, differs in a great measure. It would appear that some 20 or 30 acres are shut off completely from drainage and thus for the time being rendered useless to the plaintiff. If the railway company

B. C.

S. C.

McCRIMMON v. B. C. ELECTRIC R. Co.

Macdonald, J.

gives an undertaking to improve the culvert within a limited period by lowering it four feet at least, I will only allow damages up to the trial for the loss that the plaintiff has suffered during the past four years at $200. If such undertaking is not arranged then the plaintiff may apply to me for an injunction or to award damages on the basis of a permanent injury to plaintiff's land. The whole question of damages is thus reserved. Plaintiff is entitled to costs.

SASK.

S. C.

VICARS v. ARNOLD.

Saskatchewan Supreme Court, Newlands, Brown and Elwood, JJ. November 28, 1914.

1. INNKEEPERS (§ III B—15)—HOTEL GUEST—BAGGAGE—LOSS OF—NEGLIGENCE.

The baggage of a hotel guest placed in the room assigned to him is under the charge of the innkeeper when the guest is temporarily out of the room, and he is liable at common law for its loss as for breach of duty unless the guest was himself guilty of negligence and such negligence conduced to the loss; it is not negligence on the part of the guest to leave the room unlocked without further inquiry at the hotel office for a key on being informed by the bell-boy conducting him to his room that there was no key.

[*Burgess* v. *Clements*, 4 M. & S. 306, applied; *Oppenheim* v. *White Lion Hotel Co.*, L.R. 6 C.P. 515, referred to.]

Statement

APPEAL by plaintiff from the dismissal of his action in the District Court.

Appeal allowed.

T. J. Blain and *W. A. Adams*, for appellant (plaintiff).

P. M. Anderson, for respondents (defendants).

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—In this matter the facts are briefly as follows: In the month of January, 1913, the plaintiff and three others went to the hotel in the city of Regina kept by the defendants, and requested accommodation as guests of the hotel. They were given accommodation, and all shewn into one bedroom. The plaintiff asked the bell-boy who shewed him to the room for a key, and was told by him that there was no key for that room. The plaintiff remained at the hotel several days, and while there on one occasion left his overcoat in the bedroom that he and the three others were occupying, went down to the dining-room to have his meal, and on his return found that his overcoat had been taken. He complained at the office, but the overcoat has never

since been found. The District Court Judge before whom the action was tried held that there was not sufficient evidence to shew that the defendants were innkeepers; and that there was contributory negligence on the part of the plaintiff in not applying to the office for a key to the room; and that, the room having been left unlocked, the loss of the coat was occasioned by the negligence of the plaintiff.

So far as the question of whether or not the hotel in question was an inn is concerned, it was conceded on the argument that the evidence did disclose that the hotel in question was an inn, and was an hotel licensed to sell liquor under the provincial Liquor License Act. The evidence is indefinite as to whether or not the plaintiff left the door of his room closed when he went to the dining room, but the onus was on the defendant to shew negligence on the part of the plaintiff, and the weight of evidence was in favour of the contention that the door was closed; in fact, there was no evidence to shew that it was open. The only evidence on that point was the evidence of the plaintiff, and that evidence is as follows:—

> Q. Did you shut the door? A. I pulled it to.—Q. You won't swear the door was shut? It is just possible you left it open? A. I won't swear positively.—Q. You don't know whether it was open or shut? A. No.

In *Cashill* v. *Wright*, 6 El. & Bl. 891, at p. 899, the law is laid down as follows:—

> We think that the rule of law resulting from all the authorities is that, in a case like the present, the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.

In *Armistead* v. *Wilde*, 17 Q.B. 261, at 264, Patteson, J., says:—

> I take the law to be clear that the innkeeper is *primâ facie* liable for the loss of goods in his house, though they are left in the commercial room.

In *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q.B. 11, at 21, I find the following:—

> At any rate the plaintiff was a guest in the hotel up to the time when his luggage was put out of the bed-room into the corridor by the defendants' servants. Then the defendants were bound to keep the plaintiff's things safely; and this is conclusive of the defendants' liability for the loss, unless they can shew that the negligence of the owner conduced to the loss. The

SASK.
S. C.
VICARS
v.
ARNOLD.
Elwood, J.

defendants must shew two things: (1) That the plaintiff was guilty of negligence; and (2) that his negligence conduced to the loss.

A number of cases were cited in support of the proposition that where the plaintiff neglected to lock his room the hotelkeeper was excused, but in each of those cases the evidence shews that the means of locking the room had been furnished to the guest by the hotel. This was the case in *Calye's Case*, vol. 1 Smith's L.C. 115; and in *Burgess* v. *Clements*, 4 M. & S. 306; and in *Oppenheim* v. *White Lion Hotel Co.*, L.R. 6 C.P. 515. But those cases by no means held that in every instance even the giving of a key by the hotelkeeper and the neglect of the guest to make use of the key will relieve the hotelkeeper from his common law liability. In the case at bar, however, it seems to me that there was no negligence on the part of the guest. He, in my opinion, inquired of the person who was appointed by the hotel to shew him to the room for a key, and that person told him that there was no key for the room. Surely the guest was justified in assuming that the bell-boy would know whether or not there was a key for the room, and that when he told him there was no key, that there was in fact none. In fact, the evidence shews that there was no key for the room, but that if an inquiry had been made for a key the hotelkeeper could have or would have gotten one. I am of the opinion that there was no duty cast upon the guest to inquire for a key, but that if the hotelkeeper wishes to escape from his common law liability he must himself furnish the guest with a key and with the means of securing the room against any person coming into it. This seems to my mind pretty well established in *Burgess* v. *Clements*, *supra*, at p. 310, where I find the following:—

> And I agree that if an innkeeper gives the key of the chamber to his guests, this will not dispense with his own care or discharge him fron his general responsibility as innkeeper. But if there be evidence that the guest accepted the key and took on himself the care of his goods, surely it is for the jury to determine whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room.

The uncontradicted evidence is that the coat in question was worth $125; and in my opinion the appeal should be allowed and judgment entered for the plaintiff for $125 and the costs of the action and of this appeal.

JALBERT v. CARDINAL.

QUE.

C. R.

Quebec Court of Review, Tellier, Pouliot and Greenshields, JJ.
March 25, 1914.

1. CONTRACTS (§ IV D—360)—BUILDING CONTRACT—CHANGE IN SPECIFICATIONS—BUILDING OF DIFFERENT CHARACTER—QUANTUM MERUIT.

Where a clause in the specifications in a building contract permits the proprietor to modify in detail the plans and specifications, the contractor is not bound to accept changes which would make the building one of a different character, as by the substitution of plans for a one-storey building where a three-storey building was the subject of the contract and the first storey was completely changed; and if the builder, without protest, proceeds under the new plans and the proprietor accepts his work, the builder is not restricted to a *pro rata* share of the original contract price, but may recover on a *quantum meruit; semble*, had he declined to proceed under the new plans, he might have recovered damages for loss of profits on the cancellation of his contract.

Statement

The judgment inscribed for review, which is confirmed, was rendered by the Superior Court, GUERIN, J., on March 28, 1912.

Pelletier, Létourneau & Beaulieu, for the plaintiff.

N. U. Lacasse, for the defendant.

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff by the present action prays for a judgment against the defendant for the sum of $979.80, and in effect alleges that about August 30, 1911, the parties entered into a contract by private deed by which the plaintiff undertook, for the price or sum of $3,000 with an additional $100, the brick work on a certain building which the defendant proposed to erect at the corner of Papineau and Mount Royal avenues; that the plaintiff commenced the work in question, and made provision for the materials to carry out the contract; that about September 20 the defendant put an end to the contract, completely changed the character of the building which he intended to construct, and notified the plaintiff in writing to that effect; that nevertheless, at the demand and for the benefit of the defendant, the plaintiff did the works necessary for the construction of the building as modified and changed, and did work not contemplated in the original contract, but which became necessary in view of the changes made by the defendant; that the work was done to the satisfaction of the defendant; was completed and accepted by him; that the plaintiff is entitled to recover, on a *quantum meruit*, the value of the work done and materials furnished, the whole as appears by a detailed account attached, and which amounts to the sum of $2,543.70; that the plaintiff has received from the defendant on account $1,600, leaving a balance of

QUE.
C. R.
JALBERT
v.
CARDINAL.
Greenshields, J.

$943.70. By an amendment, this amount of $943.70 was increased to $979.80, for which the plaintiff prays for judgment.

The defendant pleads that the contract speaks for itself, and refers specially to the plans and specifications prepared by one Dupré. He denies the cancellation of the contract; admits the payment of $1,600, but alleges that the same was paid under the contract which never ceased to exist; that, by the plans and specifications, the defendant had a right to make changes and modifications in the structure, and in conformity therewith, on September 20, he notified the plaintiff that he intended to reduce the building to one storey, instead of three storeys; that, under the contract, the plaintiff was bound to construct the three storeys for $3,000; that by reason of the change, modification and suppression of the two storeys, the plaintiff was saved an expenditure in work and labour and materials to the extent of $1,322.25; that the work done by the plaintiff, after the notice on the 20th of September, was of the value and to the extent of $1,777.25, and, as a matter of fact did not exceed that sum; that, nevertheless, the defendant is willing to allow the plaintiff the sum of $1,900 for the work done, which would leave a balance in his favour of $300, which sum the defendant tenders and deposits with his plea, plus the sum of $29.15, costs of an action as brought. And the defendant concludes, that his tender and deposit be declared sufficient and the action for any surplus be dismissed.

The plaintiff, for answer, joins issue with the defendant, and particularly denies the affirmative allegations of defendant's plea, and alleges that the power to make changes in the contract did not contemplate a complete change as made by the defendant; that the changes had the effect of completely destroying and causing to disappear the original contract, and the plaintiff is entitled to claim on a *quantum meruit*.

The judgment *a quo* maintained the plaintiff's action as brought.

The case, as submitted before this Court, calls for the determination of one question only. The account of the plaintiff, if he is entitled to charge as for work and labour done and materials supplied, is practically admitted to be correct. Dupré, who prepared the plans and specifications, although not an architect, practically admits that the quantities charged are correct, and

he does not, nor does any other witness called by the defendant, destroy the plaintiff's proof as to the value of the materials, or as to the value of the work and labour done; but the question is whether the contract of August 30 was terminated, and whether the plaintiff is entitled to claim on a *quantum meruit*, or whether, on the other hand, the contract was never terminated, but the work was done by the plaintiff under the contract, and whether he is entitled to such sum as compared with the original contract price as the work done bears to the total work contemplated by the original contract; in other words, says the defendant, if the work done and materials supplied was only three-fifths of that contemplated by the original contract, then the plaintiff would be entitled to only three-fifths of $3,100. By the contract of August 30, 1911, the plaintiff undertook to furnish all the materials, scaffolding, etc., and do all the brick work necessary for the building, according to plans and specifications prepared by Dupré. In the plans and specifications prepared, and under what is called "General clauses," there is the following reservation:—

> The proprietor reserves the right to make changes, as he may see fit, and to give notice of such changes to the contractor, and if such changes entail a less expense on the part of the contractor, he will reduce his price by that amount; and if the changes entail a greater expense, the proprietor will pay the surplus, but if the changes do not entail either greater or less expense, the contractor is bound to make the work without indemnity.

Now, the original plans and specifications called for, a store, ground floor, 55 ft. in front by 100 ft. in depth and 14 ft. in height, and 2 storeys above, 53 x 65 and 10 ft. in height for the first, and 9 ft. 6 in. for the second. The plaintiff's part was the brick work. After the signing of the contract, the plaintiff proceeded to make preparations to execute the same. He brought to the place sand and lime for his mortar, material for the construction of the scaffolding, and generally, did all the work preparatory to carrying out the contract. He could not, and did not, up to September 20, do any actual constructive work, as it would appear from the proof that the iron work necessary had not been completed or ready to commence the brick work. On September 20 a notice in writing was served upon him by the defendant, which reads as follows (translation): "Notice is hereby given that I have decided to make certain changes in my building on Papineau and Mount Royal avenues, which consist in suppressing or doing away with two storeys, the whole in accordance with details

QUE.
C. R.
JALBERT
v.
CARDINAL.
Greenshields, J.

which will be furnished to you from time to time." The plaintiff received this notice, and states that he considered it a complete abandonment of the original contract, but nevertheless, having his materials there, he commenced his work some time in October—the date is not clear — and having received the details of the changed building the defendant intended to construct, proceeded to do the brick part of it at least. The change made by the defendant not only did away with the two storeys, but it changed completely the first storey. By the original plans and specifications the first storey was to be 14 ft. in height; by the change it became some 19 ft. in height. The *exhaussement* which under the original plan was to appear on the top of the third storey then appeared on the top of the first. The plaintiff continued his work, and finally completed it, and it was accepted to the satisfaction of every one. Of that there is no doubt. During the progress of the work and from time to time, when he required money to pay his men and for the materials, he applied to the defendant, and the defendant, apparently, in turn, applied to Dupré for information as to whether he would be justified at a given moment to pay the plaintiff the money he required; and thereupon Dupré, apparently, would examine the work thus far done by the plaintiff, and if satisfied, would tell the defendant that he could pay, and the defendant did, from time to time, pay the plaintiff to the extent of $1,600. There were no certificates issued by Dupré, as architects usually did, he not being an architect, and apparently there was no reference whatever made in these payments to the contract.

Now, the question is, what effect had the notice of September 20, embodying these radical changes, upon the contract? I do not have much difficulty in arriving at the conclusion that the general clause in the specifications, which I have cited, did not contemplate a change such as that made by the defendant. It is in proof, and it is well known, that these general clauses always contain a provision general in its terms, somewhat in the sense of the one under consideration. I should say such a clause covers minor details, possibly, as to windows, doors, placing of stairways, or other details of such kind, but to change a structure from three storeys to one storey is such a complete change and alteration as I should say would render the contract ineffective and put it

at an end and non-enforceable. Supposing the original plans and specifications had called for a one-storey building such as has been actually built, and with this reserved right, could the proprietor notify the contractor that he intended to make a change and make a three-storey building and compel the contractor to build for him a three-storey building. I doubt it; in fact, I should more properly say I do not doubt that he could not. The contractor might possibly be able to carry on the construction of a complete one-storey building; his financial position might enable him to do so, but might not enable him to complete a three-storey building. On the other hand, it is easy to conceive that a contractor might wish to contract for a three-storey building and might consider a contract involving the construction of the brick work of only a one-storey building of such insignificance as not to be worth his while. But, says the defendant, without protest or objection, the plaintiff continued the work and did the work according to the plans and specifications referred to in the original contract. That may be true so far as the absence of any protest is concerned, but the work was not done according to the original plans and specifications; and the first storey as it now is was not made and built according to the plans and specifications as originally made, and the very notice of the defendant of September 20 clearly shews that, because he says in his notice, "which changes consist in the suppression of the two storeys, the whole according to details with which you will be furnished from time to time," clearly contemplating changes from the original plans and specifications.

On the other hand, the answer of the plaintiff seems to me somewhat complete. If the effect of the notice was, in law, to terminate the contract and put it at an end, the fact that the defendant allowed the plaintiff to go on and do the work would, I should say, entitle the plaintiff to be paid a reasonable and fair price for the work and labour done and for the material supplied for the benefit and advantage of the defendant; and this in reality is the plaintiff's action. The Court of Amiens, on February 29, 1897, it seems to me, adopted the proper principle, where it was held that where a clause in the specifications in a contract for a fixed and determined price permits the proprietor to modify in detail the plans and specifications, that if these modifications

QUE.
C. R.
JALBERT
v.
CARDINAL.
Greenshields, J.

are of such importance as to change the original contract the contractor is not bound to accept these changes, and if the work has not been commenced by the contractor it gives rise to a claim for damages, or a claim for loss of profits which he would have made, just as if there had been a cancellation of the contract under art. 1794 of the Code Napoleon, which is our art. 1691. See Pandectes Françaises, vol. 37—Louage d'ouvrage et d'industrie, pars. 1376 and 1377. If the conclusion be correct, that the effect of the notice was to put an end to the contract, and if, the contract having ended, the plaintiff would be entitled to what he would have earned in the way of profit if he had executed the contract, *a fortiori* he is entitled to a reasonable payment for the work and labour done and the material which he actually supplied.

On the whole, I should not disturb the judgment *a quo*, but on the contrary should confirm it, and such is the unanimous opinion of the Court.

Judgment confirmed.

ONT.
S. C.

LONDON v. GRAND TRUNK R. CO.
SUMMERS v. GRAND TRUNK R. CO.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ. December 24, 1914.

1. MASTER AND SERVANT (§ II A 4—100)—RAILWAY EMPLOYEES—LOCOMOTIVE ENGINEER—DUTIES AS TO PRECAUTION—COLLISION—LIABILITY FOR INJURIES.

A locomotive engineer or other railway employee having control of the tracks, after becoming aware of the presence of any person dangerously near the track, however imprudently, is bound to use ordinary care to avoid injury to him when he knows that the danger of collision is imminent; mere knowledge that the danger is possible is not enough, there must be knowledge that a collision was likely to occur.

[*Mills* v. *Armstrong*, 13 A.C. 1; *Purdy* v. *G.T.R.* (1904), (Ont.), unreported; *Jones* v. *Toronto and York Radial* 23 O.L.R. 331; *Weir* v. *C.P.R.*, 16 A.R. 104, referred to.]

Statement

Appeals in two actions against the defendant company, tried together, by consent, by Kelly, J., with a jury.

T. G. Meredith, K.C., for the appellants the Corporation of the City of London.

D. L. McCarthy, K.C., for the Grand Trunk Railway Company.

Sir George Gibbons, K.C., and *G. S. Gibbons*, for the plaintiff Summers.

ONT.

S. C.

CITY OF LONDON v. GRAND TRUNK R.W. Co.

SUMMERS v. GRAND TRUNK R.W. Co.

Sutherland, J.

SUTHERLAND, J. (after setting out the facts):—Exception was taken at the trial, at the time of its reception, and after the charge to the jury, to the admissibility of evidence on the part of the defendants brought out on the examination by their counsel from witnesses of the plaintiffs to the effect that after the accident a rule of the plaintiff corporation was passed and put into effect requiring the driver of their motor truck, when proceeding to a fire, to stop before crossing the railway track. Counsel for the defendants was persistent in getting this evidence on the record and contended that it was admissible as shewing what the plaintiff corporation considered good practice.

It was argued before us that, in consequence, the finding of contributory negligence as against the plaintiff corporation's employees should not be allowed to stand, and that there should at least be a new trial. I am of opinion that the evidence was not admissible on the ground contended for; but the trial Judge seems to have so minimised any effect it could otherwise have had in the following statements—"I do not know that we have anything to do with orders made afterwards," "Some people are always wise after the event." "It may be (evidence) or it may not be," "We all learn by experience," "But would it be evidence of negligence?" "I will allow the question, but I do not think it has much bearing on the case"—and the language used by the jury would seem so to indicate that the evidence did not affect them in coming to the conclusion arrived at, that I do not think the finding should be disturbed. I think the provisions of sec. 28* of the Judicature Act, R.S.O. 1914, ch. 56, may well be applied. I am of the opinion that the finding as it stands is abundantly justified by the evidence.

On the question of contributory negligence, in so far as the plaintiff Summers is concerned, as he was not the driver of the truck, and there was no evidence that personally he was guilty of any negligence, he is entitled to maintain the action notwithstanding the negligence of which the jury has found the plain-

*28.—(1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to the jury, unless some substantial wrong or miscarriage has been thereby occasioned.

ONT.

S.C.

CITY OF LONDON v. GRAND TRUNK R.W. Co.

SUMMERS v. GRAND TRUNK R.W. Co.

Sutherland, J.

tiff corporation guilty through their servants in charge of the truck: *Mills* v. *Armstrong* (1888), 13 App. Cas. 1.

There was on the appeal some question raised as to the admissibility of evidence as to the condition of the head-light on the engine when it arrived at Sarnia some time after the accident. I do not think, however, that the slight evidence, thus perhaps erroneously admitted, could be said to have any appreciable effect on the minds of the jury, in view of the very strong evidence put in upon the part of the defendants to the effect that at the time of the accident, and for some time before, the head-light was shining.

It was suggested in evidence, also, that the engineer on the train ought to have heard the siren sounded and have seen the light from the head-light of the truck cast upon the railway crossing as it approached thereto, or that the brakeman on his train should have heard the siren and seen the light of the approaching truck. Indeed, it was said that he did see the light, and that, in consequence, the engine and train should have been stopped before reaching the crossing. Some argument was also based upon the fact that there was apparently no appliance on the train by which the brakeman, when he saw the light of the truck, could signal to the engineer. The jury has, however, negatived all allegations of negligence on the part of the defendant company set out specifically in the pleadings or otherwise suggested in the evidence, with the exception of that contained in the answer to question 3.

The main question, in my view, in the appeals, is as to whether this finding can stand. It is attacked by the defendant company. The trial Judge seems to have thought that it was open to the plaintiffs on the statement of claim as framed to adduce evidence in support of this finding. With respect, I have great doubt as to this. If they had no such right, then they did not ask or obtain an amendment to the pleadings to enable it to be set up. Objection was taken to its admissibility at the trial. However, I prefer to deal with it as though the evidence were properly admitted.

It is, I think, clear from the evidence that, at the time the semaphore was operated from Maitland street and the train let

ONT.

S. C.

CITY OF LONDON v. GRAND TRUNK R.W. Co.

SUMMERS v. GRAND TRUNK R.W. Co.

Sutherland, J.

in at Adelaide street, there was no danger apparent or imminent. But the contention of the plaintiffs is that, when the railway men at Maitland street saw the truck drive rapidly past that street on King street, a situation of danger, of impending and imminent danger, arose. The jury seem to have accepted this view, and, in consequence, made the finding in answer to question 3 which is attacked by the defendant company on this appeal.

[Reference to Shearman & Redfield on Negligence, 6th ed. (1913), p. 1245, discussing the doctrine of imminent danger.]

Now what was the situation at the time the truck passed Maitland street on King street? The men at Maitland street saw the engine and train beyond William street approaching that street with head-light shining and bell ringing. The train was in fact also running at the slow rate of 5 or 6 miles an hour. They saw a fire truck, which they had a right to assume was equipped, as according to the evidence it in fact was, with proper appliances to stop it within a few feet if driven at a reasonable rate and without negligence, and they had a right to assume also, as the fact was, that it was in charge of a competent and experienced driver, who knew the locality and the dangerous character of the railway crossing on William street. After the truck went by Maitland street on King street, they knew it would have to travel three blocks at least before it could arrive at the railway crossing at William street. They could not meantime see it for the intervening buildings. Unless they were to assume, which I am of opinion they were not called upon to do, that the truck, thus manned, would be driven negligently and carelessly on to the track in front of the approaching engine, there was no reason to apprehend that a collision was at all imminent or even likely. So far as they were concerned, an accident only became evident and imminent when the truck appeared on William street near the railway track. It was then apparently too late for them to do anything to avert the accident. Under these circumstances, I am of opinion that the finding of the jury in answer to question 3 is unwarranted by the evidence and should not be allowed to stand.

To say that men in the positions of the railway employees at Maitland street were to assume the responsibility of stopping

ONT.

S. C.

CITY OF LONDON v. GRAND TRUNK R.W. Co.

SUMMERS v. GRAND TRUNK R.W. Co.

Sutherland, J.

a train approaching William street, in the circumstances disclosed in the evidence, merely because they saw a fire truck passing rapidly along King street, three blocks away, and because they failed to do so, the defendants are to be made liable, is, I think, carrying the doctrine of liability for negligence against a railway company altogether too far. I would be disposed to think, from the evidence, that in any event it was most unlikely that the said employees could have done anything after the truck had passed Maitland street on King street to avert the accident.

It is said that if the lanterns had been swung at the crossing at or near Maitland street the engineer on the train could have seen them and stopped the train. The evidence was, however, to the effect that in practice it was customary for the train when signalled to stop to slacken its speed and approach slowly the point on the track from which the signal was given. Here the train was proceeding at a comparatively slow and apparently safe rate of speed, and, if it had been signalled from Maitland street, it would not in all reasonable probability have passed William street at any slower rate than it did.

I am of opinion that the appeal of the plaintiff corporation should be dismissed with costs, and the appeal of the defendant company as against the plaintiff Summers allowed with costs, if asked.

At the conclusion of his argument, Sir George Gibbons, in view of the fact that the judgment for Summers was only $600, and that he would in consequence have no further right of appeal, asked that, in the event of the present appeal of the plaintiff corporation being disallowed and such corporation making a further appeal and being successful, the right of the plaintiff Summers be preserved to share in such ultimate success.

Under these circumstances, it may well be that no judgment on this appeal should be issued as against the plaintiff Summers, dismissing his action, until the further appeal, if any, of the plaintiff corporation is finally determined.

Mulock, C.J.

MULOCK, C.J.EX., agreed with SUTHERLAND, J.

Riddell, J.

RIDDELL, J., concurred in the result.

Clute, J.

CLUTE, J., dissented. *Appeal allowed.*

PACHAL v. SCHILLER.

SASK.

S. C.

Saskatchewan Supreme Court, Lamont, J. May 21, 1914.

1. BILLS AND NOTES (§ I C—15)—SUBSTITUTED NOTE—MISREPRESENTATION —FORGERY.

There is a failure of consideration for a substituted promissory note given by the promisor in exchange for what was represented as his original note, but which was in fact a forgery, his original note having been transferred into other hands.

[*Gurney* v. *Womersley*, 24 L.J.Q.B. 46, 119 Eng. R. 51, and *Kennedy* v. *Panama, etc., Mail Co.*, L.R. 2 Q.B. 580, applied.]

2. CONTRACTS (§III A—195)—ILLEGAL—STIFLING PROSECUTION—ENFORCEMENT.

An agreement to stifle a prosecution or which has a tendency, however slight, to affect the due administration of justice, is illegal, and any obligation assumed by a person not previously liable therefore as a result of such agreement cannot be enforced.

[*Lound* v. *Grimwade*, 39 Ch.D. 605; *Windhill* v. *Vint*, 45 Ch.D. 351; *Williams* v. *Bayley*, L.R. 1 H.L. 200, applied.]

Statement.

ACTION on an alleged promissory note.

Judgment for defendant.

W. A. Boland, for plaintiff.

C. D. Livingstone and *F. Wilson*, for defendant.

Lamont, J.

LAMONT, J.:—This is an action on a promissory note. The history of the transaction is as follows: In 1911, one Ralph Jonat purchased a farm from Julius Schiller under an agreement of sale. In January, 1912, Schiller, being in need of money, brought the agreement to Jonat, who took it up and gave four promissory notes for the unpaid purchase money, amounting to something over $3,000. Three of these notes, Schiller deposited in the Union Bank as security for an advance; the other one he put in another bank. In March, 1913, Julius Schiller, being again in need of money, went to the plaintiff and told him he had in the bank four notes made by Ralph Jonat, and asked him to cash them. The plaintiff agreed to do so provided Julius Schiller would get his brother Gottlieb Schiller, the defendant herein, to endorse them. Julius said the bank had $150 and interest against the notes, and he asked the plaintiff for a cheque for $175 to lift them. This the plaintiff gave him. Julius Schiller went away, and subsequently returned with four notes purporting to bear the signatures of Ralph Jonat and the defendant. The plaintiff discounted the notes. A short time afterwards he met the defendant, and informed him he held the notes. The defendant said he had not signed them, and that his signature

SASK.

S. C.

PACHAL v. SCHILLER.

Lamont, J.

was a forgery. He said he had told Julius that he would endorse Jonat's notes but that his brother had never presented the notes for his signature. From the defendant's evidence it appears that he was willing to endorse Jonat's notes because he was satisfied that Jonat, having bought the farm, would ultimately pay them. Upon learning that the defendant's signature was a forgery, the plaintiff told the defendant that if he did not sign the notes he would send Julius to gaol for six or ten years. A meeting was arranged between the plaintiff, the defendant, and Jonat. As there was no place on the notes which the plaintiff held on which the defendant could readily sign his name, the plaintiff drew up new notes for the amount of the old ones and had them signed by Jonat and the defendant. Then he returned the notes he had received from Julius Schiller to the defendant, who handed them to Jonat. At this time all parties believed the notes returned by the plaintiff were the genuine notes of Jonat. As a matter of fact, however, only one note was Jonat's; the other three were forgeries. The three genuine notes signed by Jonat were still in the Union Bank. What happened evidently was that Julius Schiller lifted the note which was not in the Union Bank and placed the defendant's name thereon, then forged the names of Ralph Jonat and the defendant to the other three notes and sold the four to the plaintiff. When it was discovered later that the three notes were forgeries, Julius Schiller was prosecuted and convicted for forging them. Both the defendant and Jonat swore that they would not have signed the new notes to the plaintiff had they not believed that he was returning the original notes signed by Jonat. The note sued on in this action is one of the notes given to replace a note on which Jonat's signature was forged. The genuine note which the plaintiff obtained from Julius Schiller has been paid. The defendant resists payment on the ground that there has been a total failure of consideration for the note, and also on the ground that it was signed under a mistake of fact.

For the plaintiff it was contended that the defendant signed the note for two reasons: (1) to get back the notes on which his signature had been forged, and (2) to protect his brother from prosecution. Do these constitute consideration?

In *Gurney* v. *Womersley*, 119 E.R. 51, 24 L.J.Q.B. 46, a

SASK.

S. C.

PACHAL v. SCHILLER.

Lamont, J.

client of the defendants took to them what purported to be a bill of exchange drawn upon a well-known firm in London and accepted by that firm and specially endorsed over to the client. The defendants had the client endorse the bill in blank and then sold it to the plaintiffs. The acceptance by the London firm was a forgery, although the defendants did not know it at the time. The plaintiffs sued to recover the amount they had paid, and were held to be entitled on the ground that they purchased on the faith of the acceptance being genuine, and as it was not there was a failure of consideration. In *Kennedy* v. *Panama, etc., Mail Co.*, L.R. 2 Q.B. 580, at 587, Blackburn, J., in discussing the argument that a shareholder had a right to rescind a contract to take shares as soon as he found that he had not got what he applied for, said:

> If the invalidity of the contract really made the share he obtained different things in substance from those which he applied for, this would, we think, be good law. The case would then resemble *Gompertz* v. *Bartlett* and *Gurney* v. *Womersley*, where a person who had honestly sold what he thought a bill without recourse to him was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in one case and void under the Stamp Laws in the other, in both cases the ground of the decision being that the thing handed over was not the thing paid for.

In the present case the defendant and Jonat did not pay cash for the notes returned, but they gave in lieu thereof, among others, the note sued on, believing the notes they were getting in return were the genuine notes of Jonat. What they got was a forgery, and worth nothing. There was therefore, a failure of consideration for the note sued on.

It was, however, argued that part of the consideration was the forbearance of the plaintiff in not prosecuting Julius Schiller for forgery of the defendant's name. If this operated as a consideration, the transaction must have amounted to an agreement by the plaintiff not to prosecute if the defendant would sign the new notes. Such an agreement is illegal, and therefore will not support a promise to pay. In *Williams* v. *Bayley*, L.R. 1 H.L. 200, 35 L.J. Ch. 717, a case very similar to the present one, the defendant's son had forged his father's name to several notes and discounted them at the plaintiff's bank. On the discovery of the forgeries the plaintiffs intimated to the father that if he

SASK.

S.C.

PACHAL v. SCHILLER.

Lamont, J.

would take upon himself the payment of the balance all would be well; if not, that it was a serious matter—a case of transportation for life. The father agreed in writing to pay the balance, and gave an equitable mortgage on his property as security. The forged notes were then handed to him. It was held by the House of Lords that the father's agreement to pay was illegal and could not be enforced. An agreement to stifle a prosecution, or which has a tendency, however slight, to affect the due administration of justice, is illegal, and any obligation assumed by a person not previously liable therefore as a result of such agreement cannot be enforced. *Lound* v. *Grimwade*, 39 Ch.D., 605, 57 L.J. Ch. 725; *Windhill Local Board of Health* v. *Vint*, 45 Ch.D. 351, 59 L.J. Ch. 608. In so far, therefore, as the return of the notes was consideration for the defendant's promise to pay, the consideration has totally failed; and in so far as the plaintiff's forbearance to prosecute was consideration, it was illegal. There will, therefore, be judgment for the defendant with costs.

CAN.

S. C.

MONTREAL TRAMWAYS CO. v. LACHINE, JACQUES-CARTIER, ETC., R. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. June 1, 1914.

1. STATUTES (§ II A—96)—CONSTRUCTION—RAILWAY COMMISSION—JURISDICTION—OCCUPATION OF LANDS BY RAILWAY.

Jurisdiction is not conferred on the Railway Commission (Can.) under the Railway Act, R.S.C. 1906, ch. 37, sec. 176, to authorize a railway operated under Dominion law to use or occupy lands which at the time of the application for the approval and of the approval of the location of the Dominion railway had become the property of a railway operated under provincial law.

[*Montreal* v. *Montreal Street R. Co.*, [1912] A.C. 333, referred to.]

Statement.

APPEAL from the order of the Board of Railway Commissioners for Canada, dated July 20, 1912, whereby the Lachine, Jacques-Cartier and Maisonneuve Railway Company was authorized to use and occupy a portion of the lands of the Montreal Tramways Company which had been transferred to that company by the Montreal Park and Island Railway Company in pursuance of the Dominion statute 1 & 2 Geo. V., ch. 115.

The question upon the appeal was whether the Board had jurisdiction to make the order appealed from.

Perron, Taschereau, Rinfret, Genest, Billette & Plimsoll, for the appellants.

Henri Jodoin, for respondents.

CAN.

S. C.

MONTREAL TRAMWAYS CO. v. LACHINE, JACQUES-CARTIER, ETC., R. CO.

Duff, J.

FITZPATRICK, C.J., agreed with DUFF, J.

IDINGTON, J., for reasons given in writing, was of opinion that the appeal should be dismissed with costs.

DUFF, J.:—This is an appeal from the Board of Railway Commissioners for Canada, and the question which arises is whether the Board had power to make a certain order, dated July 20, 1912, which is in the following terms:—

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.
Order No. 17,082.

In the matter of the Order of the Board, No. 13,993, dated June 12th, 1911, approving the location of the Lachine Jacques-Cartier and Maisonneuve Railway Company's line of railway from the westerly terminus of the railway to a point about 400 feet west of the Canadian Pacific Railway Company's crossing at Iberville street subway, in the city of Montreal; and the application of the Lachine, Jacques-Cartier and Maisonneuve Railway Company for authority to take, for the construction of its railway, a portion of lot No. 340, in the parish of St. Laurent, in the said city of Montreal, of the lands of the Montreal Park and Island Railway Company, consisting of a strip of 597 feet in length and 100 feet in width, containing 1.62 arpents, as shewn on the plan dated June 12th, 1911, and approved under the said order No. 13,993.

Upon reading what is alleged in support of the application and on behalf of the Montreal Park and Island Railway Company, and the report of the chief engineer of the Board:—

It is ordered that the applicant company be and it is hereby authorized to take for the purpose of the crossing that portion of the said lot No. 340, of the lands of the Montreal Park and Island Railway Company, consisting of a strip of land 597 feet in length by 100 feet in width, containing 1.62 arpents, as shewn on the said plan.

(Sgd.) D'ARCY SCOTT,
Assistant Chief Commissioner.
S. J. MCLEAN,
Commissioner.
Board of Railway Commissioners for Canada.

Saturday, the 20th of July, A.D. 1912.

There can be no serious doubt, I think, that the Board, in making the order, was professing to execute powers conferred upon it by sec. 176 of the Railway Act. It appears clearly enough from the application dated May 10, 1912, and a further application of July 25, that it was understood by the respondents that the Board was exercising powers under that section. Indeed, it is so stated in the factum of the respondents, and, while the section is not mentioned in the order, the order purports to be made

CAN.

S. C.

MONTREAL TRAMWAYS CO. v. LACHINE, JACQUES-CARTIER, ETC., R. CO.

Duff, J.

under the application of May 10, and it is not really disputed that the order was an order under the section mentioned. The Board would, of course, have no power under the general expropriation provisions of the Act to make such an order, as sufficiently appears from a consideration of secs. 215 and 216.

I do not think the parties have really come to any issue upon the question whether the lands in question ever did constitute an integral part of the railway undertaking of the Montreal Park and Island R. Co., or are now such a part of the Montreal Tramways Co., and I think there is no evidence before us which would enable us to pass upon the point, assuming it would be competent for us to do so on this appeal. It may be doubted, I think, whether sec. 176 has any application to the lands of a railway company which are not physically a part of the railway undertaking: for example, subsidy lands held for sale. It is quite arguable that proceedings under the general expropriation provisions of the Act would be the appropriate method of getting authority to take such lands even where the owner is a Dominion railway company. The point, in my view, is of no importance on this appeal, because, as I have already indicated, those proceedings are taken by the railway company under sec. 176; and the lands which the respondent company was authorized to take by the order appealed from are now and at the time the application and order were made were the property of a provincial railway company owning and operating a railway which is a local undertaking and subject to the exclusive authority of the provincial Legislature.

First.—These lands are the property of the Montreal Tramways Co., whose undertaking is a local undertaking under the exclusive jurisdiction of the Quebec Legislature. It is not disputed that the lands in question, prior to November, 1911, formed part of the property of the Montreal Park and Island R. Co., whose undertaking, having been declared for the general advantage of Canada, was a Dominion undertaking. In November, 1911, however, that company was authorized by an Act of the Dominion Parliament to transfer the whole or any part of its undertaking and property to certain companies engaged in operating provincial undertakings, including the Montreal Tramways Co., and, in the result, the property in question, with other properties, became vested in the

CAN.

S. C.

MONTREAL TRAMWAYS CO. v. LACHINE, JACQUES-CARTIER, ETC., R. CO.

Duff, J.

Montreal Tramways Co., a railway company engaged in working a provincial railway, and were vested in that company when the application was made upon which the order was based. These facts are admitted again and again in course of the proceedings taken by the respondents, and are not disputed in the respondents' factum.

Secondly.—Section number 176 has no application to lands which are the property of a provincial railway company. The full text of the section is as follows:—

176. The company may take possession of, use or occupy any lands belonging to any other railway company; use or enjoy the whole or any portion of the right-of-way, tracks, terminals, station or station grounds of any other railway company, any, and have and exercise full power to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Board first obtained and to any order and direction which the Board may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

2. Such approval may be given upon application and notice, and, after hearing, the Board may make such order, give such directions, and impose such conditions or duties upon either party as to it may appear just or desirable, having due regard to the public and all proper interests.

3. If the parties fail to agree as to compensation, the Board may, by order, fix the amount of compensation to be paid in respect of the powers and privileges so granted. 3 Edw. VII. ch. 58, sec. 137; 6 Edw. VII. ch. 42, sec. 8.

If this section applies to provincial railway companies, then it is within the power of the Board of Railway Commissioners for the Dominion to authorize a Dominion railway company to make use, to any extent that the Board shall think proper, of the works of a provincial railway company without the consent of the provincial railway company or the public authorities of the province, and without a declaration by Parliament that the provincial railway should be a work for the general advantage of Canada. The Board would also have power under the express provisions of the section to impose conditions upon the provincial railway company, as well as duties, as it might appear just or desirable to them, and to fix the compensation to be paid in respect to the powers and privileges granted. In a word, the section, if such be its application, authorizes the establishment over provincial railways of that dual control which has been held to be contrary to the policy of the B.N.A. Act: *City of Montreal* v. *Montreal Street Railway Co.*, 1 D.L.R. 681, 13 Can. Ry. Cas. 541,

CAN.

S. C.

MONTREAL TRAMWAYS CO. v. LACHINE, JACQUES-CARTIER, ETC., R. CO.

Duff, J.

[1912] A.C. 333, at 345, 346. Sub-section 4 (*c*) of sec. 2 and sec. 8 of the Railway Act seem to shew that where it was intended that a specific provision of the Act should apply to provincial railway companies that has been expressly stated. I think the proper conclusion is that sec. 176 has no such application.

It is argued, however, that at the time the line of the respondents was located these lands were still a part of the property of the Montreal Park and Island R. Co., a Dominion company. I do not think that in the circumstances of this case that is an answer to the appeal. When the application was made for leave to take possession of the lands, admittedly they had passed to the Montreal Tramways Co.

The Dominion legislation authorizing the transfer to the provincial company of the property of the Dominion railway company involved by necessary implication a declaration that such property, when transferred, should no longer be part of a work for the general advantage of Canada; I entertain no doubt that such a declaration by the Dominion Parliament made with the concurrence of the Quebec Legislature would be entirely effective to remove the property transferred from the Dominion jurisdiction under secs. 91 (29) and 92 (10) of the B.N.A. Act.

The result is that, with respect to the property transferred, sec. 176 ceased to have any operation.

The appeal should be allowed with costs.

Anglin, J.
Brodeur, J.

ANGLIN and BRODEUR, JJ., concurred.

Appeal allowed with costs.

ALTA.

S. C.

VEILLEUX v. BOULEVARD HEIGHTS, LTD.

Alberta Supreme Court, Walsh, J. November 28, 1914.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—DEFECTIVE TITLE — SUBDIVISIONS — REGISTRATION REQUIREMENTS — NON-COMPLIANCE.

An agreement for sale of lots in a land sub-division since the statute of 1911-1912, Alta., ch. 4, sec. 15, amending the Land Titles Act, Alta., 1906, ch. 24, sec. 124, when the sub-division plan has not been registered, is illegal, and the purchaser may claim rescission on becoming aware of the non-registration.

[*London Electric* v. *London*, [1903] A.C. 434; *Victorian Daylesford Syndicate* v. *Dott*, [1905] 2 Ch. 624; *Brown* v. *Moore*, 32 Can. S.C.R. 93; *Burgess* v. *Zimmerli*, 17 D.L.R. 708, referred to.]

2. STATUTES (§ II B—111) — STRICT OR LIBERAL CONSTRUCTION — PENAL STATUTES.

When the legislature has plainly said that a certain act shall not be done, the legal consequences following a violation of that provision

are neither greater nor less by reason of the fact that the legislature has or has not imposed a penalty for such violation.

[*Melliss* v. *Shirley*, 16 Q.B.D. 446, distinguished; and see Stat., Alta., 1913, 2nd session, ch. 2, sec. 9.]

ACTION to rescind an agreement of sale.

M. B. Peacock, (*Peacock & Skene*), for the plaintiff.

H. P. O. Savary (*Savary, Fenerty & DeRoussy*), for the defendant.

WALSH, J.:—This is a purchaser's action for rescission of an agreement for the sale of land. The agreement which was made on March 30, 1912, covers "lots 27 to 48 inclusive in block 23 of part of the north-east quarter of section 35, township 52, range 4 west of the 4th meridian in the Province of Alberta and being known as Boulevard Heights, Edmonton." At the date of the agreement the sub-division plan according to which the sale was made had not been registered in the Land Titles Office nor was it in fact so registered until April 29, 1913, more than a year after the date of the contract. When this agreement was made, sub-sec. 7 of sec. 124 (added 1911-12, ch. 4, sec. 15), of the Land Titles Act (ch. 24, 1906), was in force, having been assented to on February 16, 1912. That sub-section reads as follows:

Walsh, J.

(7) No lots shall be sold under agreement for sale or otherwise according to any townsite or sub-division plan until after the same has been duly registered in the land titles office for the registration district in which the land shewn on said plan is situate, providing that this section shall not apply to any plan now in existence and approved by the Minister.

The plan in question does not come within the above proviso. The plaintiff did not know of the non-registration of this plan when the agreement was made. His first knowledge of that fact came to him on January 28, 1914, the day before this action was commenced. No penalty was provided for a violation of the provisions of this sub-section until by sub-sec. 4 of sec. 9 of the Statute Law Amendment Act, ch. 2, 1913, 2nd sess., assented to on October 25, 1913, one was imposed.

The plaintiff has paid all of his purchase money of $3,350 and interest except $313.50. He bases his right to rescission upon three grounds, namely (1) the illegality of the contract under the above sub-section; (2) the defendants inability to make title; and (3) misrepresentation as to the location and

ALTA.

S. C.

VEILLEUX v. BOULEVARD HEIGHTS, LTD.

Walsh, J.

physical characteristics of the land. I have considered only the first of these grounds as it is sufficient in my judgment to entitle the plaintiff to the relief which he asks. I think that the contract in question is an illegal one because it was made in direct contravention of a statute which prohibited it. The language of the sub-section is too plain to admit of any doubt but that the legislature intended to prohibit the making of such a contract as this, and, that being so, the conclusion that the contract is illegal is inevitable. Parke, B., in *Cope* v. *Rowland*, 2 M. & W. 149, at 157, says:

> It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law no Court will lend its assistance to give it effect.

In *Smith* v. *Mawhood*, 14 M. & W. 452 at 464, Alderson, B., said:

> The question is, does the legislature mean to prohibit the act done? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law and no right of action can arise out of it.

In *Melliss* v. *Shirley Local Board*, 16 Q.B.D. 446 at 453, Bowen, L.J., says:

> The established rule of law is and always has been that no action can be maintained on a contract which is prohibited either by the common law or by statute. The law was so stated by Lord Ellenborough in *Law* v. *Hodson*, 11 East 300, and it was repeated by other Judges in *Taylor* v. *Crowland Gas & Coke Co.*, 10 Ex. 293. . . . In the end we have to find out upon the construction of the Act whether it was intended by the legislature to prohibit the doing of a certain act altogether or whether it was only intended to say that if the act was done certain penalties should follow as a consequence. If you can find out that the act is prohibited then the principle is that no man can recover in an action founded on that which is a breach of the provisions of the statute.

The whole trend of the authorities, of which there are many, including such cases as *London Electric Lighting Co.* v. *London Corporation*, [1903] A.C. 434, and *Victorian Daylesford Syndicate* v. *Dott*, [1905] 2 Ch. 624, is in support of this view.

Mr. Savary contends that because no penalty was imposed by statute at the date of this contract for a violation of the provisions of this sub-section a contract made in breach of it is not invalid. I do not think that this contention is well founded There are some expressions in the judgment of Lord Esher at

p. 451 of *Melliss* v. *Shirley Local Board, supra*, which lend colour to this contention but a careful reading of all the judgments in the case satisfies me that it was anything but the intention of the Court of Appeal to lay down the broad proposition that a contract which is prohibited by statute without being thereby expressly declared to be void is only void if a penalty is imposed by the statute for breach of the prohibition against it. The very contrary of this appears to be the case. The struggle there seems to have been against the argument of counsel for the plaintiff that because a penalty was imposed for a violation of the provisions of the Act that exhausted the punishment to which the transgressor was liable and his rights and remedies under the contract should not be interfered with. The fact that a statute provides a penalty for breach of its provisions is doubtless sometimes of value in helping to determine whether or not the legislature intended to make void an act done in disregard of it when the meaning of the legislation is not otherwise quite clear. But it seems to me that when the legislature in plain and unequivocal language says that a certain act shall not be done, the legal consequences following a violation of that provision are neither greater nor less by reason of the fact that the legislature has or has not imposed a penalty for such violation. I would be inclined to think a stronger argument could be made out for the view of the invalidity of an act done in contravention of a statute from the absence than from the presence of a provision imposing a penalty. If the absence of a penalty means that no invalidity attaches to the act so done the result must be that the most flagrant violation of the statute would be permissible with no punishment for the transgressor. A man could do day after day the very thing that the statute says he must not do at all and still have full validity given to these prescribed acts while escaping punishment by fine or otherwise for his contumacy. On the other hand, the imposition of a penalty might reasonably give ground for the argument that the legislature meant to punish in that way alone and not to add to that punishment by depriving the offender of the benefit of what he had done in defiance of the statute.

Strong, C.J., in delivering orally the judgment of the Su-

ALTA.

S. C.

VEILLEUX v. BOULEVARD HEIGHTS, LTD.

Walsh, J.

preme Court of Canada in *Brown* v. *Moore*, 32 Can. S.C.R. 93 at 97, says:

It is settled law that contracts entered into in the face of statutory prohibition are void and the prohibition of sales of liquor without license provided by the statute in question has therefore the effect of rendering the contract here of no effect. It is also settled that the imposition of a penalty for the contravention of a statute avoids a contract against the statute. In the present case we have both the prohibition in express terms and the penalty.

Bramwell, B., said in *Cowan* v. *Milbourn*, L. R. 2 Ex. 230 at 236:

It is strange that there should be so much difficulty in making it understood that a thing may be unlawful in the sense that the law will not aid it and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached the consequences would be that inasmuch as no penalty is provided by the law for prostitution a contract having prostitution for its object would be valid in a Court of law.

The authorities to which I have referred are all cases in which a plaintiff has been seeking to enforce rights founded on a contract which the Court has declared to be illegal. Upon these authorities I am satisfied that if the defendant here was seeking specific performance of this contract he could not get it. But that is not the case. Instead, the plaintiff is endeavouring to get out of such a contract and recover money paid under it. Can he do so?

In *Collins* v. *Blantern*, 1 Smith's L.C. (10th ed.), p. 355, the Lord Chief Justice says:

Whoever is a party to an unlawful contract if he hath once paid the money stipulated to be paid in pursuance thereof he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a Court of justice in this unclean manner to recover it back.

Commenting upon this in delivering the judgment of the Court of Appeal in *Kearley* v. *Thomson*, 24 Q.B.D. 742 at 746, Fry, L.J., says:

To that general rule there are undoubtedly several exceptions or apparent exceptions. One of these is the case of oppressor and oppressed in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the delictum is not par and therefore the maxim does not apply. Again there are other illegalities which arise where a statute has been intended to protect a class of persons and the person seeking to recover is a member of the protected class. . . . In these cases of oppressor and oppressed or of a class protected by statute the one may recover from the other notwithstanding that both have been parties to the illegal contract.

This view was acted upon by Stirling, J., in *Barclay* v. *Pearson*, [1893] 2 Ch. 154, and by Parker, J., in *Lodge* v. *National Union Investment Co.*, [1907] 1 Ch. 300. See also *Burgess* v. *Zimmerli*, 17 D.L.R. 708.

The sub-section here in question was in my opinion passed for the protection of the large class of people who at that time were purchasers of land in what are known as subdivisions. Sales of such lands according to unregistered plans were fraught with the greatest danger to the purchasers. There was nothing certain about the subject matter of the contract. A proper description of the land for registration purposes was an impossibility. To a dishonest vendor the chances for fraud and imposition were vastly increased and to even the most careful of purchasers the risks of confusion and loss were made much greater. The plaintiff is, in my opinion, a member of the class for whose protection this legislation was passed and as such, he is, I think, entitled to the aid of the Court in getting back the money which he has paid under this illegal contract. He is not *in pari delicto* with the defendant. He knew nothing of the non-registration of the plan until nearly two years after he entered into this contract and as soon as he knew of it he demanded his money back, and I think that he is entitled to get it.

There will be judgment rescinding the agreement and directing the defendant to repay to the plaintiff the several sums paid by him under it with interest on each payment from its date at 5 per cent., and costs. The plaintiff is entitled to a lien on the land until repayment has been made.

Judgment for plaintiff.

[Appeal to Appellate Division dismissed Feb. 26, 1915. Leave to appeal to Privy Council granted on terms, March 26, 1915.]

NURSE v. NURSE.

British Columbia Supreme Court, Macdonald, J. November 16, 1914.

1. DIVORCE AND SEPARATION (§ V C—55)—ALIMONY—AMOUNT OF—HUSBAND'S INCOME.

Where the husband liable to pay alimony has no income but his wages of approximately $80 per month, $20 per month is a proper allowance to the wife, but the order may provide for changing the amount by future order on proof of altered circumstances.

HEARING of proceedings for alimony and custody of a child.

C. S. Arnold, for petitioner.

L. B. McLellan, for respondent.

B. C.

S. C.

NURSE v. NURSE.

Macdonald, J.

MACDONALD, J.:—The respondent having been found guilty of misconduct, it almost naturally follows that the petitioner should have the custody of the boy who is of tender years. There should certainly be no departure from this general rule where the respondent and co-respondent both occupy the same house, which is sought to be the home of the child. The father however should be afforded liberal access to the child. I think that every Saturday afternoon between 2 and 5 o'clock the boy should be allowed to visit his father. If, however, the hours of work in which the respondent may be engaged would interfere with this provision, then some other convenient time should be arranged. If the parties cannot agree as to the terms of the order it may be submitted to me for settlement. I should add the petitioner has undertaken not only the custody of the child but his maintenance and education and this in the face of the desire of the father to undertake this responsibility himself. There will be liberty to the father to apply at any time with respect to the custody of the child.

As to an allowance to the petitioner for alimony, I find that the respondent is at present earning wages amounting to $80 but this amount is subject to a reduction of 20 per cent. and this will leave a very small monthly allowance on which he can subsist. It is difficult to determine what would be a proper amount to allow the petitioner, as sickness, lack of employment or other circumstances might prevent her husband from earning his present salary even at the reduced rate. An allowance of $20 per month is ordered, subject to this amount being modified at any time upon proof of change of conditions and circumstances. It may be increased or even diminished with the varying fortunes of the respondent.

Order accordingly.

B. C.

S. C.

WICKWIRE v. PASS GE.

British Columbia Supreme Court, Macdonald, J. December 22, 1914.

1. BILLS AND NOTES (§ III A—63)—ACCOMMODATION ENDORSERS—ORDER OF ENDORSEMENTS—PRESUMPTION—LIABILITY.

Each endorsement in blank of a promissory note is presumed, until the contrary is proved, to have been made in the order in which the endorsements appear on the note, and the endorsers are *primâ facie* liable amongst themselves in the same order.

ACTION against endorsers of a promissory note.

R. M. Macdonald, for plaintiffs.

O'Dell, for defendants.

MACDONALD, J.:—On March 26, 1914, the defendants Passage & Tomlin, being indebted to the defendant Claughton, made their promissory note in his favour for $2,000. Defendant Claughton endorsed the note, and, in order to negotiate the same, obtained the endorsement of the defendants Sprott and the Western Canada Trust Co. Such endorsements were for the accommodation of the defendant Claughton. Plaintiffs, without his knowledge that such last-mentioned parties had thus endorsed for accommodation, discounted the note at the request and for the benefit of Claughton. It was his duty towards those who had thus accommodated him to pay the note at maturity. He failed to perform this obligation, and the note was dishonoured on June 29, 1914, and duly protested. All defendants thus at the time became liable to pay the note to the plaintiffs as holders in due course. The question is—were any of them subsequently relieved from liability? Defendant Claughton immediately negotiated with the plaintiffs and obtained an extension of time for payment. Exhibit 2 shews that he paid interest up to maturity of the note, and also a discount or bonus of 2% per month for an extension until July 10, when it was agreed that a payment of $1,000 should be made. Plaintiffs granted this extension without even reserving their rights as against the other parties who were then liable on the note. This tied the plaintiffs' hands, and had the same effect as if they had accepted a renewal note from Claughton without obtaining the assent of the other endorsers. Judgment was entered at the trial against the defendants Passage & Tomlin and Claughton, but the other defendants contend that the acts of the plaintiffs have relieved them from liability. Plaintiffs submit that the order in which the endorsers appear on the note should not govern, as endorsement includes "delivery"—that plaintiffs dealing with the defendant Claughton in the negotiation and subsequent extension were entitled to assume that defendant Sprott and the Western Canada Trust Co. were not sureties for defendant Claughton, but could be held liable by him in the event of his being called upon to pay the note. They could consider defendant Claughton as creating the last legal obligation. I do

B. C.

S. C.

WICKWIRE v. PASSAGE.

Macdonald, J.

not consider this position tenable. Each endorsement is presumed—until the contrary is proved—to have been made in the order in which they appear on the note. They are also liable *primâ facie* in the order in which they endorse. Plaintiffs thus affected by such legal position held the note, and by their actions debarred themselves from proceeding thereon for an appreciable time. Their right of action as against the endorsers other than Claughton was destroyed in the meantime. Plaintiffs ignored the right that these endorsers had to look at any time for indemnity to defendant Claughton, for whose accommodation they had endorsed. Under these circumstances, as the plaintiffs did not take the precaution to obtain the assent of these accommodation endorsers to the extension, or reserve their rights against them as sureties, the result is, in my opinion, they are relieved from liability.

The action is dismissed as against the defendants Sprott and Western Canada Trust Co. Ltd., with costs.

Judgment accordingly.

QUE.

K. B.

MASSE v. FRASER.

Quebec King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. January 10, 1914.

1. COVENANTS AND CONDITIONS (§ II C—15)—CONTRACT—WARRANTY—IMPERVIOUS TO ENTRY OF WATER—INFILTRATION OF WATER—DRAINAGE—KNOWLEDGE OF DEFECT—COST OF REPAIRS—RECOVERY OF.

Where a parcel of land and a store building in course of construction thereon in a city is the subject of an agreement of sale to be carried out on the completion of the building and the deed of sale then made contains a clause that the purchaser "reserves all legal rights he may have if the cellar be found not to be impervious to the entrance of water from without, the vendor not admitting any such rights," the purchaser may recover for the cost of repair because of the infiltration of water into the cellar due to lack of proper drainage which the vendor constructing the building should have provided in connection with the drainage system there existent where the defect remained latent until ten days after the purchaser's entry into possession; the reservation in the deed of sale did not enlarge the buyer's rights but it did not commit him to the position of a buyer who has bought with knowledge of existence of a defect and is a protestation of absence of knowledge thereof at a time when it could not be known whether the work of the vendor who had represented that he would make the cellar dry would have that effect or not.

Statement

APPEAL from judgment of Superior Court, Dunlop, J.

The appeal was dismissed.

Desbois & Delage, for the appellant.

QUE.

K. B.

MASSÉ v. FRASER.

CROSS, J.

T. P. Butler, K.C., for the respondent.

E. Lafleur, K.C., counsel.

The judgment of the Court was delivered by

CROSS, J.:—This is an action brought by the respondent against the appellant to recover the cost of repairs to a building he had purchased from him, necessitated by latent defects in it. The claim falls under two heads of $626 and $394.35 respectively and arose under the following circumstances.

The appellant gave the respondent a promise of sale on March 17, 1911, of shops then under construction and to be completed on May 1 following. One Cuthbertson, employed by the respondent to report on the construction as it progressed, did so, in April, 1911, pointing out the danger of water penetrating into the cellars and suggesting certain work to prevent it. A draft deed of sale was prepared in the same month, containing the following clause:

And the vendor warrants that the cellar is impervious to the entrance of water from without and which building the vendor hereby agrees forthwith to cause to be completed in manner as represented by him to the agent of the purchaser, the whole in a proper, thorough and workmanlike manner.

The appellant continued his work by jobber Paul Asconi, who, in his testimony, says:

Avez vous fait aucun marché verbal ou ecrit avec M. Massé dans le mois de mai de l'année passée avec objet d'empêcher l'entrée de l'eau par les fondations?—Moi, j'ai fait la cave de M. Massé et donné une couche de ciment de deux pouces et empêché l'eau qui avait entré, et moi, quand j'ai fini la cave, il n'y avait d'eau, la cave était sèche. Il y a bien du monde qui ont vu que la cave était sèche. Je suis allé moi-même chez M. Fraser, j'ai dit: Allez voir le travail que j'ai fini. M. Fraser avait mis un homme exprès tous les jours pour venir là voir l'ouvrage que j'avais fait, et l'homme est tout le temps venu et il était bien content. M. Fraser même était bien content; la cave était sèche, c'est lui-même qui a donné permission que j'aille sur la rue St.-Jacques au bureau de M. Fraser.—Et combien deviez-vous avoir de M. Massé pour faire cet ouvrage, pour empêcher l'eau de rentrer?—Il m'avait donné $200.

Having so completed this work, the parties met to sign the deed. The appellant vendor presumably considered that his obligations as regards the building had been implemented. But the respondent (the buyer), was not convinced. The appellant objected to the clause of warranty against entrance of water.

QUE.
K. B.
MASSÉ
v.
FRASER.
Cross, J.

After discussion that clause was changed to read—as it now appears in the deed—as follows:

> The purchaser, however, reserves all legal rights he may have, if the cellar be found not to be impervious to the entrance of water from without, the vendor not admitting any such rights.

Upon the deed having been signed, the respondent entered into possession. In about a fortnight water was found in the cellars. The respondent had a protest served upon the appellant and afterwards had the work done by Cuthbertson at a cost of $626.

The appellant's ground of complaint against the judgment on the part of the plaintiff's claim is that the defect was not a latent defect, and that is the first and principal matter to be decided. The appellant relies upon the rule of art. 1523 C.C. that "the seller is not bound for defects which are apparent which the buyer might have known of himself." He dwells upon the fact that the respondent had been made aware, in March, 1911, that there might be trouble from inflow of water, and upon the fact that the same thing was to be inferred from Cuthbertson's report made in April. There is no doubt that the matter was so made known to the respondent. It is also proved that the respondent, from time to time, visited the property and looked at what was being done. The legal effect of this advance knowledge is without doubt important, not only because defects, to constitute a ground of action to the buyer, must not only be latent defects, but must also be such as render the thing sold "unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them." (Art. 1522 C.C.). It is shewn here that, knowing the possibility or uncertainty of, inflow of water, or, in other words, knowing that such a problem existed, the respondent held to his bargain and went on and completed the deed, a fact established by the very deed itself. For the appellant, authority is cited that a prospective buyer, who is given opportunity to examine, ought not to content himself with mere personal inspection, but should have resort to skilled assistance, if he be not himself competent to judge of the possible defect. Pothier, Vente, No. 207. Baudry-Lacantinerie and Saignat, Vente, No. 418. Authorities

cited in Fuzier-Herman, Cod. Ann. Supp. Arts. 1641-1642, no. 11.

If the matter rested there, the case for the appellant would be made out.

But another element enters into the matter and has to be considered. There existed in Laurier Avenue, in front of the property, a street drain available, as regards level and capacity, for drainage of the cellars in question. The building was designed for use as tradesmen's shops and the cellars, for the storage of goods connected with such shops. The seller of such subjects is liable, as warrantor of the suitability of what he sells, for the appropriate uses of like shops. It is true that, if he makes adequate disclosures of particular defects, and the buyer purchases with such knowledge, the seller is relieved of responsibility to warrant against the defects. Here, as we have seen, when it was proposed to pass the deed at the beginning of May, the buyer proposed, for his protection, that the seller should expressly covenant against water trouble. The deed was not then signed, and the seller went on with work in the basements. He invited the buyer, at the end of May, to witness that the cellars were dry, as they, in fact, were at that time, and the deed was signed then. It could not then be known whether the appellant's work would accomplish the object desired, namely, make the cellars dry, or not. The appellant is to be taken as representing that his work would have that effect. The other party says in effect, "I don't know, but I will reserve my rights, if water comes in." It is clear that that amounts to a protestation of absence of knowledge of the existence of a defect. It does not enlarge the buyer's rights, but it does not commit him to the position of a buyer who has bought with knowledge of existence of a defect.

It follows that the case before us is not simply a case of a purchaser who bought with knowledge of a defect, consisting in exposure to inflow of water, but it is a case of a purchaser who has bought in ignorance of the fact that a structure, designed and made to prevent inflow of water, will prove inadequate to that end.

It is our opinion that there was a defect in the work done

QUE.
K. B.
MASSÉ
v.
FRASER.
Cross, J.

by the appellant to make the cellars dry and that that defect remained latent till about ten days after the respondent's entry into possession.

It was further argued for the appellant that the work which the respondent has in turn had done, is itself inadequate, and that water still comes into the cellars; that that is a condition which no works can prevent and is a sort of *vice du quartier*, to be witnessed in all the basements in the neighbourhood.

There is some testimony to the effect that, on a few occasions after the replacing work done by Cuthbertson for the respondent had been finished, slight moisture was observed in the cellars. It is also proved that water percolates into other basements in the neighbourhood. But, though the trial in this action took place late in 1912, it was not shewn that there had been any serious inflow of water, even in the season of spring freshets. It appears that the work proposed by Cuthbertson in April, and carried out in July, was objected to by the appellant as unnecessary and very costly. It appears that the appellant, on the one hand, considered that the water could be kept out—as far as it was possible by any means to keep it out—by a coating of cement on the inside surface of the walls and floors, and by a process of "rendering" or treating the walls on the outside. On the other hand, it appears to have been considered by Mr. McVicar, an architect, and by Cuthbertson, that, instead of only trying to keep out the water, provision should be made to carry it off by a French drain under the floor. The latter mode was the one finally adopted, and if it be the proper mode, we, at once, have an explanation, not only of the fact that the appellant's work proved ineffective, but also of the fact of the presence of water in other basements, in so far as provision may not have been made to carry it off from them by French drains. In presence of the fact of the existence of the Laurier Ave. drain, it would, moreover, appear to be mere common sense to conclude that provision of adequate drainage of those cellars is a simple matter of adoption of adequate and possible means to the end.

It may be added that the assurance given to the respondent, at the end of May, to the effect that the cellar was dry, does not fit in with the contention afterwards made and now persisted in, that, no matter what is done, there will always be water in the

cellars. If that had been recited in the deed, it is not shewn that the respondent would have signed it, and it is clear that the stores would not have been readily marketable. It follows that the defect is shewn to have been a latent defect and that the appeal fails as regards the first part of the claim. It may be added that objection was also made to part of the amount claimed under this head, on the ground that part of the work done by Cuthbertson consisted in lowering the cellar floors to give more space. It is, however, sufficiently proved that the lowering in question consisted merely in what was necessary to give the part of the floors operated upon an even surface and a proper pitch towards the drain outlets.

[His Lordship then proceeds to deal with the second item of the respondent's claim as to which questions of fact alone arise.]

The judgment is unanimously confirmed with costs.

Judgment confirmed.

TWYFORD v. BISHOPRIC.

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. June 30, 1914.

1. LIMITATION OF ACTIONS (§ III E—55)—WHEN STATUTE RUNS—FRAUD.

The statute of limitations is not a bar to equitable relief in case of fraud founded on fraudulent misrepresentation made to induce the purchase of shares in a company, as against the persons guilty of the fraud, if the person defrauded is not guilty of laches in seeking relief; and so long as the latter remains in ignorance of a concealed fraud without any fault of his own, his remedy is not barred.

Twyford v. *Bishopric*, 14 D.L.R. 320, varied; *Bulli Coal Co.* v. *Osborne*, [1899] A.C. 351, and *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, applied.]

2. LIMITATION OF ACTIONS (§ III E—125)—WHEN ACTION IS BARRED—FRAUD.

In case of a concealed fraud so far as the plaintiff seeks relief against a person not committing the fraud but who had received the benefit of the money without himself being at fault, the plaintiff must show that he has been diligent and vigilant; and if by reasonable diligence he could have discovered the fraud more than six years before action brought, the court will refuse the relief of following the money against the innocent party on the ground that it would be inequitable to permit the plaintiff to set up such claim after the long delay.

[*Twyford* v. *Bishopric*, 14 D.L.R. 320, varied.]

Statement

APPEAL by plaintiff from the judgment of Walsh, J., *Twyford* v. *Bishopric*, 14 D.L.R. 320, dismissing the action.

ALTA.

S. C.

TWYFORD v. BISHOPRIC.

The appeal was allowed as against defendants Bishopric and Powell.

C. A. Grant, K.C., for plaintiffs.

Parlee, Freeman, & Abbott, for defendants, Grierson & Powell.

McCaul & Valens, for defendants, Moranville Milling Co. and Bishopric.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—Early in 1903 the defendants Bishopric, Powell and Grierson, with one Braithwaite, were carrying on business in partnership under the name of The Moranville Milling Co. Bishopric and Powell made certain representations to the plaintiffs for the purpose of inducing them to come into the business in the form of a joint stock company. The plaintiffs then did each put $4,000 in by subscribing for that amount of shares in a limited company which was then formed by themselves and the partners. In a year or two the company got into financial difficulties and finally became insolvent and the property was sold in 1905.

In 1912 the plaintiffs brought action against the three defendants named and the limited company for a return of the money or for judgment against the defendants for $8,000 with interest from the time of payment with other claims. At the close of the plaintiffs' case at the trial there was a long argument, from which it appears that the trial proceeded from that time as an action for the money only. The learned trial Judge found as a fact that the payment of the moneys was obtained by the fraudulent misrepresentations of the defendants Bishopric and Powell and that the money was used largely or wholly in payment of indebtedness of defendant partners. He, however, held that the action was barred by the Statute of Limitations and dismissed the action. *Twyford* v. *Bishopric*, 14 D.L.R. 320.

For the appellants it is argued that the Statute of Limitations of James, in so far as it applies to torts, is not in force in this province by reason of a part, but a part only, of the statute having been enacted by our local legislature. It is contended further that even if that be not the case the statute should not

be held to apply inasmuch as this is in the nature of an equitable action based on fraud which was concealed from the plaintiffs. It is not questioned that the fraud did not in fact come to the knowledge of the plaintiffs till within 6 years before action was brought, nor that there was in fact any unreasonable delay in bringing the action after the plaintiffs became aware of the fraud. Indeed, the defendants strenuously maintained by their pleadings and evidence that there was no fraud, but the learned trial Judge's finding upon that point appears to be justified from the evidence and I do not understand counsel seriously to question it on this appeal. The learned trial Judge found that the plaintiffs could have learned, by the exercise of reasonable diligence, in 1905 everything that they now know. He says (14 D.L.R. 324):—

> According to their own evidence they were suspicious of the defendants' honesty long before then and for this reason should have been more vigilant when the opportunity to confirm or prove their suspicions was ready to their hand. There was no active concealment by the defendants of any fraud of which they had been guilty. On the contrary, they seem to have adopted, in February, 1904, the very means by which discovery of it might have been made when they employed Hamilton for the purpose of making a thorough examination of the affairs of the syndicate and the company, and disclosing that condition on his balance sheet. Mrs. Twyford's examination for discovery satisfies me that the plaintiffs knew enough of the facts in 1904 not only to put them on their enquiry but to justify them in proceeding then, and that their failure to do so is to be attributed to other causes than ignorance of the facts and their inability to ascertain them.

Counsel for the defence contend that the action is simply one which previously would have been a common law action of deceit and that the rules which must be applied are those of the common law, including the Statute of Limitations, by virtue of which the right became barred long before action was begun. There is no such thing now as a common law action or a proceeding in equity, though there is no doubt that the old distinctions affect the principles to be applied in the determination of the rights of parties in an action and it is therefore necessary to consider what would have been the former character of the action.

Courts of Equity prior to the Judicature Act assumed a jurisdiction in cases of fraud and it would appear that the facts of the case would have supported a case either at Common Law or in Equity. *Gibbs* v. *Guild* (1882), 9 Q.B.D. 59; 46 L.T. 248,

ALTA.

S. C.

TWYFORD v. BISHOPRIC.

Harvey, C.J.

was an action just such as this, founded on fraudulent misrepresentation made to induce the purchase of shares in a company. It was held that that case was one in which a Court of Equity would have exercised concurrent jurisdiction with a Court of Law and that now the equitable rule should apply and the Statute of Limitations would not be a bar to the right of action. It is, however, contended by counsel for defendants that there must have been another fraud than the original fraud to enable the Court of Equity to oust the statute, and that it is such secondary fraud preventing the plaintiffs from learning of the original fraud that raises the Court's equitable jurisdiction to reject the limitation of the statute. The *dicta* of Lord Justice Brett in that case certainly support that view and Lord Coleridge does not put the case any farther.

However, a later case of the highest authority, as far as this Court is concerned, appears to me to reject this view entirely. In *Bulli Coal Mining Co.* v. *Osborne*, [1899] A.C. 351, which was as action founded on fraud, which, as pointed out in the judgment, might have supported a claim either at common law or in equity, this argument of the necessity for fraudulent concealment of the original fraud is expressly over-ruled. In the judgment of the committee, which was delivered by Lord James, of Hereford, on p. 363, it is said:—

> Now, it has always been a principle of equity that no length of time is a bar to relief in the case of fraud in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud so long as the party defrauded remains in ignorance without any fault of his own.
>
> The contention on behalf of the appellants that the statute is a bar unless the wrong doer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. . . . It would be something of a mockery for courts of equity to denounce fraud as "a secret thing" and to profess to punish it sooner or later and then to hold out a reward for the cunning that makes detection difficult or remote.

This leaves no room for doubt on this point and the only question to be determined is whether the plaintiffs "remained in ignorance without any fault of their own."

The learned trial Judge has found that they might have learned all the facts earlier and that it was not ignorance of the

facts that prevented Mrs. Twyford from bringing an action. Admitting this to be so, does that amount to "fault of the plaintiffs"? It would not be surprising that persons who had lost their money in the way the plaintiffs did should feel suspicious and think there ought to be some way to get their money back and might feel disposed to resort to the courts for assistance, but it seems clear that they did not, in fact, know of the fraud and any action, if it had set up fraud, would have been based on suspicion merely and not on knowledge. The fact that the plaintiffs were not business people and were comparatively new-comers to the country also is entitled to consideration, and perhaps of even more importance is the relationship of the parties. Although the parties were members of a limited company, it was one which was limited also in its shareholders to the parties in question and was simply an outgrowth of a partnership and, as far as the confidential relation is concerned, was, in my opinion, not different from a partnership.

In *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, which was a case of partnership, Lindley, L.J., at p. 479, says:

> What right has a partner to say to his co-partners "You ought not to have trusted me. You are bound to look at the books and see that I am cheating you"? Such a doctrine as that is unfounded,

and Rigby, L.J., speaking generally in discussion of the principle, without reference to partners, says at p. 482:

> What is the duty of a man to enquire? To whom does he owe that duty? Certainly not to the person who has committed that concealed fraud. For a man in that position to come and say, "you ought to have enquired, and if you had enquired you would have found me out" is utterly opposed to every principle of equity;" and again, "I agree that here, with care,—with the usual care I may say—this ought to have been discovered long ago; but as regards the person on whose behalf the claim is set up, it does not lie in his mouth to say, "I was fraudulent, but you ought to have found me out and I will take advantage of the fact that you did not find me out."

It seems clear from these cases that there is no question of the Statute of Limitation, but it is simply a question of whether it would be inequitable to permit the plaintiffs to maintain the action. I am unable to see what duty the plaintiffs owed to the defendants, who had been guilty of fraud, to take steps to discover the fraud and how, therefore, they were in fault in respect to them.

ALTA.

S. C.

TWYFORD v. BISHOPRIC.

Harvey, C.J.

In respect to Grierson, however, who is not found to have been in fault at all, and against whom the claim could only be supported upon the ground that he received the benefit of the money, other considerations apply and I am of the opinion that to support a claim against him, the duty is on the plaintiffs to shew that they have been diligent and vigilant. They have failed in this and I think it would be inequitable at this late date to permit them to set up this claim. But as to Bishopric and Powell, I would allow the appeal with costs.

The plaintiffs are entitled to be reimbursed by the defendants the amount that they advanced, namely, $8,000, with interest at the legal rate from March 27, 1903, when the money was obtained. It appears from the evidence that the defendants did in fact give the plaintiff, Mrs. Twyford, some land in consideration of her loss. Though this was not intended to be in satisfaction of any legal liability, credit should be given for it on account of the plaintiffs' claim. The evidence about it is very meagre, not even the quantity being definitely shown. There should be a reference to the clerk or the Master to ascertain the value of this land and deduct the amount of such value from the amount the plaintiffs are held entitled to. If the land is still the property of the plaintiffs or either of them, its present value should be the amount to be deducted; if it has been disposed of, the value at the time of such disposition should be taken, a proper allowance being made for interest.

There should be judgment for the plaintiffs against the defendants Bishopric & Powell for the difference between the $8,000 and interest and the value of the land with costs.

The company and Grierson should have their costs of the action so far as they have any separate costs apart from the other defendant with whom each joined. As neither appeared separately on the appeal, but only in conjunction with one of the parties against whom the appeal is allowed, and there was, in reality, no appeal against the company, there need be no order as to their costs of appeal.

Appeal allowed as against defendants Bishopric and Powell.

CANADIAN COLLIERIES v. DUNSMUIR.
DUNSMUIR v. CANADIAN COLLIERIES.

IMP.
P. C.

Judicial Committee of the Privy Council, Lord Moulton, Lord Sumner, and Sir George Farwell. July 3, 1914.

1. SALE (§ I A—2)—EFFECT—WHAT PASSES AS APPURTENANCE—SALE OF MINE—RESERVATION OF "EARNINGS" TILL DELIVERY OF POSSESSION —WHAT WITHIN — COAL STORED — CASH AND BOOK DEBTS.

In a contract for the sale *in praesenti* of a controlling interest in a colliery company of which the vendor had possession and control *de facto*, a reservation to the latter of the "earnings of the properties" up to the time of closing the sale, taken in conjunction with the vendor's covenant to keep the property intact in the meantime, does not operate to enable the vendor to retain coal and coke in hand at the date of the contract, nor cash and book debts then belonging to the colliery company; the "earnings" in such case are what the vendor can in the interim make by operating, manufacturing and trading in the ordinary way of business so far as the purchaser's consent can authorize him to do so, the vendor paying all the expenses of operation and upkeep and keeping for himself all the moneys representing the proceeds of coal mined, sold, and shipped during the period.

[*Canadian Collieries* v. *Dunsmuir; Dunsmuir* v. *Mackenzie*, 13 D.L.R. 793, varied on appeal.]

Statement

CONSOLIDATED appeals from judgments of B. C. Court of Appeal, *Canadian Collieries* v. *Dunsmuir, Dunsmuir* v. *Mackenzie*, 13 D.L.R. 793, involving an interpretation of the word "earnings" in a contract for the sale of an interest in a colliery company.

The appeal against Dunsmuir was allowed and his appeal was dismissed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER.:—On January 3, 1910, Mr. James Dunsmuir entered into an agreement with Mr. Robert Thomas Elliott with reference to The Wellington Colliery Co., Limited, of British Columbia, and the Robert Dunsmuir Sons Co. of California, the benefit of which was subsequently assigned by Mr. Elliott to Sir William Mackenzie, and by him reassigned to the Canadian Collieries (Dunsmuir), Limited, now Appellants. On June 16, 1910, they paid the consideration moneys to Mr. Dunsmuir and took over most of the properties with which the contract dealt, except in so far as the disputes arose which are the subject matter of the present appeal. It is convenient to call Mr. Dunsmuir "the vendor," and the Canadian Collieries (Dunsmuir), Limited, "the purchasers," as little, if anything, turns on the fact that the latter are only assignees from Mr. Elliott, who was the party described as "the purchaser" in the agreement itself.

IMP.
P. C.
CANADIAN COLLIERIES v. DUNSMUIR.
Lord Sumner.

In October, 1910, the purchasers sued the vendor on the agreement of January 3, 1910, joining with him the Robert Dunsmuir Sons Co. and The Wellington Colliery Co., Limited, which may be called respectively "the San Francisco Co." and "the Colliery Co.." About a month later the vendor began a cross-action against Sir William Mackenzie, the Colliery Co., and the purchasers. In the first action the purchasers claimed a conveyance of certain properties alleged to be transferable to them under the agreement, and an account of all dealings with those properties in the meantime; in the second, the vendor claimed declarations of his rights under the same agreement and also other relief. Accordingly in substance the two actions raised the same questions from the different points of view of the opposing parties. They were tried together before Hunter, C.J., and appeals and cross-appeals were taken to the Court of Appeal of British Columbia. Thence appeals have been brought, by leave of the Court of Appeal or of their lordships, to this Board, and by order of this Board they have been consolidated.

Only parts of the matters originally in dispute have been debated before their lordships. They may be and have been called (in inverse order of their importance) (1) the barge "Oregon," (2) the "Wellington Farm," (3) the Vancouver "stock pile" and its proceeds, and (4) the "earnings" of the properties.

The right of the purchasers to the barge "Oregon" depended upon its being "ordinarily used . . . in connection with the Wellington Collieries," within the meaning of the agreement. This raises a question of fact. The purchasers only faintly contested the adverse decision of the Court of Appeal before their lordships' Board. It is enough to say that as regards the "Oregon" their lordships see no reason to differ from the judgment of the Court of Appeal.

Both Courts below decided in the vendor's favour that the "Wellington Farm" did not pass under the agreement, except as to any coal-measures underlying the same. The point involved questions of fact and from these concurrent findings their lordships have no mind to differ. Here too the purchasers' appeal fails.

Under an agreement between the Colliery Co. and the C. P. R. Co., dated February 29, 1908, the former bound itself to supply coal to the latter on specified terms, and for that purpose to keep a reserve of coal of not less than 20,000 tons at Vancouver for the use of the railway company, to be taken as and when required. This reserve was called the "Vancouver stock pile." The vendor contended that the whole "stock pile" as it existed at any given time belonged to the railway company, and that the removal of portions of the coal from it as required only cause proportionate sums to become due and payable on account of the price. The purchasers' case was that the coal only became the railway company's property as and when it was taken from the pile. The trial Judge's decision in favour of the vendor on this point was reversed, and as their lordships think, rightly reversed, in the Court of Appeal. It is clear that no property passed to the railway company till it took the coal from the "stock pile" for railway purposes.

The remaining question as to the stock pile is one of those which arise upon the words "earnings of the properties." By paying the balance of the consideration moneys mentioned in the agreement of January 3, 1910, which they did on June 16, 1910, the purchasers became entitled to a transfer of the "properties" with which it dealt. The vendor, conceiving that he was entitled to do so, caused the Colliery Co. to declare a dividend of $700,000 thirteen days previously, and received this sum by cheque or in account. His case was that, even if in form he was not entitled to receive a dividend so declared, he was in substance entitled to a like sum as earnings of the properties within sec. 7 of the agreement; that the whole price payable for the coal in the stock pile was included in such earnings, and that in any case the true effect of the transaction was that he was not bound to give up either coal or coke, or book debts, or cash in hand, belonging to the Colliery Co. at any date prior to June 16, 1910. He submitted that all were *de facto* in his hands or in his control down to June 16, 1910, and that on the true view of the contract they all belonged to him. They might be called the property of the Colliery Co., but that was mere form. This is the substantial question in issue upon these appeals.

IMP.
P. C.
CANADIAN COLLIERIES v. DUNSMUIR.
Lord Sumner.

When the Esquimault and Nanaimo R. Co. was formed and its railway was made, it received by virtue of legislation of the province of British Columbia and grants from the Dominion of Canada, a subsidy consisting among other things of valuable coal-bearing lands, which were exempt from provincial taxation unless and until the railway company used them for other than railroad purposes, or leased, occupied, sold, or alienated them. The Colliery Co. was incorporated to work these coal-bearing lands, and did so under an agreement with the C. P. R. Co., which had acquired the issued share capital of the Esquimault and Nanaimo R. Co. By that agreement the former railway company covenanted that the latter should, on demand, convey all the coal in these lands to the Colliery Co. This was done in order to keep alive the valuable concession of freedom from taxation. So much of the share capital of the Colliery Co., as could be held by one person, belonged to the vendor. He controlled the Colliery Co. absolutely and no doubt thought and often spoke of it as his own.

The argument on behalf of the vendor is this. In substance he carried on one big business, that of getting, shipping, and selling coal. In form part of that business belonged to and was carried on by the Colliery Co., which was under his control and was virtually, if not in name, under his management through his ownership of nearly all the shares. Mr. Elliott sought an option over this business, which would enable him within certain limits of time to acquire the mineral areas and the fixed plant and assets at a price, leaving the good will and the liquid assets unaffected. An option was accordingly granted to him. If he failed to use it he forfeited any payments made during its currency and was under no future obligation; if he exercised it, he acquired the above properties as they stood on the date, when his option was exercised and became converted into an agreement to purchase. Nothing else was affected. Meantime the vendor would go on as before, subject to not wasting the assets in question, and, going on as before, he would make what he could out of it. In form he sold shares, but this was mere machinery; in substance and in the contemplation of the parties he sold fixed assets, and it was understood that they

were his and were sold as his. The transfer of shares was substituted for the conveyance of the assets themselves, so far as they were in law the property of the company, so that the company might be kept alive and the exemption from taxation might remain unaffected.

Such a view is entirely intelligible and the parties might well have decided to give effect to it and to carry out the transaction accordingly. Evidence was given with the apparent object of proving that they did so, but it was irrelevant, and before their lordships the admission of it was not defended. As the questions in the actions arose between the vendor and mesne or ultimate assignees for value from Mr. Elliott, common mistake and a right to rectification was not, and probably could not have been, set up. Both courts below in substance concluded that the transaction was such as the vendor submitted that it was and construed the agreement accordingly. Their Lordships only differ from those conclusions after very full consideration of the terms of the agreement, but they are of opinion that its terms are unambiguous and will not bear that construction.

The agreement is one by which the vendor agreed to sell shares which were his, not property belonging to the Colliery Co. or the San Francisco Co., which was not his. It must be so construed. Whether it was an option or not does not much matter. It is called an "option" in clause 9, but clause 1 states an agreement to sell *in præsenti* for a price to be paid *in futuro*. It is clearly a contract relating to a sale of shares, and the price is one very large lump sum, no attempt being made to value the items whether of real or personal property separately. The sale and transfer of the shares would of itself give the right and the means to obtain possession and enjoyment of the assets of the respective companies, subject to the rights of the other shareholders. The vendor on ceasing to hold any shares would neither be able to help nor to hinder such enjoyment. Clauses 2 and 3 contain statements of the properties belonging to the two companies, so far as it was thought material to name them. In their lordships' opinion they are brief enumerations, which both serve to define the vendor's obligation under clause 9 that "the properties of the two companies will "be kept intact," and also to

IMP.
P. C.
CANADIAN COLLIERIES v. DUNSMUIR.
Lord Sumner.

warrant that the assets of the companies, whose shares are being sold without any concurrence of the companies themselves, are such and such specified things. This is clearly so in the case of clause 3. The words in clause 2—" which pass under the sale of the shares at the above price," and " which is to pass with the assets of such companies to the purchaser " are certainly not enough to alter the expressed character and basis of the contract. They do no more than clumsily state that the purchaser, to whom a controlling interest passes on the transfer of the shares, will find that he can thus get the control of these properties, which will have passed away from the vendor. The words in clause 1:—

> together with all the benefits . . . of him the vendor . . . by virtue of every existing contract between the vendor and the C.P.R. Co.

are sufficiently and correctly referable to the fact that he was himself a party to the contract above-mentioned, under which the Canadian Pacific Railway Co. covenanted to convey on demand the coal lying within the Esquimault and Nanaimo Railway Belt. The words in clauses 1 and 2 to the effect that the shares in the companies or

> the companies the shares of which are to be so transferred

are to be

> free from any contracts for the sale and delivery of coal except such as have been heretofore made in the ordinary course of business and current cargo contracts at the time of completion of purchase hereunder

and

> shall be free and clear of all debts and liabilities at the time of such transfer

are the vendor's personal undertakings, appropriate enough in view of the fact that he had had and still retained the practical control. They might be enforced against him as virtual covenants of indemnity, if, at or after the transfer, the companies proved to be fettered by any contractual obligations contrary to those clauses. Again the statement in clauses 5 and 6, that the vendor will not give up possession of the properties owned by the said companies until paid in full and when paid in full will turn over the properties of the said companies to the purchaser or assignee has reference to his business control *de facto*, not to any legal possession *de jure*. No one could contend that this agreement was artistically drafted. Its clauses are often obscurely expressed and sometimes use language inconsistent with

its main purpose, but, whatever difficulties may thereby arise, it is in their lordships' opinion impossible to press them, so as to convert language effecting a transfer of the vendor's legal rights into language operating to cause the companies to suffer legal wrongs. It is fundamentally a sale by the vendor of shares which were his, not an agreement to give up possession of assets which were not his, but his companies.

Specific stress was laid on the words of clauses 7 and 9. The latter is put in for the protection of the purchasers and by itself does not go far to determine the choice between the vendor's submission and that of the purchasers. Upon the former the vendor's case was put in two ways:—(*a*) If the contract be treated as disregarding the distinction between the vendor and his companies the clauses simply state *ex abundanti cautelâ* that when by the exercise of the option an agreement of purchase and sale arises the properties will be bought as they stand at that time, and that in the meantime the vendor will use them for his own benefit and at his own cost in the ordinary way of business except that he promises to keep them intact and not to squander them; (*b*) in any case, as he is to retain "all the earnings of the properties up to the day of giving up possession" without specifying from what time those earnings are to be taken to commence, he is entitled to all earnings before as well as after the date of the agreement, and in view of the payments that he engages himself to make, the earnings are simply the receipts of the business and that too in the widest sense of money due as well as money in hand, and of coal gotten and won and coke manufactured, for which when sold money will be receivable, and not merely proceeds of coal and coke shipped and sold. In this view what he promises to keep intact is what is called "the fixed assets" only, and even these, it is said, may be diminished by severing coal, and not merely shipping coal, in the ordinary course of business.

The first of the two above-mentioned views of clause 7 is disposed of by the considerations already advanced with regard to the construction of the agreement generally. The second depends upon an interpretation of the word "earnings," which their lordships think it is wholly unable to bear. It was admitted by counsel for the vendor that the declaration of the divi-

IMP.
P. C.
CANADIAN COLLIERIES v. DUNSMUIR.
Lord Sumner.

dend gave him no better right than he had without it, and in their lordships' opinion "earnings" clearly cannot cover coals and coke in hand at the date of the contract, and is equally inapt to describe cash and book debts and other choses in action then belonging to the Colliery Co. Nor again can coal won and coke made but not shipped or sold between January 3 and June 16, 1910, be called "earnings." These clauses have an appropriate meaning in connection with the sale of a number of shares sufficient to control the fortunes of the companies. They mean that, between the date of the contract and that of the exercise of the purchasers' rights under it by payment in full, the vendor, though in full control, will on the one hand keep the properties intact, and on the other hand make what he can out of his control by operating, manufacturing, and trading in the ordinary way of business, so far as the purchasers' consent can authorize him to do so. He will pay all the outgoings, and keep for himself all the incomings so obtained during that period, which thus become for him and from his point of view "earnings of the properties." It follows that full effect can be given to these clauses without detriment to the fundamental scheme expressed in the previous part of the agreement. It may be that in the result the vendor will get less than he expected, or indeed than Mr. Elliott expected, but parties must be held to their written agreements, and confusion between a man and his companies must all the more be avoided by courts of law, because it is common and even natural among men of business. In their lordships' opinion the order, which the Court of Appeal of British Columbia should have made, would have omitted the words commencing "but that all moneys payable by the Canadian Pacific Railway Company" and ending "at a time or times prior to the said 16th day of June, 1910," that is from line 19 to line 31 inclusive of page 289 of the Record, and would have instead contained declarations—

(*a*) that, as against the Canadian Collieries (Dunsmuir), Limited, and Sir William Mackenzie, the receipt of moneys by Mr. James Dunsmuir in respect of the dividend, purported to be declared by the Wellington Colliery Co. on June 2, 1910, was wrongful, and that he must account to them for all moneys so received by him;

(*b*) that, as against the same parties, Mr. James Dunsmuir was not entitled to any moneys which, prior to January 3, 1910, were in the hands of and formed part of the assets of the Wellington Colliery Co., Limited, and must account to them for all moneys so received by him;

(*c*) that, as against the same parties, Mr. James Dunsmuir was not entitled to the proceeds of any coal gotten or coke made forming part of the assets of the Colliery Co. on that date, even though sold after that date, and that he must account to them for all moneys so received by him;

(*d*) that, as between himself and the same parties, and subject to his having paid all expenses of operation and upkeep of the said colliery up to June 16, 1910, Mr. James Dunsmuir was and is entitled to all moneys received either by him or persons acting on his behalf, or by the Colliery Co. or its agents in respect of coal gotten, sold, and shipped, and of coke manufactured, sold, and shipped between January 3 and June 15, 1910, and to all net moneys received since June 16, 1910, by the Canadian Collieries (Dunsmuir), Limited, or its agents, or the Wellington Colliery Co., Limited, or its agents, or Sir William Mackenzie or his agents, in respect of such coal or coke, and that for all such moneys so received by them respectively, or by agents on their behalf, the three last-named parties must account to Mr. Dunsmuir; and the said order of the Court of Appeal should further have remitted the case to the trial Judge to direct such accounts to be taken and inquiries to be held, and to make such orders and to allow such set off, and to direct such payments and to enter such final judgment or judgments, as might be necessary to give effect to the order so made by the Court of Appeal.

Their lordships think that in all other respects the order of the said Court was right, and should stand. Accordingly their lordships will humbly advise His Majesty that the appeal of the Canadian Collieries (Dunsmuir), Limited, and Sir William Mackenzie should be allowed with costs, and the order appealed from should be set aside in part and varied as aforesaid and no further, and that the appeal of Mr. James Dunsmuir should be dismissed with costs. *Appeal against Dunsmuir allowed, and his appeal dismissed.*

CAN.

Ry. Com.

DOMINION TRANSPORTATION CO. v. ALGOMA CENTRAL & HUDSON BAY RY. CO.

Board of Railway Commissioners, July 31, 1914.

1. JURISDICTION (§ I-2)—TRAFFIC—ACCOMMODATION AND FACILITIES—COMPETITION—PREVENTION—RAILWAY ACT, SECS. 2(21), 284, 317.

The Board under secs. 2(21), 284, 317, has jurisdiction to direct the respondent to maintain its dock at Michipicoten harbour and provide facilities thereat for receiving, loading, carrying, unloading and delivering traffic of the applicant in competition with traffic of the respondent.

[*Canadian Northern Ry. Co.* v. *Robinson & Son*, 37 S.C.R. 541, 6 Can. Ry. Cas. 101, followed.]

Statement

APPLICATION to direct the respondent to maintain its dock at Michipicoten harbour so as to afford accommodation and facilities for the traffic of the applicant.

H. S. Osler, K.C., for the applicant.

Thomas Gibson, for the respondent.

The Chief Commissioner.

July 31, 1914. THE CHIEF COMMISSIONER:—Michipicoten is located on Michipicoten harbour, on the north side of lake Superior, on the line of the Algoma Central and Hudson Bay Railway Company, 190 miles north of Sault Ste. Marie.

The principal traffic handled to and from Michipicoten is iron ore from the Helen and Magpie mines, which are located on the railway about 8 miles from Michipicoten, and the supplies for the mines, the railway, and their employees.

While the railway between Michipicoten and the mines has been in operation for a number of years, the line running north and south of Hawk Junction, and which connects the line between the mines and Michipicoten, is of recent construction.

The railway company had provided two docks, one for the handling of iron ore and the other passenger and package freight traffic. The latter is the dock in question.

Prior to the construction of the line recently finished and running north and south of Hawk Junction, all the traffic to and from Michipicoten was handled by boat for this dock, and the railway company duly issued and filed a standard wharf tariff applicable to this dock.

The railway company, now that the connecting line has been built, I think desires that the traffic to and from Michipicoten should be carried on its railway and not by the boats of the applicant company, which, as before stated, has in the past done business at the railway company's dock.

At the hearing, it became manifest that the real question was as to whether or not the railway company should be obliged to maintain this dock.

"THE CHIEF COMMISSIONER:—I suppose what this really comes down to is whether or not the railway company has to maintain a dock to enable you to do business in competition with the railway company?

"MR. GIBSON:—That is the point.

"MR. OSLER:—Yes, undoubtedly."

It was claimed at the hearing that all of the freight carried by the applicant line was for consumption at Michipicoten harbour, and not for transmission on the railway line.

From investigation, it would appear that this is only true in part, and that traffic is offered by the applicant company to the railway company.

The railway company in the first instance submits that the Board has no jurisdiction to make an Order as asked, and on the merits states that the dock was built for the express purpose of landing freight for the construction of the railway up to the point where it joins the main line. Whether it was so constructed in the first instance or not, it would seem to be clear that a large amount of business carried over the dock was for this purpose.

The railway company further states that this construction is completed; that the railway has been built at a cost of over ten millions of dollars, and that it would be manifestly unfair to compel it to maintain the dock any longer. It further claims that it intended absolutely changing the terminal facilities; intended to spend some two or three millions of dollars at this point; and that it could not do this and maintain the present dock.

For the purpose of maintaining this facility, should there be any danger of defeating the proper construction of the railway and the completion of the project for which it was incorporated, the Order on the merits should not be made; and the matter has been allowed to rest by the Board so that the situation, as well as the requirements of the railway, could be properly developed.

No work of the character described by the railway company is in progress, and it does not now appear, after the lapse of a full year, that any hardship, in so far as the use of this property is concerned, will be suffered by the railway company.

CAN.

Ry. Com.

DOMINION TRANSPORTATION CO. v. ALGOMA CENTRAL & HUDSON BAY R. Co.

The Chief Commissioner.

On the question of the Board's jurisdiction, the company was within its legal rights in constructing and maintaining the wharf as necessary for the accommodation and use of the traffic and business of the railway. There is no question but that the wharf was necessary for this purpose and continued necessary at least until railway construction had been completed.

The term "railway," under the interpretation clause, section 2(21), includes among other things "wharves;" so that in the consideration of sections 284 and 317 the term "railway" or "railways" will cover "wharves."

The railway company in addition, as already noted, has itself treated the dock as part of its system (as indeed it was bound), in filing with the Board its tariffs, which include charges at the dock in question, the tariff referred to being issued by the company on April 8th, 1911, effective April 24th, 1911, the tariff being cancelled by a supplement issued May 1st, 1913, effective June 5th, 1913.

I am of the opinion that the Board has jurisdiction and may annul the supplemental tariff which discontinues the service under the tariff of April 8th, 1911. As matter of fact the wharf constitutes a facility for traffic, if not, indeed, an integral part of the railway system. If part of the railway system, there can be no question as to the Board's jurisdiction. If merely a facility, I am of the opinion that the Board has power to direct that the use of the wharf shall be continued under sections 284 and 317.

In principle the case does not differ greatly from the *Canadian Northern Railway Company* v. *T. D. Robinson & Son*, 6 C.R.C., page 101. The applicants in that case complained of the discontinuance by the railway company of certain track facilities. The report in that case gives the Board's reasons as follows:

"The Board is of opinion that, in taking from the applicants the siding and rail connection formerly enjoyed by them, the railway company deprived the applicants of reasonable facilities which the company should be directed to restore. . . . The Board is of opinion that it may properly regard the siding and connection, and the privilege of loading cars and delivering goods for carriage on such a siding, and of receiving and unloading goods by means thereof, as facilities within the Act."

It should not be understood that of necessity the wharves

have to be approved as facilities so that railway companies must provide them or any other facilities to their carriers.

CAN.

Ry. Com.

Under all the circumstances of this case, the railway company not having put the dock to another use, the discontinuance of the former service seems to be unreasonable, and only made for the use of preventing competition.

The Chief Commissioner.

THE ASSISTANT CHIEF COMMISSIONER and MR. COMMISSIONER MCLEAN concurred.

Asst. Chief Commissioner. Com. McLean.

NORTHERN ELEVATOR CO. v. WESTERN JOBBERS.

MAN.

K. B.

Manitoba King's Bench, Galt, J. October 2, 1914.

1. ASSIGNMENTS FOR CREDITORS (§ VIII A—66)—ELEVATOR COMPANY—AGENT—GRAIN TICKETS—ADVANCES TO AGENT—SAFEGUARDING—LOSS—ASSIGNMENT FOR CREDITORS—RIGHTS OF COMPANY.

Where grain dealers supplied their paying agent with currency to pay to its customers their grain tickets, it being a term of the contract that the money "shall be used for the payment of grain tickets only and for no other purpose," and the money was in fact kept by the agent separate from his own and earmarked as the grain dealers' property the agent is bound to safeguard such money only to the same extent as he did his own and other moneys in his care belonging to other parties; and where, without negligence on his part, the money, which was in bank bills in his safe, left temporarily open, was destroyed by a fire, the loss falls on the grain dealers, and they are not entitled, even with the paying agent's consent, to rank on his estate on an assignment for creditors.

[*Finucane* v. *Small*, 1 Esp. 315; *Sinclair* v. *Brougham*, [1914] A.C. 398, and *Hallett's Case*, 13 Ch.D. 698, referred to.]

ACTION to establish a creditor's claim against an assignee for creditors.

Statement

Action dismissed.

F. Fisher, for plaintiffs.

A. E. Hoskin, K.C., and *P. J. Montague*, for defendants.

GALT, J.:—The plaintiffs are a company doing business as grain dealers in Manitoba, and the defendant is the assignee for the benefit of creditors of Peter L. Hyde, formerly a merchant carrying on business in the village of Silverton, in Manitoba.

Galt, J.

In or about the month of October, 1911, the plaintiffs employed Hyde as their paying agent at Silverton (where there was no bank), upon the terms that the plaintiffs were to supply Hyde with funds from time to time, through the Bank of Toronto at Winnipeg. The funds were sent by the bank, on request from time to time, in packages, usually containing either $1,000 or $500 in bank bills of various denominations, usually fives, tens and twenties. On such occasions Hyde would sign a receipt expressed as follows:—

MAN.

K. B.

NORTHERN ELEVATOR CO. v. WESTERN JOBBERS.

Galt, J.

Received from the Northern Elevator Co., Ltd., the sum of five hundred dollars, $500.00. It is agreed that this money shall be used for the payment of grain tickets only and for no other purpose.

Hyde was examined at the trial, and appeared to me to be a frank and truthful witness; in fact, no attempt was made by either of the counsel to impugn his honesty. He kept a general store at Silverton, and was also postmaster. He had a safe in the store, the upper portion of which was large enough to hold his books, etc., and the lower portion contained open pigeon holes. He stated that after receiving a package of bills from the bank he would open the package, count the money, and put the package in a certain pigeon hole at the bottom of the safe. Each time he was called upon to pay for grain tickets he would make a memorandum of the amount withdrawn from any package or packages (in case he had more than one), so as to save himself the trouble of re-counting the remaining bills each time he made a payment. Hyde also acted as paying agent for at least one other elevator company, and apparently he treated their moneys in the same way as the plaintiffs' in this case, only utilizing a separate pigeon hole.

He stated that his employees were not allowed to touch any of these elevator company moneys. In case grain tickets were presented for payment during Hyde's temporary absence, his clerk had instructions to pay for the tickets out of the general moneys of the store and then Hyde would reimburse himself on his return by taking a similar amount from the appropriate package. When it became necessary to pay out a sum less than $1 the change in silver was not placed back again in the package, but was kept in a drawer in the safe. Occasionally, for the convenience of a customer, Hyde exchanged bills of one denomination from the package for bills of other denominations.

Part of Hyde's duties consisted in forwarding plaintiffs at the end of every week a cash statement and summary shewing the amount of his receipts in cash and the amount of his payments out for various classes of grain tickets. That portion of the statement which related to receipts contained as its first entry, "To bal. cash on hand last statement." The last parcel of money received by Hyde from the bank was $1,000 on November 22, 1912. At that time he had several hundred dollars additional remaining as a balance, and from time to time portions of the money were applied in taking up grain tickets.

MAN.

K. B.

NORTHERN ELEVATOR CO. v. WESTERN JOBBERS.

Galt, J.

On the evening of December 23, 1912, Hyde closed up his store at 7.30 p.m., locking the safe securely and bolting all the doors of the store. He spent an hour or two at the rink, and then it occurred to him to complete some stock-taking or work with his books, so he returned to the store with his clerk James Hainstock, opened the safe, took out the books and carried them into his own adjoining house. He closed the safe door but did not lock it. Both Hyde and Hainstock state that they saw the packages of money in the lower pigeon holes of the safe. It is quite true that neither Hyde not his assistant counted the money, but the packages had the same appearance as no doubt they had had for some considerable time before the evening in question. If anyone had interfered with the packages and stolen the money it was not noticeable. In the same safe Hyde kept several policies of insurance and bundles of cheques and drafts, also postal notes and some of his own money in bills.

At about 11.30 p.m. Hyde noticed a smell of smoke, and upon making his way into the store found that flames were coming up from the register. He made an effort to get at the safe, but found it impossible owing to fire and smoke. The building was entirely burnt down and the safe fell into the cellar. Hainstock states that he helped to get at the safe next day, and it was found that the door was partly open, that all the contents had been burnt up, and there were some ashes where the various packages had been. This evidence is also confirmed by certain admissions made by the parties in reference to evidence which would be given by two persons now resident in Toronto if they were to attend the trial. The cause of the fire has never been ascertained, and on the evidence must be regarded as accidental.

The parties admit in the agreed statement of facts that on the said December 23, 1912, the said Hyde had paid out various moneys for the plaintiff company, and the amount which he had received exceeded the amount which he had so paid out in the sum of $1,276, which accordingly constitutes the amount of the plaintiffs' claim herein.

On January 3, 1913, Hyde executed an assignment to the defendant company for the benefit of his creditors *pro rata*. On the same day Hyde gave to the defendant company a list of creditors as he claimed to remember them at the time, which list did not

MAN.

K. B.

NORTHERN ELEVATOR CO. v. WESTERN JOBBERS.

Galt, J.

include the plaintiff company; but on or about February 20, 1913, Hyde signed a notice to be given to the defendant company as follows:—

Messrs. Kent & Salter, Winnipeg.

Dear Sirs,—At the time I was burnt out I had in trust for the Northern Elevator Co. in the neighbourhood of $1,276 and about a like amount for the B.A. Elevator Co. As these were not wholesale creditors, I neglected to give them along with the others. They are, however, liabilities, and you will give these your consideration along with the others.

Yours truly,

P. L. HYDE.

The defendant company has collected all insurance moneys payable to said Hyde, amounting to the sum of $7,500, and has realized from other assets of said Hyde the sum of $2,484.68. The defendant company has paid an amount equal to about 30 per cent. of other creditors' claims, and they have now on hand $4,455.85 awaiting distribution.

The moneys supplied to Hyde were so supplied for a special purpose, and it would have been a breach of contract and of faith for Hyde to have used the moneys for any other purpose than in payment for grain tickets. Hyde honestly adhered to this arrangement. It is true, as he admits, that, for the convenience of customers, he would occasionally take out a portion of the money in the packages and substitute money of other denominations but amounting to the same total. It is also true that after Hyde made his assignment, he, at the suggestion of one of the plaintiffs' agents, gave instructions to his assignee, recognizing that the plaintiffs were entitled to rank on his estate for the money which had been destroyed. This action is brought against the defendants for a declaration that the plaintiffs are entitled to rank as creditors of Hyde by reason of the fact that the moneys were received by him for the use of the plaintiffs. The defendants contend that the money which was destroyed in the fire was wholly the property of the plaintiffs, who should accordingly bear the loss. That the defendants are entitled to take this position notwithstanding Hyde's admission of liability is shewn by such cases as *Ex parte White, In re Nevill*, L.R. 6 Ch. 397, 24 L.T. 45. There a firm of manufacturers had entered into an arrangement with a member of a firm of hosiers upon terms which the parties thought constituted them principal and agent. The firm of hosiers executed an assignment for the benefit of creditors, and the firm of manu-

facturers sought to prove for an alleged deficiency in respect of moneys held by them as agents for the other firm. The assignee repudiated the liability, and claimed that the relationship between the parties was that of vendor and purchaser rather than of principal and agent, and it was so held by the Court, with the result that the claim of the firm of manufacturers was rejected.

If the plaintiffs, prior to Hyde's assignment, had a right of action against him "for moneys received for the use of the plaintiffs," they are entitled to succeed in the present action. Otherwise they must fail. They do not seek to follow the money, as that would only lead them *in nubibus*. The origin of the action for money had and received, and the circumstances under which it is applicable, have been very recently dealt with by the House of Lords in *Sinclair* v. *Brougham*, [1914] A.C. 398. There moneys had been received by a building society from both shareholders and depositors, and these moneys had been used by the society in carrying on a large banking business. The society had no power to carry on this business, and all their dealings in reference thereto were held to be *ultra vires*. In 1911 the society was ordered to be wound up, the creditors were all paid, and there remained a large surplus for distribution, and questions of priority arose between the shareholders and the depositors, each claiming the surplus moneys. The House of Lords held that the depositors were not entitled at law to recover moneys paid by them on an *ultra vires* contract of loan on the footing of money had and received by the society to their use, but that, in equity, they were entitled to follow their moneys in accordance with *Hallett's Case* (1880), 13 Ch.D. 696.

If in the present case Hyde ever became indebted to the Northern Elevator Co. for the moneys in his hands by contract, whether express or implied, it is difficult to see how the defendants could successfully resist the plaintiffs' claim. It sometimes happens that Judges and text-writers use language which, taken in its generality, would completely establish a legal proposition, and in the present case counsel for the plaintiffs point out that Bullen & Leake (Precedents of Pleading, 6th ed.), p. 256, make the following note:—

> Whenever a person has received money, which, in justice and equity, belongs to another, under circumstances which render the receipt of it a receipt by such person to the use of such other, a debt is created which is

MAN.
K.B.
NORTHERN ELEVATOR CO. v. WESTERN JOBBERS.
Galt, J.

recoverable by action (*per* Lord Mansfield, C.J., *Moses* v. *Macpherlan*, 2 Burr. 1005; and see *Marriott* v. *Hampton*, 2 Smith's L.C., 11th ed., p. 421). Taken in its generality this statement of the law would appear to completely establish the plaintiffs' right.

Furthermore, in *Sinclair* v. *Brougham*, p. 436, Lord Dunedin says:—

> It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a *jus in re*, for you cannot have a *jus in re* in currency.

The plaintiffs' money in Hyde's hands was undoubtedly currency, and, if Lord Dunedin's dictum be taken in its generality, the property as well as the possession of the money passed from the plaintiffs to Hyde.

The result of this would be that the plaintiffs could not assert any right to the money itself, although remaining intact in Hyde's hands. If, then, Hyde misapplied the money in any way, or lost it, the plaintiffs would, upon principles above referred to, be entitled to an action for money had and received. But the propositions laid down by Bullen & Leake and by Lord Dunedin overlook the fact that nowadays money may be ear-marked as effectually as any other chattel. This is clearly laid down by Jessel, M.R., in *Re Hallett's Estate* (1879), 13 Ch.D. 696, at 714 *et seq.*

In *Sinclair* v. *Brougham*, *supra*, Viscount Haldane says, at p. 418:—

> The difficulty of establishing a title *in rem* in this case arises from the apparent difficulty of following money. In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease *ipso facto* to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment, it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognizes as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title.
>
> But the exception is not extended beyond the limits which necessity imposes. If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie.

Again, at p. 420:—

> My Lords, it is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed, and the money itself can be ear-marked in the hands of the person who has wrongfully obtained it. A person standing in a fiduciary relation

may be in this position, but it is not because of his trust or fiduciary duty. The common law, which we are now considering, did not take cognizance of such duties. It looked simply to the question whether the property had passed, and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed . . . provided it could be ear-marked or traced into assets acquired with it.

In the present case, I am of opinion that the money delivered by the plaintiffs through the Bank of Toronto to Hyde always remained the plaintiffs' moneys. I think it makes no difference that, from time to time, Hyde occasionally exchanged certain moneys of a customer for moneys in the plaintiffs' parcel of the same amount. At most these exchanges appear to have been trifling in amount. The package of currency undoubtedly belonged to the plaintiffs, and Hyde could never have refused to redeliver, upon demand by the plaintiffs, whatever balance of money he had in the parcel upon the ground that he himself had altered the complexion of the money in any way. If, before the fire, the plaintiffs had revoked Hyde's authority and had demanded the return of any balance in his hands, and Hyde, for any reason, had refused to re-deliver the money, the plaintiffs might well have had an action for money had and received. In such a case the law would imply a contract to return the money and the relation of creditor and debtor would be established; but the evidence shewed that Hyde took the same care of the plaintiffs' money as he did of his own and of moneys belonging to other parties.

On December 23 all the contents of the safe were destroyed by accidental fire. In *Finucane* v. *Small*, 1 Esp. 315, the plaintiff complained that he had delivered to the defendant a certain trunk containing several articles to be by him kept for a certain reward to be paid to him by the plaintiff for the same; and that the defendant so negligently kept the trunk that several of the articles which were contained in it were stolen and lost. The defendant was an upholsterer; the plaintiff was an officer in the army, and being about to leave London, he sent his trunk to the defendant's house for safe custody, and he was to pay him 1s. per week for the house-room. When the plaintiff returned he received the trunk; but the whole of the contents had been taken out. Lord Kenyon, in delivering judgment, said:—

To support an action of this nature, positive negligence must be proved. It has appeared in evidence in this case that the goods were lodged in a place

MAN.

K.B.

NORTHERN ELEVATOR CO. v. WESTERN JOBBERS.

Galt, J.

of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do; and if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own.

For the above reasons, I think the property in the money always remained in the plaintiffs, and, as against the assignee for the benefit of Hyde's creditors, the loss must fall upon the plaintiffs, upon the principle *res perit domino*.

The action will, therefore, be dismissed with costs.

B. C.

S. C.

NEWBERRY v. BROWN.

British Columbia Supreme Court, Murphy, J. December 17, 1914.

1. CONTRACTS (§ I D 3—55)—STATUTE OF FRAUDS—DEFINITENESS—"CLIENT OF P. N. ANDERSON"—INSUFFICIENCY OF.

Where the only document available in proof of the alleged agreement of sale and signed by the party to be charged gave no further particulars from which it could be ascertained who was the other party to the contract than the words "client of P. N. Anderson," there is not a sufficient agreement to satisfy the Statute of Frauds.

[*Ratham* v. *Caldwell*, 16 B.C.R. 201, followed; *Andrews* v. *Calori*, 38 Can. S.C.R. 588, distinguished.]

ACTION to enforce an agreement of sale.

Action dismissed.

Gwillam & McKay, for plaintiffs.

D. A. McDonald & Bourne, for defendants.

Murphy, J.

MURPHY, J.:—In my opinion the only document that can be looked at on the question of compliance with the Statute of Frauds is defendant's offer of May 21, 1914 (ex. 2), inasmuch as it contains no reference to any other document and is the only document before me signed by defendant. If that be so, the question narrows itself down to this—Does the phrase "client of P. N. Anderson" sufficiently describe the plaintiff so that his identity cannot fairly be disputed? To my mind, it clearly does not, and that view has been fortified by a perusal of the cases cited to me on the argument.

Andrews v. *Calori*, 38 Can. S.C.R. 588, seems the strongest case in favour of plaintiffs, but, just as it was held in *Ratham* v. *Caldwell*, 16 B.C.R. 201, that the further *indicia* which sufficed to take the receipt in the *Calori Case* out of the category of the equivocal were wanting, so I find them wanting here.

The action is dismissed with costs.

CAMPBELL v. NEWBOLT.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. June 2, 1914.

1. PRINCIPAL AND AGENT (§ III—32)—CONTRACTS BY AGENT—NECESSARIES.

The person placed in charge of range cattle to find feed for them may be considered the owner's agent to contract for necessary pasturage for starving cattle which it was found *en route* it would not be practicable to drive to the destination of the herd.

APPEAL from a district Court. Statement

Appeal allowed.

A. B. Mackay, for plaintiff, appellant.

A. L. Smith, for defendant, respondent.

The judgment of the Court was delivered by

SIMMONS, J.:—This is an appeal from His Honour Judge Carpenter, dismissing the plaintiff's action with costs. Simmons, J.

The plaintiff claimed for:—

Pasturage of cattle	$153.70
Board furnished defendant's men	103.25
Wheat furnished defendant	12.00
Total	$268.95

The defendant paid into Court $36 on account of board furnished his man and denied liability as to the rest of the plaintiff's claim. The plaintiff at trial relinquished any claim in regard to the third item, $12.

The plaintiff owned a farm near Langdon and the defendant's ranch is near Langdon in the Province of Alberta. Walter Dundrett resided on and was in charge of the plaintiff's farm during the winter of 1911. There were a number of straw stacks in a field on one part of the plaintiff's farm. East of this field was another field of stubble and pasture, and in which there was also a small lake where cattle could obtain water. The defendant in January, 1911, took about 500 head of his cattle to a range north of the plaintiff's land and left them in charge of one Hank Smith. A number of the defendant's cattle drifted south to their home range and Hank Smith made an arrangement with Dundrett to leave some of the cattle in plaintiff's east field and on behalf of his employer agreed that the defendant should pay the plaintiff at the rate of eighty cents

ALTA.

S. C.

CAMPBELL v. NEWBOLT.

Simmons, J.

per head per month. In the month of February the defendant came to the plaintiff and offered to purchase the straw stacks on plaintiff's farm. The plaintiff said that it would be necessary for him to get in communication with his foreman Dundrett and ascertain the probable quantity and value of the straw. This the plaintiff did, and the defendant came again to the plaintiff on February 21st, and agreed to pay $300 for the straw and the right to hold his cattle in plaintiff's field while the straw was fed to the defendant's cattle. The defendant says that when the deal was made, he had no knowledge of the arrangement made by his man Hank Smith and there is no evidence suggesting any such knowledge. Campbell knew of it then, but did not mention anything about it when he sold the straw. It seems indisputable from the statements of both the plaintiff and the defendant, the bargain included only the price of the straw and the right of occupation of the plaintiff's lands while the same was fed to the cattle.

The trial Judge has found against the plaintiff in regard to this item of pasturage on the ground that agency has not been established between the defendant and Hank Smith, his man, who was in charge of the cattle. I am not able to concur in this finding.

On page 50 (case) the defendant was asked upon cross-examination:—

I think you said you issued instructions to your man to take bunches of cattle north and find feed for them? A. Yes. Q. Who was he? A. Hank Smith.

The defendant also says that the lead cattle were drifting back. Dundrett says that some of these cattle were practically starving to death and that Hank Smith arranged that he would put the poorest of the cattle in there. The defendant has not called Hank Smith, and upon the uncontradicted evidence of Dundrett and the statement of the defendant above referred to, the man Hank Smith did what was proper and reasonable and in compliance with his instructions from his employer in making the deal with Dundrett for the pasturage of these cattle, and therefore the defendant is liable.

In regard to the meals and the feed for horses supplied at

ALTA.

S. C.

CAMPBELL v. NEWBOLT.

Simmons J.

the farm by Dundrett to plaintiff's men and horses, the judgment should stand for the reason given by the trial Judge, namely, that the plaintiff has not offered evidence of the reasonableness of the charge and there is no evidence upon which the trial Judge could form the basis of compensation. I would therefore allow the appeal in regard to this claim for pasturage of $153.70, and judgment for the plaintiff for this amount in addition to $36 paid in Court by the defendant for board, the plaintiff to have costs of the trial below and this appeal.

THE "HUMBOLDT" v. THE "ESCORT NO. 2."

CAN.

Ex. C.

Exchequer Court of Canada, British Columbia Admiralty District. Martin, L.J.A. December 23, 1914.

1 SALVAGE (§ I—4)—CLAIM—BASIS OF ASSESSMENT—DERELICT—ACTUAL ABANDONMENT.

A salvage claim is not to be assessed on the basis of the salved boat being a derelict merely because she was on the point of being abandoned by her master and crew; there must be an actual abandonment to constitute a derelict and it must be without hope of recovering it or of returning to it.

ACTION for salvage.

Statement

C. B. MacNeill, K.C., for plaintiff.

Alexander, for defendant.

Martin, L.J.A.

MARTIN, L.J.A.:—This is a claim for salvage services rendered to the tug "Escort No. 2" which on November 22, 1913, had become disabled owing to her propeller being broken, and had got into such a position (a little to the s.e. of Hannah Bank, in the Sea Otter Group, Smith Sound) that she would beyond any reasonable doubt in the state of the wind and tide, have become a total wreck within a very short time, had not the S.S. "Humboldt" come to her assistance at 1.15 p.m. in response to her danger signals. The "Humboldt" finally took her in tow at 2.20 after about an hour's manœuvering which placed the "Humboldt" in a position of peril to an appreciable degree, because when she did make fast to the "Escort" and take her in tow she was between half and three quarters of a mile from the reef. Owing to the heavy swell it was then impossible to take the master and crew (consisting of 11 souls, all

CAN.
EX. C.
THE "HUMBOLDT" v. THE "ESCORT No. 2."
Martin, L.J.A.

told) off the "Escort" and they had before the arrival of the "Humboldt" made preparations to abandon her and take to their boat and make the somewhat hazardous attempt to reach land at Cape Calvert some 15 miles away which was the most favourable point to reach in the circumstances.

The "Humboldt" is a wooden steamship of 1,075 tons gross, valued at $150,000, with a crew of 46 men all told and had 50 passengers on board and a cargo of $8,725, and gold bullion to the amount of $142,032. She towed the "Escort" to Alert Bay, about 50 miles distant, and the only safe port in the circumstances, at night, arriving there at 4 a.m. the following day, after being further delayed about three hours by fouling the hawser (which had to be cut out of the wheel) in bringing the "Escort" up alongside when nearing Alert Bay. In performing this service the "Humboldt" did not have to diverge from her regular course more than five miles.

A conflict arose as to the value of the "Escort" and much evidence was given on both sides and I have found difficulty in determining this often vexed question (as to which *cf. Dunsmuir* v. *Otter* (1909), 18 B.C.R. 435; *Vermont S.S. Co.* v. *The Abbey Palmer* (1904), 8 Ex. 446; *The Iron Master* (1859), Swab. 441; *The Harmonides* [1903] Prob. 1; 9 Asp. 354; *The Marpass*, [1906] Prob. 95 and *The Hohenzollern*, [1906] P. 339, 76 L.J.P. 17), and the conclusion that I can arrive at which is nearest to my own satisfaction is to fix her value at $10,000.

It was submitted that the "Escort" should, in the circumstances, be considered to be a derelict as she was in a hopeless position and on the point of being abandoned by her master and crew, who were about to take to their boat when succour arrived, and therefore a large award should be given, a moiety being asked for, and the cases of *The Hebe* (1879), 4 P.D. 217, and *The Livietta* (1883), 8 P.D. 24, were cited in support of the submission. But they do not assist the plaintiff because it was admitted that the respective vessels were in fact derelicts in each of these cases. I have been unable to find any authority in support of the contention that a vessel should be deemed to be a derelict before it has been abandoned. The general rule is

stated in Lord Justice Kennedy's work on Civil Salvage (2nd ed. 1907), at p. 61-2.

In the case at bar it is therefore clear that from no point of view could the "Escort" be regarded as a derelict as there was no abandonment, and therefore I shall deal with the value of the salvage services in the ordinary way and have decided to award the sum of $2,000 and the value of the damaged hawser $270 as a fair remuneration therefor, deducting however the amount received from the sale of the damaged hawser, said amount to be proved by the affidavit of Marx Kalish, at his company's expense, pursuant to his undertaking given in that behalf. Judgment will be entered accordingly, with costs.

Judgment for plaintiff.

SAINT DAVID'S SAND CO. v. GRAND TRUNK AND MICHIGAN CENTRAL RY. COS.

Board of Railway Commissioners. October 23, 1914.

1. CARRIERS (§ IV B—522)—TOLLS—REASONABLE—JOINT.

The Board, following the General Interswitching Order, approved a joint toll of 50 cents per ton on sand over a distance of 12.3 miles (3 miles over M.C.R. and 9.3 miles over G.T.R.) from the sand pit to Merritton, subject to a minimum weight of 60,000 lbs.

[*Doolittle & Wilcox* v. *Grand Trunk and Canadian Pacific Ry. Cos.* (*Stone Quarry Toll Case*), 8 Can. Ry. Cas. 10, at p. 13; *Continental, Prairie and Winnipeg Oil Cos.* v. *Canadian Pacific Ry. Co.*, 13 Can. Ry. Cas. 156, at p. 159; *Canadian Manufacturers' Association* v. *Canadian Freight Association* (*General Interswitching Order*), 7 Can. Ry. Cas. 302, followed.]

2. CARRIERS (§ IV B—542*a*)—TOLLS—DIFFERENCES—QUANTITIES—TRAFFIC—C.L. AND L.C.L.—TRAINLOAD.

While it is justifiable to base differences in a toll on quantity as between C.L. and L.C.L. traffic movement, it is not justifiable to make a difference in a toll based on the distinction between carload and train-load movements.

Statement

APPLICATION for a joint toll of 40 cents per ton on train-load traffic moved from the applicants' pit to the Welland Ship Canal *via* Michigan Central and Grand Trunk Rys.

Frank Pringle, K.C., for the applicant.

W. C. Chisholm, K.C., for the Grand Trunk Ry. Co.

D. W. Saunders, K.C., for the Michigan Central Ry. Co.

Com. McLean

October 23, 1914. MR. COMMISSIONER MCLEAN:—The applicant is of opinion that a joint rate of 35 cents over the Michigan Central and Grand Trunk should be granted, and a joint rate

CAN.

Ry. Com.

SAINT DAVID'S SAND CO. v. GRAND TRUNK AND MICHIGAN CENTRAL R. COS.

Com. McLean.

of 40 cents was mentioned in the course of the hearing by counsel for applicant as one which might serve. The railway companies are of opinion that a 55-cent rate is not unreasonable for the movement asked. The distances involved are as follows:—

M.C. Ry., from pit to Grand Trunk interchange, approximately	3 miles
G.T. Ry., Niagara Falls to Merritton	9.3 "
	12.3 "

The Board, in *Doolittle & Wilcox* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 8 an. Ry Cas., held, at page 13, that a rate of 45 cents per ton crushed stone for a distance of 12 miles was reasonable. to be observed that this rate was for a movement on a single line haul. The Board has recognized that there is a justification for a lower rate basis on a single line haul than on a two or more line haul for substantially similar distances: *Continental, Prairie & Winnipeg Oil Cos.* v. *Canadian Pacific Ry. Co. et al.*, 13 Can. Ry Cas. 159. . . . .

Ordinarily, sand is carried under a uniform special mileage tariff which covers building and construction materials, and under this the rate for sand up to 10 miles, the Grand Trunk distance, would be 50 cents per ton. Mr. Chisholm, for the Grand Trunk, stated, at page 5051 of the notes of hearing, that his company had a commodity rate of 40 cents from Niagara Falls to Merritton, and that this had been in operation for a considerable period of time. The same statement was made by Mr. Martin, for the Grand Trunk, at page 5156.

In view of the Board's action, as set out in its Interswitching Order, it does not appear clear how the Board can require the two companies to establish a less joint through rate than 50 cents per ton.

In the course of the hearing, a suggestion was made that, on account of the sand moving in train-load quantities, a special concession might be made. It has been recognized in the actions of rate regulative tribunals, both in this country and in the United States, that, while it is justifiable to base rate differences on quantity as between less than carload and carload movements, it is not justifiable to make a difference in rate based on the distinction between carload and train-load quantities.

CAN.

Ry. Com.

Com. McLean.

In the present case, the Michigan Central and the Grand Trunk should publish and file, effective not later than November 9th, a joint rate of 50 cents per ton on sand and gravel from the applicants' pit to Merritton; with the provision that the cars be loaded to their full carrying capacity, subject to a minimum weight of 60,000 lbs.

Assist. Chief Commissioner.

The Assistant Chief Commissioner concurred.

QUE.

K.B.

CANADIAN PACIFIC R. CO. v. BALL.

Quebec King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 25, 1914.

1. Arbitration (§ III—17)—Expropriation proceedings—Award—Appeal—Power of Court.

On an appeal from an award in expropriation proceedings under the Railway Act, Can., the Court may send the case back to the same arbitrators to make a new award where the first one is defective in that it does not definitely and clearly disclose what the award is based upon and how the sum awarded is arrived at, where it seems probable that some wrong principle has been applied by the arbitrators.

Statement

Appeal by the C.P.R. Co. from an award.

Meredith, Macpherson, Hague, Holden and Shaughnessy, for the appellants.

Weinfield and *Ledieu*, for the respondents.

Trenholme, J.

Trenholme, J.:—This is an appeal by the C.P.R. Co. from an award made under the Railway Act of Canada. The Canadian Pacific Railway, wishing to enlarge its track in the city of Montreal, found it necessary to expropriate a lane off Mountain St. The property which they wished to expropriate is the blind end of a lane some 19 feet wide. Ball owned one property fronting on Mountain St., No. 176, and the next property between his and the railway track was Mrs. Ball's, No. 174 Mountain St., and the railway company, proceeding to expropriate, gave notice to Ball, after having complied with the statute, that they wished to expropriate this blind end, and offered him $25 as indemnity for depriving him of the use of this lane. He did not own the property. He had the use in common of that lane under the deed, use without obstruction, and they offered him $25, as I have said, for his interest in the lane. He refused it.

The railway company offered at the same time to Mrs. Ball, who owned the lot next to her husband's, they offered Mrs. Ball $100 as indemnity for her interest in the lane, which she also re-

QUE.
K.B.
CANADIAN PACIFIC R. CO. v. BALL.
Trenholme, J.

fused, and the parties interested in the property having refused the offer of the railway company, the company proceeded to have the indemnity to be paid established under the Railway Act, according to its provisions.

The arbitrators went on and examined the place, and heard the witnesses of the parties, and in Mrs. Ball's case they awarded the sum of $1,000 of indemnity.

In the case of Mr. Ball they awarded the sum of $4,000 for the rights which in the first instance the company had offered $25.

The company took an appeal under the Railway Act. There is a provision in the Canada Railway Act that an appeal will lie, if the award is over a certain amount, either to the Superior Court or to the Court of Appeal, and the railway company brought it to the Court of Appeal.

The case was argued at length, and immense records were produced, covering hundreds of pages of evidence in this paltry case, and we have now to dispose of it by our judgment.

Well, what we say in regard to the award in favour of Mrs. Ball is this: The lane which has been taken, or the piece of lane which has been taken by the C.P.R. is in close vicinity to Mrs. Ball's property, and the company, by offering a sum of money to her, have maintained her title and her right, and it remains, therefore, after that, not as a question of right, but a question of quantum, how much she is entitled to get. The arbitrators went and saw the property, and heard the witnesses, and came to the conclusion that Mrs. Ball as proprietor was entitled to $1,000 instead of the sum offered for her interest in that lane. The arbitrators have a right to determine the amount from their own observations and inspection.

Now, we have been told again and again by the higher Courts, that is, the Supreme Court and the Privy Council, that in the case of these arbitrations, the quantum, the amount awarded by the arbitrators, practically must be confirmed, as a question of fact, upon which they are supposed to be well qualified to judge.

Looking at Mrs. Ball's case, we cannot say that the arbitrators might, in considering the close proximity of the lane which she is now being deprived of, or the end of that lane, we cannot say that the arbitrators might not be right in giving Mrs. Ball $1,000 for being deprived of the use of that lane, which is, I think, 60 feet

long and 19 feet wide. Therefore, we feel constrained, although we think it is a pretty liberal sum, to grant Mrs. Ball $1,000, and confirm the award of the arbitrators in the matter. So much for Mrs. Ball's case.

As regards Mr. Ball's case, he stands on a different footing. His property is 33 or 34 feet from this piece of lane. Suppose the back of this desk where I am sitting is Mountain St., and there is a lane running from Mountain St. at right angles to Mountain St., back to a lane that runs behind the property like an L. Now, Mr. Ball's property is on the line running back from Mountain St.; it is not touched at all, and the piece of lane taken by the company is not less than the whole width of his wife's property and 7 or 8 feet more, and it is a puzzle to know how $4,000 can be awarded for that piece of blind lane, which is 33 feet distant from Ball's property. It is a puzzle to know how $4,000 is due for depriving him of that piece of lane. What use could he make of it? It is hard to see how $4,000 could be awarded without acting on some wrong principle. It is possible they have acted on a wrong principle.

Ball has filed a statement of claim before the arbitrators, claiming among other things that he is put to extra cost in carrying on his business in the yards of the two houses; he is a marble and tile dealer, and he has made out a statement that it will cost him $2,000 a year extra on account of being deprived of this little bit of lane, that it will cost him $1.35 a foot more for the sawing of his marble, and that extra cost will amount to over $2,000 a year, and in twenty years this will amount to the sum of $47,000. This is a most unfounded bill. We do not say the award is based on that, but we are puzzled to find what the arbitrators have based the award of $4,000 on, for depriving Ball of the use of a blind lane some 18 feet wide. We are puzzled to know how that award could be made, and we are setting aside the award and sending it back to the arbitrators to go over it again, so that they can tell us, as the statute requires them to tell us definitely and clearly, for what they have made this award of $4,000. I myself would not have given costs in Ball's case; I would reserve those costs until the case comes before us again, when the award is before us, but I am in a minority on that point.

In a recent case in the Privy Council an award was made, and

QUE.
K.B.
CANADIAN PACIFIC R. CO. v. BALL.
Cross, J.

the Privy Council sent the case back before the arbitrators to make a new award, and they gave the costs in the case.

CROSS, J.:—My opinion and decision is that this appeal should be maintained with costs; that the arbitrators' award should be set aside, and the matter remitted to be again heard and decided by arbitrators pursuant to the provisions of the Railway Act of Canada.

Appeal allowed.

ONT.
S. C.

MURPHY v. LAMPHIER.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. September 21, 1914.

1. COSTS (§I—16a)—EXECUTORS — ALLEGED WILL — PROBATE REFUSED — JUDGE—DISCRETION AS TO COSTS.

Where the parties named as executors propounded an alleged will which on its face is in regular form and probate is refused, the trial Judge has a discretion also to refuse costs to such parties out of the estate, but on appeal the Court may confirm an arrangement to pay a part of such costs.

[*Murphy* v. *Lamphier*, 31 O.L.R. 287, affirmed.]

APPEAL by the plaintiffs from the judgment of BOYD, C., 31 O.L.R. 287.

J. G. O'Donoghue, for the appellants.

J. W. Bain, K.C., and *A. Ogden*, for the defendants, the respondents.

Meredith, C.J.O.

September 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 18th April, 1914, of the Chancellor, after the trial of the action before him sitting without a jury at Toronto on the 4th, 10th, 16th, 17th, 18th, and 19th days of March, 1914.

The appellants propounded in the Surrogate Court of the County of Peel as the last will and testament of Jane Lamphier, deceased, a paper writing dated the 25th May, 1912, and the proceedings in that Court were removed into the Supreme Court.

By the judgment in appeal it is declared, ordered, and adjudged that this paper writing is not the last will and testament of the deceased.

In his reasons for judgment the learned Chancellor has carefully and elaborately reviewed the evidence on both sides; and

ONT.

S. C.

MURPHY v. LAMPHIER.

Meredith, C.J.O.

the able argument of the learned counsel for the appellants has failed to satisfy me that the conclusions reached by the Chancellor are wrong.

Agreeing, as we do, with the reasoning of the Chancellor and his conclusion that the appellants failed to satisfy the onus which rested upon them of establishing the testamentary capacity of the deceased, it would serve no good purpose to review the evidence or to discuss the grounds of the decision.

The learned counsel for the appellants pointed out one or two errors in the Chancellor's statement of the facts, but they are unimportant and in no way affect the soundness of his conclusions upon the facts.

The appellants complain of the disposition which was made of the costs by the learned Chancellor; but, as the costs are left to the discretion of the trial Judge, this Court, according to the practice, has no power to interfere with the exercise of that discretion, as the appeal in other respects fails, and no leave was given by the learned Chancellor to appeal as to the costs.

During the argument counsel for the respondents expressed his willingness to pay $500 towards the costs of the appellants; and, if an arrangement is made that that shall be done, the Court will approve of it, and if there is power to make such a direction the order dismissing the appeal may provide for payment of the agreed amount out of the estate of the deceased.

HILLHOUSE, HUME and BOOTH v. CANADIAN PACIFIC RY. CO.

CAN.

Ry. Com.

Board of Railway Commissioners, July 8, 1914.

1. RAILWAYS (§ II B—21)—FARM CROSSINGS—RE-OPENING—RESERVATIONS—RAILWAY ACT, SEC. 252.

Prior to the passing of the Railway Act of 1888, there was no right to a farm crossing unless it was specifically covered in the conveyance from the land owner to the railway, and to retain it, successors in title must have it explicitly reserved in the conveyances to them.

[*Midland Ry. Co.* v. *Gribble*, 2 Ch.D. 129, 827; *Toronto, Hamilton & Buffalo Ry. Co.* v. *Simpson Brick Co.*, 17 O.L.R. 632, 8 Can. Ry. Cas. 464, followed.]

Statement

APPLICATION to direct the respondent to re-open certain farm crossings.

Com. McLean.

July 8, 1914. MR. COMMISSIONER MCLEAN:—Application is made for an order directing the Canadian Pacific Railway to re-

CAN.

Ry. Com.

HILLHOUSE, HUME AND BOOTH v. CANADIAN PACIFIC R. CO.

Com. McLean.

open farm crossings on the properties of Mrs. Adam Hillhouse, E. Hume, and E. I. Booth. The farms in question are located in the province of Quebec, near Foster Station, where the Canadian Pacific branch line to Knowlton joins the main line from St. John.

The farm crossings in question, which date back to the construction of that portion of the Canadian Pacific system which was built under the charter of the Atlantic and North West Railway, were closed by the Canadian Pacific on January 8, 1914. The railway claims to be within its rights in so acting, as it states that in each instance the property is owned by different parties on each side of the railway.

Under section 252 of the Railway Act, every railway is required to make crossings "for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway for farm purposes." This obligation, however, came into the Railway Act only in 1888. Prior to that date, there was no right to a farm crossing unless it was specifically covered in the conveyance from the landowner to the railway. The railway in question was built at a time when the law was as above set out. The question of the rights, if any, of the present landowners to a reservation of the farm crossings as a matter of right relates itself to the reservations made at the time of the construction of the railway. It is stated that there were reservations as to farm crossings, and that these crossings were long enjoyed.

[Reference to *Midland Railway Co.* v. *Gribble*, 2 Ch. D. pp. 129 and 827, also section 68 of the Railway Clauses Act, 1845.]

Under date of Nov. 17, 1902, Lucie Chamberlain, widow of the late Charles H. Young, conveyed to Edward Hume the property in connection with which the question as to the farm crossing is now raised. In this deed there was a specific reservation of "the right-of-way across that part of said lot fourteen hundred and three lying north of the Atlantic and North West Railway Company's right-of-way, owned by the said seller . . ." The deed also recites the obligation of the purchaser in connection with this right-of-way—"to keep up at all times and to keep shut a good and substantial gate at the place of exit, on the highway from the piece across which the right-of-way is hereby

granted." That is to say, there was reserved to the purchaser an exit from the farm crossing in existence over the lands of the vendor to the highway.

In *Toronto, Hamilton and Buffalo R.W. Co.* v. *Simpson Brick Co.*, 17 O.L.R. 632, a set of facts was dealt with which appears to be especially pertinent to Hume's case. When the railway was built, it traversed a piece of land which was the property of Noah S. Briggs and Charles S. Briggs as tenants in common. Simultaneously with the conveyance of the right-of-way through their property to the railway, they obtained an agreement from the railway for the construction of a farm crossing. Subsequently both properties were acquired by Maguire. Later, Maguire conveyed to Fanning the portion of property north of the railway, granting him at the same time a right-of-way, by way of exit to a highway over the land which the vendor owned south of the railway. Because of the facts which have thus been set out, it was held that there was no such severance as would involve the cessor of the right of crossing. It was pointed out in the decision that, while in *Midland R.W. Co.* v. *Gribble* there had been no reservation, in the present case ". . . there was the grant by Maguire to Fanning, as appurtenant to the land to the north which Fanning bought, of the right-of-way over the strip 30 feet wide leading from the railway crossing over Maguire's unsold land to Aberdeen avenue."

In Hume's case, I am of opinion that there is a legal right to the continuance of the farm crossing, and that it should forthwith be re-established.

As to the cases of Mrs. Hillhouse and Booth, no such legal right appears. The Board is advised by its inspector that it is necessary that these parties should have farm crossings, if they are properly to enjoy their properties. Under these conditions, an order should, I think, go, under section 253, as a matter of grace, the cost being on the applicants.

THE ASSISTANT CHIEF COMMISSIONER concurred.

CAN.

Ry. Com.

HILLHOUSE, HUME AND BOOTH v. CANADIAN PACIFIC R. CO.

Com. McLean.

Assist. Chief Commissioner.

N.B.

S. C.

Re REARDON AND ST. JOHN & QUEBEC R. CO.; Ex Parte SHEA.

New Brunswick Supreme Court, Landry, McLeod, White, Barry and McKeown, JJ. February 10, 1914.

1. MOTIONS AND ORDERS (§ II—6)—ORDER—N.B. RAILWAY ACT, C.S.N.B., CH. 91, SEC. 17—PURCHASE MONEY—PAYMENT INTO COURT—SERVICE OF—SETTING ASIDE.

An order made under the N.B. Railway Act, C.S.N.B., ch. 91, sec. 17, for claimants on purchase money for a railway right-of-way paid into Court by the railway will be set aside where the mortgagor who contracted for the sale had no authority to do so for the mortgagees, nor was service of the order made on an assignee of the mortgages, as had been directed by the Court when the order was made.

Statement

APPLICATION to set aside an order for publication of a notice to file claims under the New Brunswick Railway Act, C.S.N.B. 1903, ch. 91.

Order set aside with costs.

P. A. Guthrie, for the St. John & Quebec R. Co., shewed cause.

W. P. Jones, for George A. Shea.

Landry, J.

LANDRY, J.:—In November, 1912, Mr. Guthrie applied to the Court, as counsel for the St. John & Quebec R. Co., for an order for publication of a notice to file claims under ch. 91 of the C.S. N.B. 1903, and read affidavits of J. Chipman Hartley, Silas B. Wass, Burton M. Hill and John Connor establishing, among other things, that by an agreement under seal signed by John Reardon, dated April 3, 1912, the said Reardon agreed to sell to the railway company a portion of his property described in the agreement for the purposes of a right-of-way; that a copy of the agreement, with proper plans of the land so agreed to be sold, were filed on November 9, 1912, with the registrar of the Court, and that the amount agreed upon as compensation for such right-of-way was deposited, with the usual interest, with the said registrar; that after the signing of the agreement on April 3, the said John Reardon executed a deed of the said land to one George A. Shea; that prior to November 9, 1912, the solicitor of the said railway company presented to the said Shea a deed of said land and requested him to execute it in compliance with the agreement with Reardon, and that Shea refused to do so.

On such facts the Court granted the application, and authorized the publication of a notice to George A. Shea, and to all others whom it might concern, stating, among other things, that such services alleged to be due for compensation, under the agreement,

had been paid to the registrar, together with interest, as required by the Act, and calling upon all persons entitled to the said lands or any part thereof, or to any interest therein, to file their claims to such money on or before February 10, 1913.

The order of the Court required the company to serve a notice of the order on the said George A. Shea. The notice was published, but never served on the said Shea, who lived in Houlton, Maine. The affidavits produced by Mr. Jones on this application established that at the time of said agreement to sell the legal title to the land in question on the records was in three mortgagees and the equity of redemption was in the said John Reardon. The said George A. Shea, after he was so requested to execute a deed to the railway company, took an assignment of the mortgages that were on the property and registered a deed to him from the said Reardon of the lands, including the *locus*.

This is an application by George A. Shea to have the order and all the proceedings themselves set aside. The grounds for such application are several. It seems to me necessary to consider two grounds only, *viz.*, that the said Shea was not served with the notice, and that Reardon, having only an equity of redemption in the lands at the time of the agreement to sell the right-of-way to the company, the interest of the mortgagees could not be acquired by the company by the proceedings to which they had recourse. I believe that the order requiring a notice on Shea not having been complied with in that particular, the proceedings had subsequently to the procuring of the order should be set aside.

As to the other point, I hesitate to conclude as my brother Judges do, *viz.*, that the statute does not give authority to a mortgagor in possession to dispose by agreement or contract of lands required for railway purposes in the same manner and as fully as "all corporations and persons whatever, tenants for life, guardians, executors, administrators, and all other persons whatsoever," and mortgagors in possession are not meant to be included in the words of the statute (secs. 11, 12 and 16, ch. 91, C.S.N.B. 1903). It seems to me that sec. 16 might rightly be construed as authority to a mortgagor, being interested in lands, etc., to make "agreements or contracts" touching lands in which he is interested touching the compensation to be paid for the same. Here the mortgagor was interested; he had the equity

N. B.

S. C.

RE REARDON AND ST. JOHN & QUEBEC R. CO.; EX PARTE SHEA.

of redemption; he made an agreement for the sale and for the compensation, after which the company proceeded in the regular way under the Act as though dealing with a party entitled to contract.

Landry, J.

While I am not prepared to express an absolute dissent from the decision of the majority of the Court that the mortgagor cannot dispose under the statute of the interests of the mortgagees in lands required for railway purposes, I feel it due to myself, with the opinion I have, to record my doubts on the point for the reasons I give.

McLeod, J.

McLEOD, J.:—This is an application made to set aside an order made in this Court in November last, under sec. 17, sub-sec. 27, of the N.B. Railway Act, being ch. 91 of C.S.N.B. The facts may be shortly stated as follows: A company known as the St. John & Quebec R. Co. are building a line of railway extending from Grand Falls to St. John, commonly known as the Valley Railway. The line passes through a farm formerly owned by one George Reardon. Prior to July, 1878, Reardon was the owner in fee of the farm. On July 4, 1878, he gave a mortgage on the farm, conditioned to pay $700, to the Rev. Thomas Connolly. On October 26, 1894, he gave another mortgage, conditioned to pay $1,400, to the Rev. Thomas Connolly. On June 7, 1900, he gave another mortgage, conditioned to pay $900, to Eliza L. Gaskin. The farm was therefore subject to these three mortgages. On April 3, 1912, the representatives of the St. John & Quebec R. Co. called on Reardon to make an agreement for a right-of-way of that company through his land, and an agreement in writing for a right-of-way was made between him and the company. On July 12, 1912, one George Shea, who was a son-in-law of John Reardon, took an assignment of the three mortgages that had been given by Reardon. The agreement made with Reardon by the St. John & Quebec R. Co. provided for a payment by the company to Reardon of $35 an acre for the land taken for the right-of-way, or $126.28 in all. On November 9, 1912, the company, under the provisions of the New Brunswick Railway Act, paid that amount into the office of the registrar of the Supreme Court, and on November 12 obtained an order under sec. 17, sub-sec. 27, of the N.B. Railway Act, ch. 91, Con. Stat. 1903, and a notice under this order was directed to be published

in certain newspapers in order that any person claiming any part of the money might get their share from the Court. A copy of this order was also directed to be served on George Shea, who was at that time the assignee of the mortgages. This notice was not served on him; and in February, 1913, on motion of counsel on behalf of Shea, this Court granted a rule, returnable at the April sittings of this Court, calling on the company to shew cause why the order made in November should not be set aside. The grounds on which this rule was granted are:—

(1) That the notice of publication was not served on George A. Shea, as required by the said order of November 12, 1912. (2) That John Reardon, Senior, was not the owner of the property in question when the alleged agreement for transfer of property for right-of-way was signed; that the said George A. Shea was the owner, and that the said the St. John & Quebec R. Co. had knowledge of these facts. (3) That at the time the said alleged agreement was signed there were three mortgages on the said property, amounting to its full value, registered; that the mortgagees never consented to the alleged agreement, and that the said George A. Shea now has assignments of these three mortgages. (4) That the alleged agreement is not such a sufficient contract or agreement as sec. 14 of the N.B. Railway Act (Con. Stat. 1903, ch. 91) contemplates.

I agree with what Mr. Justice Landry has said with reference to the non-service of the order on Shea. It should have been served on him; but I also am of the opinion that Reardon could not make any agreement to affect the mortgagees. He was not the owner of the property. He owned the equity of redemption, but the legal title was in the mortgagees. When the agreement was made the legal title was really in Thomas Connolly, under the first mortgage, and the other mortgagees had subsequent titles. In my view, Reardon could not possibly make any agreement that would convey the land to the company. The fair test of it is: Suppose he had made a conveyance of this whole farm to the company, would the company have obtained title to it? I think not. It would have obtained simply a right in his equity of redemption, subject to these three mortgages. In my opinion, the agreement made by Reardon did not convey the land, and the railway company got no title to it. The importance

N. B.

S. C.

RE REARDON AND ST. JOHN & QUEBEC R. CO.; EX PARTE SHEA.

of setting aside this order is because it may affect the title of the mortgagees to the part of the land taken.

In my opinion the order granted on November 12 should be set aside, and the railway company should have the right to take out of Court the money it paid in, namely, $126.28. I also think the railway company should pay the costs of this application.

WHITE, J., agreed that the order of November 12, 1912, should be set aside.

Barry, J.

BARRY, J.:—I just desire to say that this motion was made by Mr. Jones in February Term last, to set aside an order made by this Court on November 12, 1912, under the provisions of the N.B. Railway Act. Four grounds were taken upon the motion: First, that the order was not served on Shea; second, that John Reardon was not the owner of the lands when the agreement was signed, and the company had actual knowledge of this fact; third, that at the time the agreement was signed there were three mortgages outstanding against the property, amounting to its full value, and that there was no consent on the part of the mortgagees to the making of the agreement; and fourth, that it was not such an agreement as the N.B. Railway Act contemplates.

I agree with the judgment of the Court. My agreement is upon the first and third grounds; that is, that the notice was not served on Mr. Shea, as ordered by this Court; and that at the time of the agreement Mr. Reardon had no authority, in fact or in law, to bind the interests or the rights of the mortgagees.

McKeown, J.

MCKEOWN, J., agreed that the order of November 12, 1912, should be set aside.

CAN.

Ry. Com.

ST. JOHN & QUEBEC RY. CO. v. CANADIAN PACIFIC RY. CO.

Board of Railway Commissioners and New Brunswick Public Utilities Commission. July 18, 1914.

1. RAILWAY COMMISSIONERS (§ I—2)—JURISDICTION—QUESTION OF LAW—CONNECTIONS AND SWITCHES—RAILWAY ACT, SECS. 176, 228.

The Railway Commission, Can., has no power to order that a railway company operating under a provincial law shall be permitted by a railway company under federal jurisdiction to connect its tracks with the latter and to maintain and operate the necessary switches, but crossings may be authorized and protection of same ordered at the expense of the applicant provincial company where it is the junior road.

[*Preston & Berlin Street R. Co.* v. *G.T.R.*, 6 Can. Ry. Cas. 142, and *St. John & Quebec R. Co.* v. *C.P.R.*, 14 Can. Ry. Cas. 360, considered.]

CAN.
Ry. Com.
ST. JOHN & QUEBEC R. Co. v. CANADIAN PACIFIC R. Co.
The Chief Commissioner.

APPLICATION for authority to take and use the lands and tracks of the respondent and order it to make a physical connection with the applicant.

W. H. Grimmer, Attorney-General for New Brunswick, for the applicant.

E. W. Beatty, for the respondent.

THE CHIEF COMMISSIONER:—This is an application made by the St. John & Quebec Railway Company to the Board of Railway Commissioners for Canada and to the New Brunswick Board of Commissioners of Public Utilities, for orders under secs. 227, 228, and 229 of the Railway Act directing the Canadian Pacific Railway Company as follows:—

1. To allow the St. John & Quebec Railway Company to connect its tracks with those of the Canadian Pacific Railway at the city of Fredericton, and to maintain and operate the necessary switches and turnouts at the following points:

(1) At a point between Westmoreland and York streets marked "A" on the plan.

(2) At a point at or near station 1159.50 (C.P.R. Location), marked "B" on the plan.

(3) At or near station 1118.00 (C.P.R. Location), marked "C" on the plan.

(4) At or near station 1072.80 (C.P.R. Location), marked "D" on the plan.

2. To permit the St. John & Quebec Railway Company and its lessees to operate its trains, engines, cars, and other vehicles between points "A" and "B" and between points "C" and "D" above mentioned over and along the different tracks, switches, wyes, and sidings of the Canadian Pacific Railway Company, or as leased by them.

3. To re-arrange spur track used by the Canadian Pacific Railway Company for switching between Westmoreland and York streets, marked "X" on the plan, so that said switching can be carried on south of the located line of the applicant company. . . .

The Dominion Board has no jurisdiction over the route of the applicant company; but the applicant company was of the view that the suggestion of the municipality was a reasonable one and should be given effect to. The result, then, is that the application, in so far as it asks that a connection be made with the lines of the

CAN.

Ry. Com.

ST. JOHN & QUEBEC R. Co. v. CANADIAN PACIFIC R. Co.

The Chief Commissioner.

applicant company and those of the Canadian Pacific Railway Company at the point between Northumberland and York streets marked "A" on the plan, is not pressed and need not be considered; and that that part of the application which asked for running rights on the tracks of the Canadian Pacific Railway between points "A" and "B" on the plan also became unnecessary.

The application is, therefore, dismissed in so far as these two questions are concerned.

At the hearing, the Canadian Pacific Railway Company objected to any order being made at all and was particularly insistent on its legal rights.

After the hearing, an inspection was made by both Boards.

The applicant company has constructed its tracks to a point between Northumberland and York streets on the north and on the south to a point near the letter "D" on the plan submitted. As the matter, therefore, now stands, construction has gone on, public moneys have been invested, and there remains the connecting link of some two miles to be made. If effect is given to the objections of the Canadian Pacific, this construction cannot be made, the Canadian Pacific objecting not only to running rights being granted, but also to the necessary crossings.

I am of the opinion that, beyond all question, the applicant company should be allowed to connect up its construction. The proper solution of the difficulty is to be found in the creation of a joint section or an agreement as to running rights.

I am compelled, although reluctantly, under the circumstances of this case to find that, as a matter of law, the Board has no power to permit the applicant company to exercise any of the provisions of sec. 176 of the Act. The possibility of this result was suggested in the former judgment. Under the Act as has been previously found, provincial companies which are not subject to the disabilities of the Railway Act cannot obtain benefits under it except in so far as those benefits are expressly extended to them. As a result of the recent legislation connections can now be ordered. An order made under the appropriate sections would enable the tracks of the applicant company to be connected with those of the Canadian Pacific at point "D" on the plan, and again at point "C"; and a crossing can be authorized at point "B." The result of this would be that supplemental orders can be made

by the Board providing for the safe and proper transfer of engines and equipment of the applicant company by the Canadian Pacific between points "C" and "D."

After going into the question carefully with the Board's Operating Officer, I find that this is something which cannot be satisfactorily accomplished. The applicant company states that it expects to handle through heavy trains of grain. A transfer charge between these two points would create a heavy and continuous burden on this traffic.

I am of the opinion that an order can go authorizing the applicant company to cross the line of the Canadian Pacific at a point at or near Regent street for the purpose of gaining access to the Union Station to which the lines of both the Intercolonial and applicant company will run; to again cross at Salamanca at a point at or near "C"; and to again cross at a point at or near point "D," all as shewn on the plan submitted.

The crossing at "C" is rendered necessary by reason of the fact that the right of way of the Canadian Pacific lies so close to and in some instances immediately adjoining the river highway as to render construction on the east side of that right of way impossible, with the further result that the applicant company being obliged to build to the west is again compelled to make another crossing at "D" in order to connect up with its construction on the east.

It may well be said that three crossings within a distance of something over a mile and a half constitutes a somewhat ridiculous construction. I think it does. I think that the result will be onerous not only to the applicant company but also to the Canadian Pacific. So far as the applicant company is concerned, it is onerous because each one of these crossings must be protected by a full interlocker and must be maintained by the applicant company. Capitalizing the cost of maintenance and adding it to the cost of construction it means an expenditure of $120,000.00. So far as the Canadian Pacific is concerned, it will be onerous in that its track will have no less than three breaks in this short distance and that its traffic will be hindered and impeded. These objections can largely be done away with, and there is only necessity for one crossing if the Canadian Pacific choose, as a matter of agreement, to allow the business of the applicant company to

CAN.
Ry. Com.
ST. JOHN & QUEBEC R. CO. v. CANADIAN PACIFIC R. CO.
The Chief Commissioner.

be carried on over its right-of-way between points "C" and "D." If this is done, a double track must, of course, be laid, and its construction, and all new construction necessary, should be at the cost of the applicant company, which will also, of course, have to bear its fair and proper share not only of the cost of the maintenance and operation of the joint section, but also of the capital account. In any event, I am of the opinion that such a solution, however, would be better for both the interested companies.

An alternative order may be made at the option of the applicant company. That alternative order would authorize a crossing of the Canadian Pacific's line at a point at or near Regent street, equipped with a full interlocker at the cost of the applicant company, and this part of the Order will be permanent. The other part of the Order which would be temporary would, instead of providing for crossings "C" and "D," provide for physical connection of the lines and for the transfer of engines and equipment by the Canadian Pacific Railway between these points on terms to be fixed by the Board. The Order will continue until such time as a further hearing takes place, which would, in any event, be necessary to determine the terms and conditions of transferring the applicant company's equipment over the Canadian Pacific track between points "C" and "D."

A further alternative may exist, and that is that the construction now asked should not be proceeded with by the applicant company. An arrangement has been made between that company and the Intercolonial Railway under which the Intercolonial Railway will operate it. Doubtless that arrangement can be so far changed as to permit of the construction which has been objected to being made entirely by the Intercolonial.

I say nothing as to the legal rights of the Intercolonial. It is a matter over which this Board has no jurisdiction; and I do not wish to be understood as suggesting either that it has or has not any rights whatever of expropriation over the property of a company whether it is incorporated by the Dominion or the Provincial Parliament; but it may, in any event, well be that arrangements can be made by the Intercolonial with the Canadian Pacific, that the applicant company has been unable to make, which will permit of a proper solution of a matter which should not be one of serious difficulty. It must, of course, be borne in mind that the Canadian

CAN.

Ry. Com.

ST. JOHN & QUEBEC R. CO. v. CANADIAN PACIFIC R. CO.

The Chief Commissioner.

Pacific has its rights, which must be observed. It has a right not only to its present industrials but to the development of further industries along the line of the St. John river, and should the matter be adjusted by the easy solution which would require the applicant company to build a new track to the west of the Canadian Pacific's existing track from point "C" to "D" to be used by the Canadian Pacific, the present track to become that of the applicant; I am of the view that the line of the applicant company between these points should at all times be subject to not only the right of existing industrial tracks connected with the Canadian Pacific, but any further or new industrials the necessity for which may in the future arise.

Com. Goodeve, Ch. Otty, Com. Connell.

MR. COMMISSIONER GOODEVE of the Board of Railway Commissioners for Canada, and CHAIRMAN OTTY and MR. COMMISSIONER CONNELL of the New Brunswick Board of Public Utilities, concurred.

SASK.

S. C.

DOUGLAS v. CARRINGTON.

Saskatchewan Supreme Court, Elwood, J. March 5, 1914.

1. INTERPLEADER (§ III—30)—JUDGMENT CREDITOR—CLAIMANTS—CREDITORS' RELIEF ACT (SASK.)—APPEAL FROM LOCAL MASTER.

The decision of a Local Master in an interpleader between the judgment creditor and claimants upon the fund under the Creditors' Relief Act, R.S.S., 1909, ch. 63, is subject to appeal to a Judge in Chambers.

[Sask. Rules 572 and 622 and Eng. Order 54, rule 21, considered.]

2. LANDLORD AND TENANT (§ III D3—111)—RENT PAYABLE IN GRAIN—DEFAULT—JUDGMENT—EXECUTION—REMOVAL OF CROP—WAGE CLAIMS—PREFERENCE.

Apart from the effect of taking judgment for the rent as a bar to distress, the landlord cannot distrain in respect of a rental stipulated to be payable in grain to a certain value, if, on the tenant's default in paying the crop rental, he takes judgment for the money equivalent and issues execution, upon which the crop is removed from the land and sold; nor has he preference on the proceeds as against wages claims against the debtor filed against the money realized by the sheriff in the plaintiff's action, such money not being distrainable for rent.

[*Chancellor* v. *Webster*, 9 Times L.R. 568, and *Potter* v. *Bradley*, 10 Times L.R. 445, referred to.]

3. STATUTES (§ II A—96)—LANDLORD AND TENANT—STATUTE 8 ANNE CH. 14, SEC. 1—REASON FOR PASSING—PROTECTION OF LANDLORD—CREDITORS—COLLUSION OF—JUDGMENT BY LANDLORD—EFFECT OF.

The statute 8 Anne ch. 14, sec. 1, was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with creditors to issue writs of execution; it contemplates only executions issued by third parties, and does not entitle the landlord to a preference in respect of rent for which he himself had taken judgment and issued the execution under which the fund in question in the sheriff's hands was realized.

[*Taylor* v. *Lanyon*, 5 Bing. 224, followed.]

SASK.

S. C.

DOUGLAS v. CARRINGTON.

Elwood, J.

APPEAL from an order of the local master.

H. C. Pope, for plaintiff.

Balfour, Martin & Casey, for claimants.

ELWOOD, J.:—On August 16, 1910, the plaintiff leased to the defendants the whole of section 23, township 20, range 28, west of the 2nd meridian, and the whole of section 19 and the east half of section 18 in the same township and range, until November 1, 1913, at a crop rental. On October 16, 1911, differences having arisen between the parties, the plaintiff and the defendants entered into an agreement of settlement, whereby, among other things, the defendants agreed that the plaintiff should be entitled to receive first out of the crop of wheat, oats and flax grown upon the lands mentioned in the said lease grain to the value of $6,750, and the amount of certain promissory notes. After the signing of the agreement of October 16, the plaintiff, on November 6, 1911, issued a writ against the defendants claiming the sum of $9,016.75, being the amount of the several sums which were included in the said agreement of October 16, 1911. Judgment was recovered by the plaintiff against the defendants for the above sum, and execution issued. A seizure was made by the sheriff of the grain on the said land, and the grain was sold on or about November 29, 1911. On December 4, 1911, the claimants filed their claims with the sheriff. These claims are for wages under the Creditors' Relief Act, being ch. 63 of R.S.S. 1909. Apparently thereafter the sheriff sold the grain so seized, and after such sale the plaintiff caused the sheriff to be notified that he disputed the above claims for wages and claimed that the moneys realized belonged wholly to the plaintiff. The question was brought before the Local Master of the District Court at Moose Jaw, and apparently it was urged on the part of the plaintiff that the plaintiff was entitled to the moneys so realized as rent by virtue of the lease above-mentioned, and the learned Local Master so held. Under the agreement of October 15 the plaintiff reserves to himself all the rights and remedies given to him in and by the lease, and it was thereby agreed that the memorandum of lease should be in full force and effect until all the conditions of the agreement of October 16 should be fulfilled. It was, in the first place, contended that there was no appeal to me from the decision of the Local Master, and that the right of appeal, if any,

SASK.

S. C.

DOUGLAS v. CARRINGTON.

Elwood, J.

was to the Court *en banc*, and for this contention, r. 572 was cited. I am of opinion, however, that the right to appeal under r. 622 from an order of the Local Master is not limited. Order 54, r. 21, of the English Rules, is similar to our r. 622, and it was held that notwithstanding O. 57, rs. 8 and 9, the decision of a Master in an interpleader proceeding is a subject of appeal to a Judge. See *Clench* v. *Dooley*, 56 L.T. 122, and *Bryant* v. *Reading*, 17 Q.B.D. 128. I am of the opinion, therefore, that an appeal in this case does lie to a Judge in Chambers.

A number of cases were cited to me in support of the proposition that the rights of the plaintiff did not merge in the judgment, and that the judgment did not deprive the plaintiff of the right to distrain for rent. I am, however, of the opinion that those cases are not applicable, because at the time that the plaintiff made his claim the goods seized by the sheriff had been removed from the land in question and sold, and that therefore there was nothing in the sheriff's hands upon which a distress could be made; in fact, the subject-matter of this interpleader was not distrainable under the lease. The cases of *Chancellor* v. *Webster*, 9 T.L.R. 568, and *Potter* v. *Bradley*, 10 T.L.R. 445, seem to be authority for the proposition that where a judgment has been recovered for the rent, the rent for which judgment has been recovered cannot be distrained for. However, as the property in this case clearly could not be distrained, there is no necessity for me to express a decided opinion on the question of whether or not a judgment deprives the landlord of distraining for rent.

It was contended that the plaintiff was entitled to the money realized by the sheriff under the statute, VIII. Anne, ch. 14, sec. 1. The case of *Taylor* v. *Lanyon*, 6 Bing. 224, seems to be very much in point. At 247 Tindall, C.J., says:—

> That statute was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with creditors to issue writs of execution; for property so in the custody of the law could not be distrained, and the judgment creditor, by keeping possession for a length of time, might seriously affect the interests of the landlord. The statute, therefore, contemplated executions issued by third persons and not by the landlord.

I am of the opinion, therefore, on the authority of the above case, that the statute of Anne does not apply in this case in favour of the plaintiff, and that therefore the Local Master was incorrect in barring the claim of the claimants.

SASK.

S. C.

DOUGLAS v. CARRINGTON.

Elwood, J.

The result will be that the order appealed from will be set aside. It did not appear before me whether the amounts of the various claimants' claims had been proven. If these claims have not been proven, there will be an issue directed to try the amounts of those claims. If, however, they have been proven, there will be an order directing the sheriff from the moneys in his hands to pay the amounts of the claims so far as the money will apply. The plaintiff will pay the claimants' costs of this appeal and of the interpleader proceedings, and will also pay the sheriff's costs of and incidental to the proceedings.

Appeal allowed.

ONT.

S. C.

BANK OF B.N.A. v. HASLIP. BANK OF B.N.A. v. ELLIOTT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 8, 1914.

1. CHEQUES (§ II—5)—PRESENTATION—TIME, WHEN.

If the person who receives a cheque and the bank on which it is drawn are in the same place, the cheque must in the absence of special circumstances be presented for payment on the day after it is received. [*Blackley* v. *McCabe*, 16 A.R. 295; *Lord* v. *Hunter*, 6 L.N. (Que.) 310, referred to.]

2. CHEQUES (§ II—7)—PRESENTATION—NECESSITY OF—TIME.

If the person who receives a cheque and the bank on which it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must in like manner present it or forward it at the latest on the day after he receives it.

3. CHEQUES (§ II—12)—PRESENTATION—FAILURE TO PRESENT—ENDORSEMENT.

The endorsement or delivery of a cheque to another does not extend the time for presentment as against prior endorsers.

Statement

APPEALS by the plaintiff bank in each action from the judgment of MIDDLETON, J., 19 D.L.R. 576, 30 O.L.R. 299.

G. L. Smith, for the appellant bank.

Eric N. Armour, for the defendants, the respondents.

Maclaren, J.A.

June 8. The judgment of the Court was delivered by MACLAREN, J.A.:—The question to be decided is, were these cheques presented for payment within a reasonable time after their endorsement and delivery by the respondents to the bank? What is a reasonable time for the presentment of bills payable on demand, would appear to indicate that a reasonable time for the purposes of sec. 86 is a mixed question of law and fact, and

that the rules of the common law and the law merchant were not meant to be overruled.

Before the passing of the English and Canadian Acts, the law as to the presentment for payment of cheques in order to hold an endorser liable was well-settled in both countries. If the person receiving a cheque and the bank on which it is drawn are in the same place, the cheque must, in the absence of special circumstances, be presented for payment on the day after it is received. If the person who receives a cheque and the bank on which it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must in like manner present it or forward it at the latest on the day after he receives it. . . .

While the liability of the drawer and endorser of a bill as a rule is identical, this is not true of cheques. By sec. 166, the drawer of a cheque is only relieved by non-presentment within a reasonable time in case he suffers actual damage thereby, and to the extent of such damage. The discharge of an endorser by such non-presentment is absolute and complete whether he suffers damage or not.

[The learned Judge here referred to the following cases: *Rickford* v. *Ridge* (1810), 2 Camp. 537; *Down* v. *Halling*, 4 B. & C. 330, at p. 333; *Boddington* v. *Schlenker*, 4 B. & Ad. 752, at p. 758; *Moule* v. *Brown*, 4 Bing. N.C. 266, at p. 268; *Alexander* v. *Burchfield*, 7 M. & G. 1061; *Owens* v. *Quebec Bank* (1870), 30 U.C.R. 382; *Blackley* v. *McCabe* (1889), 16 A.R. 295; *Lord* v. *Hunter* (1883), 6 L.N. (Que.) 310.]

The appellant bank seeks to justify its tardy presentment by rule 12 of the Toronto clearing house.

It is unnecessary to consider how far this rule may be binding upon the banks concerned in this matter. The evidence falls far short of proving that this rule had become a usage of trade within the meaning of sec. 86, and one with reference to which the appellant and respondents in these appeals would be presumed to have contracted.

[Reference to the Canadian Bankers' Association Act, 63 & 64 Vict. ch. 93 (D.).]

ONT.

S. C.

BANK OF BRITISH NORTH AMERICA v. HASLIP.

BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

Maclaren, J.A.

I do not find anything in the present rules of either the Town Clearing House or the Metropolitan Clearing House of London, as given in the 5th ed. of Grant on Banking, pp. 68 to 71, that would be a precedent for or would justify rule 12 of the Toronto Clearing House, especially if it be given the meaning contended for by the appellant.

There does not appear to have been much discussion in any of the above cases as to the meaning of the words "in the same place," in speaking of the delivery of a cheque and the bank upon which it is drawn. They appear to have been used in their ordinary sense as meaning the same town or city, especially where it is a distinct business or financial entity. This is the meaning given to them by Crompton, J., in the case of *Firth* v. *Brooks*, 4 L.T.N.S. 467; and is particularly appropriate to the city of Toronto, within the limits of which all the offices and places of business affected are situate.

By presenting these cheques at the market branch, through their notary, on the 4th October, and sending out the notices of dishonour, the appellant has treated them as having been dishonoured only on that day. If this assumption be correct, then all that has been said will apply with even greater force, as I have throughout assumed that they were presented on the 3rd. There is some evidence of their having been presented and dishonoured on that day, and very little evidence of presentment will suffice when a cheque is lying at the bank on which it is drawn, and there are no funds to meet it. I do not think the subsequent futile presentment by the notary would be an abandonment of the benefit of any previous presentment that had been made. Protest of the cheque was unnecessary: sec. 114 (2); proper notice of dishonour was sufficient; and the returning of the bill to the appellant bank within proper time might avail to hold the latter liable.

On the whole, I am clearly of opinion that these cheques were not presented within a reasonable time after their endorsement and delivery by the respondents to the appellant bank, having due regard to their nature as cheques, and to the usage of trade with regard to cheques, and the facts of the particular case. Especially am I of opinion that it was not reasonable

ONT.

S. C.

BANK OF BRITISH NORTH AMERICA v. HASLIP.

BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

Maclaren, J.A.

that the cheques should be allowed to lie at the head office of the Standard Bank for nearly twenty-four hours, allowing the proper time for their presentment at the market branch to pass by, when this branch was only three or four blocks and some five minutes' walk from the head office, and there was nothing to prevent the presentment being made at the proper time. In consequence of such delay, I am of opinion that the respondents as endorsers were absolutely released.

Having come to this conclusion, it is unnecessary to consider whether the mistakes and irregularities in connection with the notices of protest and dishonour would have operated as a release of the respondents if the presentment had been made within the proper time.

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

KERR v. SASKATCHEWAN REALTY.

SASK.

S. C.

Saskatchewan Supreme Court, Brown, J. May 2, 1914.

1. DAMAGES (§ III A—40)—CONTRACT—INSURANCE AGENT—TRANSFER OF PROPERTY—LIABILITY FOR PREMIUMS GUARANTEED.

Building owners who contract for value with a fire insurance agent that he shall be entitled for five years to place the insurance on the building in companies he represents, are liable to him for the insurance premiums on policies renewed in the regular course, although in the meantime the property has been transferred to a trust company acting in the interests of the transferors; and *semble*, the owners would have been bound to protect the insurance agent by making it a term of any sale of the property that the agent should have the insurance renewals for the period which they had guaranteed.

Statement

Action to recover insurance premiums under a five-year contract.

Judgment accordingly.

Alexander Ross, K.C., for plaintiff.

J. F. Frame, K.C., for defendant.

Brown, J.

BROWN, J.:—On November 24, 1908, and for some time thereafter, the defendants were the registered owners of the King's Hotel property, situate in the city of Regina, and the plaintiff was and has since continued to be an insurance broker doing business in the said city. On the aforesaid date the parties hereto entered into a contract whereby the defendants, who had previously carried on an insurance business, agreed for valuable consideration to transfer their insurance business and the good-

SASK.

S. C.

KERR v. SASKATCHEWAN REALTY.

BROWN, J.

will thereof to the plaintiff. Among the provisions of the said contract are the following:

2. It is a condition precedent to this agreement that the parties of the first part do guarantee to the party of the second part that all the fire insurance to be placed on the King's Hotel in the city of Regina and contents thereof for the space of five years from the thirty-first of October, 1908, and the present insurance thereon shall be placed, shall continue and remain with the party of the second part as agent for the companies whom he may represent.

3. And it is further a condition precedent to the execution of this agreement that all the insurance of real or personal property of any kind belonging or to belong to the Saskatchewan Realty & Improvement Company shall be placed with the party of the second part as agent for the companies whom he may represent for the space of five years from this date.

4. And it is further a condition precedent to this agreement that all the fire insurance placed on either real or personal property belonging or to belong to the Saskatchewan Distributing Co. shall be placed with the party of the second part as agent for the companies whom he may represent for the space of five years from this date. It is distinctly understood and agreed that in case the King's Hotel or contents shall be sold or any of the real or personal property of either the Saskatchewan Realty & Improvement Co. or the Saskatchewan Distributing Co. shall be sold that the insurance on the said property shall be guaranteed by the parties by the first part to remain with the party of the second part for the space of five years from this date.

It is further stipulated in the contract that all of the provisions thereof shall inure to the benefit of and be binding on the heirs, executors, administrators, successors and assigns of the parties thereto respectively. In pursuance of this contract the plaintiff did, at the defendants' request, place insurance on the said King's Hotel property in the sum of $135,000 in several companies satisfactory to the defendants. These policies were renewed from year to year by the plaintiff in accordance with the custom of the business. The expiry date for all the policies in 1913 was July 29, and in accordance with the correct practice these policies were all renewed before expiry date by the plaintiff and the renewal policies were sent to the Mortgage Co. of Canada at Winnipeg, who were mortgagees of the property. On November 24, 1911, a trust deed was executed whereby the Western Trust Co. had become a trustee of the defendants' property, and on December 30, 1911, the same company became the registered owners of the King's Hotel property under the said trust deed. On July 25, 1913, the Mortgage Co. of Canada, upon

receipt of the renewal policies, which had been sent them by the plaintiff, wrote the plaintiff the following letter:

Kerr Land Co., Winnipeg, July 25th, 1913.
Regina, Sask.

Dear Sirs:—

Re Western Trust Co. Loan, No. 3,453.

We have been handed by the Western Trust Co. insurance policies amounting to $135,000, covering the King's Hotel property in Regina, being part of our security under the above loan. These policies run from July 29th, 1913.

As the Western Trust Co. are now the registered owners of the King's Hotel property, we are bound to accept the policies tendered by them. Therefore, we regret to have to return you the following policies:

Manitoba No. 598, The North British & Mercantile No. 2406325, Royal No. A. 112433, Phoenix No. 8748986, Alberta and Saskatchewan No. 338570, British America No. 607986, German American No. 908, Alliance No. 3748215, Caledonian No. 557984, Westchester No. 205350, and Guardian No. 4350148.

Yours truly,
A. Gouzée,
Manager

The Mortgage Co. returned the policies to the plaintiff with this letter, and the plaintiff received the same prior to July 29. Had the plaintiff so desired he could, after receiving these returned policies, have succeeded in having them all cancelled before July 29, and thus before any of them became operative, and without being called upon to pay any premiums for such renewal. The plaintiff kept the policies in force until November 29, 1913, when he had the same cancelled, and by keeping them in force he incurred expense for the premiums thereon for that length of time in the sum of $1,048.68. Of this amount $874.95 was actually paid out to the various insurance companies, and $173.73 was retained by the plaintiff as his commission, being the usual commission in that respect. The plaintiff now seeks to recover this $1,048.68, and the defendants admit liability for $173.73; they, however, dispute liability for the balance. Their grounds for disputing same are that there was a change of ownership in the property; that the Trust Co., having become the registered owners, had a right to insure the property as they pleased; that the defendants had no longer any control over it; and that the only damage necessarily incurred by the plaintiff under the circumstances was the loss of his commission, $173.73. It is clear

SASK.

S. C.

KERR v. SASKATCHEWAN REALTY.

Brown, J.

that the plaintiff, had he wished, could have cancelled the policies before July 29 and not have incurred any part of the $874.95 expenditure. But was he compelled to do so? I am of opinion that he was not. The five-year period in which the plaintiff had the right to insure did not expire until October 31. The evidence shews that it is the custom of the trade and the proper business procedure to renew the policies from year to year, and the policies being about to expire on July 29 the plaintiff was, in my judgment, entitled to renew the same for another year. That was a right which could not without good reason be denied him. In this case there were absolutely no good reasons given for denying him this right, and no reasons given at all except that the Trust Co. wanted to place the insurance themselves. It is clear that the wording of the contract was such as to bind the defendants. Even in case of sale they were bound to protect the plaintiff in this matter of insurance. The Trust Co. were equally bound by this contract, although not parties to it. They knew of its existence when they accepted the position of trusteeship, and I have no hesitation in saying that nowhere in the trust deed do they get any authority to ignore it. They, under the trust deed, are bound to administer the estate in the interests of the estate, and not in their own interests, nor for the benefit of any insurance company in which they may be specially interested. Their conduct towards the plaintiff and, *ipso facto*, towards the defendants would be in my judgment an act of bad faith for which they could be held answerable under sec. 24 of the trust deed. But, moreover, the plaintiff got no notice from the defendants nor the trust company to discontinue the insurance. The first, and apparently only, intimation he received was from the mortgage company in the letter already referred to. Under such circumstances it was, in my opinion, not only his right but his duty to renew the policies and to maintain them; and the defendants must make good the expense which he has incurred on their behalf. An admission was filed signed by counsel that the cancellation of the policies on November 29 was in the interests of all parties and was not in any way to prejudice the plaintiff. The plaintiff will therefore have judgment in his favour for $1,048.68 and his costs of action.

TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY CO.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. February 23, 1914.

1. BONDS (§ II B—15)—FIDELITY INDEMNITY—APPLICATION FOR—CIVIC EMPLOYEES—REPRESENTATIONS BY MAYOR.

The answers of the mayor of a municipality to the series of written questions in the application for a fidelity insurance bond in respect of a civic employee may be sufficiently incorporated by reference thereto in the renewal policy issued on the like terms as the original bond, to satisfy the provisions of the Insurance Act, R.S.O. 1897, ch. 203, sec. 144, and to form part of the contract.

[*Hay* v. *Employers' Liability*, 6 O.W.R. 459; *Venner* v. *Sun Life*, 17 Can. S.C.R. 394; *Jordan* v. *Provincial Provident*, 28 Can. S.C.R. 554, followed; *London West* v. *London Guarantee*, 26 O.R. 520, not followed.]

2. BONDS (§ II C—37)—FIDELITY BONDS—TAX COLLECTOR—DEFALCATIONS—DEFENCES—MISREPRESENTATIONS.

Recovery on a fidelity bond issued to a municipality against loss through the fraud or dishonesty of its tax collector may be denied where it was represented in the answers given on behalf of the municipality with the application to the bonding company that auditors would examine the tax rolls and vouchers yearly, and on each renewal of the bond a further representation was made that the collector's books and accounts had been examined and found correct, when in fact neither the municipal auditors nor any one on behalf of the municipality checked up the collector's tax rolls for arrears of previous years which it was his duty to collect and in respect of which the defalcation occurred.

[*Town of Arnprior* v. *U.S. Fidelity and Guaranty Co.*, 12 D.L.R. 630, reversed.]

APPEAL from the decision of BRITTON, J., 12 D.L.R. 630.

G. H. Watson, K.C., and *R. J. Slattery*, for the appellants.

W. M. Douglas, K.C., and *J. E. Thompson*, for the plaintiffs, the respondents.

Maclaren, J.A.

February 23, 1914. MACLAREN, J.A.:—The bond sued upon was dated the 30th May, 1905, and covered the period from the 10th June, 1905, to the 10th June, 1906, subject to continuance or renewal. It was renewed by annual continuation certificates up to the 10th June, 1911.

There had been a similar previous bond, dated the 16th June, 1904, covering the period from the 10th June, 1904, to the 10th June, 1905, issued upon the application of Mattson, and the answers by the then Mayor of Arnprior to certain questions; the said answers being stated to be taken as the basis of the bond applied for by Mattson, and being dated the 10th June, 1904. No new application was made by either Mattson or the town

ONT.

S. C.

TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY CO.

Maclaren, J.A.

corporation for the new bond of the 30th May, 1905; but, on account of the renewal or continuation certificate not having been received from the head office at Baltimore, the general agent at Toronto issued, instead, the new bond in the same terms as that of the expiring one.

It was contended on behalf of the town corporation, both at the trial and before us, that the defendants could not invoke for any purpose the answers given in 1904, on which the first bond purported to be based.

This position however, I consider to be untenable. The bond on which the plaintiffs bring their action, and on which they base their claim, contains a recital that they have delivered to the defendants "a statement in writing setting forth the nature and character of the office or position to which the employee has been elected or appointed, the nature and character of his duties and responsibilities, and the safeguards and checks to be used upon the employee in the duties of his said office or position, and other matters, which statement is made a part hereof." It is also therein stated that "it is hereby agreed and declared" that the bond is given "upon the faith of the said statement as aforesaid by the employer, which the employer warrants to be true." The only statement which the town corporation had given to the company was that of the 10th June, 1904; and, the corporation having accepted and retained in their possession the second bond, containing the statements above quoted, and having paid the premium therefor and the subsequent annual premiums, and having accepted and retained the bond and the annual continuation certificates, which are expressly declared to be "subject to all the covenants and conditions of the said original bond heretofore issued," and having brought their present action upon the bond of 1905 and the annual continuation certificates, they cannot now be heard to dispute the facts so plainly stated in the bond; and they are, in my opinion, clearly estopped from now setting up such an objection.

In submitting to the plaintiff corporation the questions regarding Mattson and his position and duties, the defendant company expressly stated that the answers would be taken as the basis of the bond, and at the foot of the answers the Mayor in his

"official capacity," declared that it was agreed that the answers were to be taken "as conditions precedent and as the basis of the bond."

Assuming that the answers and statement of the Mayor of the 10th June, 1904, are the statements referred to in the bond sued upon, it remains to be seen whether the plaintiffs, under the terms of the bond and the facts disclosed by the documents and the testimony, are entitled to recover.

It appears that there was no default on the part of Mattson during the first four years (1904 to 1907) covered by the bonds of the defendant company. During the year from the 10th June, 1910, to the 9th June, 1911, suspicion was aroused, and a special audit and investigation revealed the fact that he had during the years 1908 and 1909 collected over $11,000 more than he had paid over to the Treasurer of the town. Counsel for the company did not before us question the fact that the defalcation amounted to more than the face of the bond; and that, if there was any liability at all, it would amount to $5,000, for which judgment was given.

The main point relied upon, and the one most strongly urged before us by counsel for the defendant company, was the failure of the town corporation to audit or examine the Collector's rolls of the town.

Counsel for the respondent corporation argued that the answers of the Mayor were not embodied in the bond in question sufficiently to comply with the provisions of the Insurance Act, R.S.O. 1897, ch. 203, sec. 144, and cited *Village of London West* v. *London Guarantee and Accident Co.*, 26 O.R. 520, in support of this proposition. We are, however, precluded from giving effect to this argument by the decision of this Court in *Hay* v. *Employers' Liability Assurance Corporation*, 6 O.W.R. 459, by which it was held, under the authority of *Venner* v. *Sun Life Insurance Co.*, 17 S.C.R. 394, and *Jordan* v. *Provincial Provident Institution*, 28 S.C.R. 554, "that the plaintiff's proposal and the statements therein contained are, by reference thereto in the policy, sufficiently incorporated therewith and set out in full therein, within the meaning and requirements of the above section (144), and, therefore, form the basis of and are part of the contract between the parties."

ONT.
S. C.
TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY CO.
Maclaren, J.A.

It is true that in the *Venner* case the statements relied upon were contained in the answers of the applicant for the insurance. Here they are not in the answers of Mattson, who was the applicant, but in those of the Mayor, who answered on behalf of the town corporation the questions put by the company on which the bond was to be based. This brings the case within another decision of this Court, in which the answers were given by the party in whose favour the policy was to be issued, as in the present case, viz., *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.*, 11 O.L.R. 330, in which *Hay* v. *Employers' Liability Assurance Corporation*, above cited, was expressly followed.

It was further argued on behalf of the plaintiffs that, the corporation having passed a by-law appointing the two auditors under sec. 299 of the Municipal Act of 1903, their full duty was performed, and they were not responsible for the acts or omissions of the auditors, who were statutory officers.

It is not necessary now to inquire how far the responsibility of the corporation may possibly extend under the statute; but we have to consider what obligation, if any, arises from the contract based upon the answers given by the Mayor, and how far the corporation may be affected by the information conveyed to the council by the reports made to them by their auditors. . .

Whatever might have been the duties of the auditors and the corporation with respect to the Collector's rolls in case there had been no undertaking regarding them or no duty as between the corporation and the company, I am of opinion that, as a consequence of the promise of the corporation in the answers to the questions put to them that the auditors would examine the rolls yearly, and of the annual statements of the corporation that the books and accounts of Mattson for each year were examined by them from time to time in the regular course of business and found to be correct in every respect, they were in duty bound to do so. It is proved and not denied that these promises and statements were material to the risk.

As already stated, the auditors themselves declare that they did not examine the Collector's rolls, and never even saw them, so that there is no pretence that the promised annual examina-

tion of the rolls by the auditors was ever made. As to the annual certificate of the Collector's books and accounts having been examined from time to time in the regular course of business, it is true to this extent: when the Collector handed in his roll at the end of the year, the collections recorded were added up by the Town Clerk, when he was adding five per cent. to the amounts unpaid, and he compared this with the receipts given by the Treasurer to the Collector, and he found that they substantially agreed.

The roll was then handed back to the Collector for the purpose of his collecting these arrears, and he was never subsequently asked for any statement, nor did any person on behalf of the corporation ever examine these rolls or inquire as to the collection of these arrears. It is in evidence that about two-thirds of the taxes were usually collected during the first year. As to the remaining one-third collected subsequently, no examination was made by any one as to whether the Collector had handed over to the Treasurer the whole of these collections. His defalcations arose from his not handing over the full amount of these subsequent payments.

The fact that neither the auditors nor any other person on behalf of the corporation checked over these subsequent collections no doubt tempted and led the Collector to retain and use these moneys. This neglect was a violation of the promise in the statement on behalf of the corporation that the auditors would examine the rolls yearly. In order to render this examination of any use, it was necessary that the old rolls, as well as the new one, should be examined and checked. The examination of the new roll by the Town Clerk might possibly have served as a substitute for the examination by the auditors, but he never saw or examined the old rolls.

The same may be said as to the statement upon which the annual renewal certificates were issued. That statement was untrue. The "books and accounts" of the Collector were not examined each year by them, as stated. A single book, the Collector's roll for the current year, was all that was examined. It was equally important that the old ones in his possession should be also examined each year, and the fact that this was

ONT.
S.C.
TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY CO.
Maclaren, J.A.

never done gave him the opportunity of concealing his defalcation for two successive years and a portion of a third, until the special audit brought them to light. . . .

I am of opinion, however, that the learned trial Judge erred with respect to the failure of the town corporation to keep the promise made on their behalf by the Mayor in answer to questions 12 (*a*) and (*b*), that the auditors would examine the Collector's rolls yearly. It does not even appear that they informed the auditors that such a promise had been given, although it is surprising that the auditors should have thought that they had properly performed the duties of their office and complied with the requirements of the by-law appointing them, without examining the Collector's rolls, which, it appears, were properly kept, and all payments entered; and a simple comparison of these entries with his receipts from the Treasurer would at once have disclosed any deficiency. Under the facts proved in this case, the examination of the rolls in his possession at the time of the audit in January, 1909, would at once have disclosed a defalcation of $3,941.28 for 1908, and the defalcation of 1909, amounting to the further sum of $7,521.61, would never have occurred. There can be no question that the promise and representations were most material to the risk.

But there is more. The report of the auditors dated the 3rd March, 1909, which was read to the town council and confirmed, clearly shewed that the auditors did not claim to have examined any other books than those of the Treasurer, and it was the duty of the council, under sec. 10 of the Municipal Act, to have seen that these officers duly performed the duties of the office to which they had been appointed. In my opinion, they had by no means, as argued before us, fulfilled their duty by simply passing the statutory by-law naming the officers.

By acquiescing in and confirming the report of the auditors, which shewed that they had not examined the Collector's rolls, they violated the promise given by the Mayor on behalf of the corporation, in the answers that preceded and formed the basis of the bond; and the representations subsequently made by the Mayor and Clerk, in the certificates upon which the annual renewals or continuation certificates were made, were untrue.

ONT.

S. C.

These, as shewn above, were all material to the risk, and, in addition directly contributed to the defalcation in question.

In my opinion, the appeal should be allowed and the plaintiffs' action dismissed with costs.

Maclaren, J.A.

MEREDITH, C.J.O., and HODGINS, J.A., agreed with the judgment of MACLAREN, J.A., each giving reasons in writing.

Meredith, C.J.O. Hodgins, J.A.

MAGEE, J.A., also concurred.

Magee, J.A.

[Appeal to Supreme Court of Canada dismissed, February 8, 1915.]

CITY OF HAMILTON v. TORONTO, HAMILTON & BUFFALO R. CO.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. June 19, 1914.

1. CARRIERS (§ IV A—519)—RAILWAY COMMISSION—QUESTION OF JURISDICTION—POINT OF LAW—STATED CASE.

The Railway Commission of Canada may, of its own motion, submit a stated case for the opinion of the Supreme Court of Canada upon a question of its jurisdiction which in the opinion of the Commission involves a point of law.

2. CARRIERS (§ IV A—519)—RAILWAY COMMISSION—ALTERATIONS IN CONSTRUCTED LINES—RAILWAY ACT, R.S.C. 1906—REQUEST OF RAILWAY COMPANY.

The Railway Commission (Can.) has no power under the Railway Act, R.S.C. 1906, ch. 37, to order deviations, changes or alterations, in a constructed line of railway of which the location has been definitely established, except on the request of the railway company.

Statement

STATED case referred by the Board of Railway Commissioners for Canada under section 55 of the Railway Act, R.S.C. 1906, ch. 37, for the opinion of the Supreme Court of Canada on a question as to its jurisdiction which, in the opinion of the Board, involved a question of law.

The stated case submitted by the Board was as follows:—

"The following case which, in the opinion of the Board, involves questions of law, is stated by the Board for the opinion of the Supreme Court of Canada:—

"1. The Toronto, Hamilton and Buffalo Railway Company was incorporated by Act of the Legislature of the Province of Ontario, ch. 75, 1884, and under that Act was authorized to construct a railway from a point in or near the city of Toronto to a point in or near the city of Hamilton, and thence to some point at or near the International Bridge, or Cantilever Bridge, in the

CAN.

S. C.

CITY OF HAMILTON v. TORONTO, HAMILTON & BUFFALO R. CO.

Statement

Niagara River, and with full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands, if any, lying between the points aforesaid.

"2. By ch. 86 of the statutes of 1891, passed by the Parliament of the Dominion of Canada, the undertaking of the Toronto, Hamilton and Buffalo Railway Company was declared to be a work for the general advantage of Canada, reserving to the company all the powers, rights, immunities, privileges, franchises, and authorities conferred upon it under and by virtue of the above recited Acts of the Legislature of the Province of Ontario.

"3. By section 4 of the federal Act all the provisions of the Railway Act were made to apply to the Toronto, Hamilton and Buffalo Railway Company, in so far as they were applicable to the undertaking, and except to the extent to which they were inconsistent with the provisions of the said Acts of the Legislature of the Province of Ontario.

"4. By-law No. 755, passed by the municipal council of the city of Hamilton on the 25th day of October, 1894, and confirmed by Ontario statute, 58 Viet. 1895, ch. 68, and by Dominion Act, ch. 66, 1895, fixed a definite location of the company's line in the city of Hamilton. The conditions of the by-law were complied with and the line constructed along Hunter street, in the city of Hamilton, in accordance with the provisions of the by-law referred to, and in accordance with the map or plan duly approved under the provisions of the Railway Act.

"5. The present application on behalf of the city is for an order requiring the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway into the city from Hunter street to a location in the north end of the city in common with the Grand Trunk and the Canadian Northern Ontario Railway companies.

"6. The application was heard at the sitting of the Board held in Hamilton on the 10th day of October, 1913, at which counsel representing the city, the Toronto, Hamilton and Buffalo Railway Company, the Canadian Pacific and Grand Trunk Railway Companies, and certain property owners, were

present. Counsel for the Toronto, Hamilton and Buffalo Railway Company contended that the Board was without jurisdiction to make the order applied for.

"7. After hearing argument and reading the submissions filed, and taking time to consider, the Board came to the conclusion that, for the reasons set out in the judgments of the Chief Commissioner and the Assistant Chief Commissioner, it had power, if so advised, to make such an order; and this conclusion was announced to the parties interested.

"8. At the request of counsel for the Toronto, Hamilton and Buffalo Railway Company, who expressed his intention of appealing from this decision, the merits of the application were not gone into, and counsel was asked to proceed to perfect his appeal without delay.

"9. A draft form of order upon which to base an application for leave to appeal was submitted by counsel for the Toronto, Hamilton and Buffalo Railway Company, and order No. 21087, dated December 24th, 1913, issued as a result of this application. The said order No. 21087 is not in terms in the form of the draft order submitted by counsel, and for that reason counsel refuses to perfect his appeal, but raises the objection that the Board is without power to act in the premises.

"10. The only order made by the Board was the order No. 21087, referred to, declaring that it had jurisdiction to entertain the application and to make an order directing the deviation of the line of the Toronto, Hamilton and Buffalo Railway Company within a distance of one mile from its present location. The merits of the case were not gone into.

"11. The city objects to this order, contending that the Board's power to order a diversion in the premises was not limited to a diversion within one mile from the present location of the railway.

"12. The statutes relating to the said company contained in the printed volumes of the statutes of the Parliament of Canada or of the Legislature of the Province of Ontario, the judgments and proceedings herein, shall be deemed to be and shall be read as part of this case.

"13. The questions involved being, in its opinion, questions

CAN.

S. C.

CITY OF HAMILTON v. TORONTO, HAMILTON & BUFFALO R. CO.

Statement

of law, the Board, under section 55 of the Railway Act, may of its own motion state a case in writing for the opinion of the Supreme Court of Canada; and, in pursuance of this power, the questions submitted for determination by the Supreme Court of Canada are as follows:—

(1) Whether, as a matter of law, the Board of Railway Commissioners for Canada has the power, on an application by the city of Hamilton, to make an order directing the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway from its present location in the city of Hamilton to some other location in the said city?

"(2) Whether, if the Board has power to order such diversions, such power is limited to a diversion within one mile from the railway as already constructed?"

The issues raised on the argument in the Supreme Court of Canada are referred to in the opinions of the Judges now reported.

M. K. Cowan, K.C., and *F. R. Waddell*, K.C., for city of Hamilton.

I. F. Hellmuth, K.C., and *J. A. Soule*, for the railway company.

June 19, 1914.

Sir Charles Fitzpatrick, C.J.

THE CHIEF JUSTICE:—I agree with MR. JUSTICE IDINGTON.

Idington, J.

IDINGTON, J.:—The answers to the questions submitted relative to the jurisdiction of the Railway Commissioners of Canada must be chiefly dependent upon whether the legislation contained in 58 & 59 Vict. ch. 66, is to be held a "special Act" within the meaning of that term in the Railway Act.

The applicant passed a by-law No. 755, in 1894, granting a bonus of $225,000 in aid of respondent upon the terms and conditions set out therein and agreed on between said parties.

Part of said terms and conditions thereby imposed was that the railway should pass through the city of Hamilton by a southerly route which is set out with great detail in the specifications forming part of the said by-law. Another clause in the said terms and conditions provides that the said company should build by the 1st September, 1895, and always maintain a first-

class passenger station in a central part of the city of Hamilton and all regular passenger trains on said railway running from or through Brantford to Toronto, or from Toronto to or through or from Brantford to Welland, or Welland to Brantford, should stop at such principal passenger station of the company in Hamilton, and that all regular passenger trains running through Hamilton should stop at such station, and should build and maintain a second passenger station within said city at or near Locke street south of Main street.

All this was declared by said Act confirming said by-law to be binding upon the parties to this litigation and respondent seems to have conformed to the said terms and conditions.

It is proposed by the applicant now to change the location of all this part of the line so definitely exacted by the terms of said by-law, so validated by said Act, and direct the line of railway to be so "diverted, changed or altered" that the railway shall run, instead of on the routes so adopted, along the Grand Trunk Railway route on the north side of the city where that road and station existed long before the existence of the respondent.

I think said legislation must be held to be "a special Act" within the meaning of that term as interpreted in section 2, subsection 28, of the Railway Act, and applied by giving thereto the effect designed by section 3 of said Act, which is as follows:—

"3. This Act shall, subject to the provisions thereof, be construed as incorporate with the special Act, and, unless otherwise expressly provided in this Act, where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the special Act shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of this Act: 3 Edw. VII. ch. 58, secs. 3 and 5."

It seems to me that the subject-matter of this special Act involves the definite and permanent location of the railway at the place in question and that "the provisions of said special Act" must, in so far as is necessary to give effect to such special Act, be taken to override the provisions of the Railway Act relative to the location of railways or changes in regard thereto.

Section 6 of the Railway Act which may be applicable to the

CAN.
S. C.
CITY OF HAMILTON v. TORONTO, HAMILTON & BUFFALO R. CO.
Idington, J.

railway in question does not restrict the operation of this section three, which may be read therewith.

The case of *Canadian Pacific Ry. Co.* v. *City of Toronto* (Toronto Viaduct Case), [1911] A.C. 461, 12 Can. Ry. Cas. 378, relied upon by applicant has hardly any resemblance to this case. There was presented in that case a tripartite agreement validated by Parliament which possibly covered a small part of the field of public safety there in question but by no means that which was involved in applying section 238. There the special Act covered only a small corner of the subject-matter of public safety. Here the special Act covers absolutely the whole question of location which is the subject-matter involved.

It is made clear by the judgment of the Chief Commissioner that everything relative to public safety is eliminated from the question. And nothing is left but the subject-matter of location of the railway which seems to me identical with that determined by the by-law and contract and conditions made permanently binding by the special Act. No one has ventured to distinguish the subject-matter of the special Act, from that of section 167 relied upon, by setting up that the subject-matter in the latter is not location, but change of location. If such a suggestion occurs to any one, I may repeat what I have just pointed out that this special Act was by its terms intended to be perpetual, and thus overrides anything providing for change of location and leaves the section 167 to operate where there can be no such conflict.

It is suggested by the judgment of the Chief Commissioner that as this special Act, by section 8, provides that nothing in the Act contained shall affect any rights or powers conferred by the Railway Act on the Railway Committee of the Privy Council, to which the Board may be considered the statutory successor, therefore, this power now invoked has been excepted from the operation of the special Act.

When we turn to the then existing Railway Act and consider the provisions thereof relative to the rights or powers of the then Railway Committee, the only semblance of any such "right or power" therein, such as now appears in section 167, is to be found in section 11 of the Railway Act of 1888, sub-section (*b*), "changes in location for lessening a curve, reducing

a gradient or benefiting the railway or for other purposes of public advantage."

I cannot think this provision should ever have been resorted to in way of justifying the Railway Committee in directing such a change as now contemplated.

And it may be observed that the restriction, in said section 8, upon the operative effect of the rest of the special Act can only be read in light of the then existing "rights and powers of the Railway Committee."

Later extensions of powers to the railway company or even to the committee, of which I can find none bearing hereon, could not affect the question presented.

Moreover, the right of changing location within a lateral mile's limit, originally rested with the railway company and the restrictions now existent are results of later enactments.

It is not necessary that I should here trace out in detail all these changes by means of which the curious evolution has taken place whereby the present jurisdiction of the Board was first given in way of restriction upon the railway company and then it was given the power of its own motion to direct that to be done which the railway company had got power to do with its sanction.

A study of this legislative development does not help in way of finding jurisdiction in the Board and for doing what it is now alleged it can do relative to old established things, including contracts, and the correlative rights, duties and obligations arising therefrom.

I conclude upon the foregoing grounds alone that there is no jurisdiction such as claimed.

On the narrower ground of the actual meaning of section 167 as it stands, and assuming no special Act in the way, I should doubt very much indeed if any such change as involved in doing what is contemplated was ever the purpose of the section.

There are a great many pieces of parallel railway lines lying within a mile or a few miles of each other which public opinion, if enlightened and well directed, might well have prevented the building of and saved millions of wasted capital entailed in such building. Economic pressure may ultimately eliminate much of this duplication.

CAN.

S. C.

CITY OF HAMILTON v. TORONTO, HAMILTON & BUFFALO R. CO.

Idington, J.

If we should answer the first question submitted in the affirmative and the second in the negative, I can conceive of the Board being urged to use that measure of power, so implied, and its other extensive powers to ameliorate the conditions of things brought about by such improvidence. But should any Court say, looking at the purview of the provisions creating and empowering the Board as provided by this Railway Act in Canada, that such an attempt by the Board would properly fall within its jurisdiction?

I put this illustration of what seems to me the logical and perhaps not undesirable outcome of the answers applicant seeks herein to the questions submitted in order to test the validity of the argument that rests upon a reading only of the two or three sections referred to, without looking at their place and purpose in the Act as a whole. Tried by such a test I do not think section 167 was ever by its framers dreamt of as going so far.

I also desire to illustrate thereby the view I take of the right now challenegd in argument to submit these questions.

I have no doubt regarding the right of the Board under the 55th section of the Railway Act to submit as a question of law a case involving only a question of its jurisdiction.

In some cases it may conceivably be most expedient to do so before involving a costly investigation that may do no good and indeed do much harm.

At the same time the concrete case might often bring into their true relation many of the facts, circumstances and considerations that need sometimes to be weighed in order to apprehend the true bearing of the question of jurisdiction.

I should answer the first question in the negative and in doing so the second question needs no answer.

Duff, J.

DUFF, J., was of opinion that the first question should be answered in the negative and the second question did not need to be answered.

Anglin, J. (dissenting)

ANGLIN, J. (dissenting), was of opinion that the first question should be answered in the affirmative and the second in the negative.

Brodeur, J.

BRODEUR, J., for reasons given in writing was of opinion

that the first question submitted should be answered in the negative and that it was not necessary to answer the second question. *Judgment accordingly.*

CAN.
S.C.
Brodeur, J.

WILLS v. CENTRAL R. CO. OF CANADA.

QUE.
S. C.

Quebec Superior Court, Beaudin, J. December 9, 1914.

1. COSTS (§ I C—2)—APPEAL—PETITION TO REVISE—DELAY PENDING APPEAL—JUSTIFICATION.

The party ordered to pay costs under a judgment of the Court of King's Bench, Que. (appeal side), is justified in delaying his petition to revise the plaintiff's bill of costs in the Superior Court until an appeal from the King's Bench, Que., to the Privy Council on the merits has been disposed of, particularly where the plaintiffs had not tried to execute the judgment in their favour until after the Privy Council decision affirming same.

[*Wills* v. *Central R. Co.*, 19 D.L.R. 174, referred to.]

PETITION for the revision of plaintiff's bill of costs in the Superior Court. Statement

Petition granted.

Cook & Magee, for plaintiffs.

McLennan & Weldon, for defendant.

BEAUDIN, J.:—Considering that the appeal of the defendant to the Court of King's Bench from the judgment of the Superior Court and the further appeal of the defendant to the Privy Council justified the defendant to wait until the case was finally disposed of, the more so as the plaintiffs did not try to execute the judgment in their favour until after the Privy Council had finally confirmed the judgment of the Court of Appeal; Beaudin, J.

Considering that the context of the judgment of the Court of King's Bench shews that the only costs that defendant was condemned to pay were those incurred on the amount of the money condemnation, to wit $2,373.20, that it is evident that the Court could not intend to give costs on the injunction, which by the same judgment was quashed; that the same reasoning applies to the additional fee of $250 charged in the bill of costs:—

Doth grant the petition of defendant to revise said bill of costs, according to its conclusions striking off the items therein enumerated with costs of petition against plaintiffs.

MAN.

K. B.

BRITISH AMERICAN ELEVATOR CO. v. BANK OF B.N.A.

Manitoba King's Bench, Galt, J. July 14, 1914.

1. TRUSTS (§ II B—47)—RIGHTS, POWERS AND DUTIES—MANAGEMENT OF TRUST—NON-COMPLIANCE WITH TERMS—EVIDENCE—ADMISSIBILITY.

It is not open to a trustee, or to one acting knowingly in conjunction with him, where there has been a breach of trust and loss has followed, to tender evidence that if he had strictly followed the directions of the trust an equal or a greater loss might have taken place.

2. BANKS (§ IV A 3—63)—BANKING—PAYMENT—CHECK OF FIDUCIARY—TRUSTEE.

If a bank has a reasonable suspicion that money drawn from the trust account by the trustee is being applied in breach of trust, and if the bank is going to derive a benefit from the money being transferred out of the trust account, and intends and designs that it should derive a benefit from it, then the bank is not entitled to honour the cheque drawn upon the trust account without some further inquiry.

[*Bridgman* v. *Gill*, 24 Beav. 302, and *Coleman* v. *Bucks, etc., Bank*, [1897] 2 Ch. 243, applied.]

3. TRUSTS (§ III—60)—TRUSTEES—RIGHTS OF CESTUI QUE TRUST—ACCOUNTING TO.

If a trustee or person acting in conjunction with a trustee keep the trust money in his hands, meaning to appropriate it, or even to use it temporarily only, the actual loss ceases to be the measure of his responsibility; the beneficiary is entitled to claim the repayment of his money.

[*Re Emmet*, 17 Ch.D. 142, applied.]

ACTION for return of moneys misappropriated by bank.

H. Phillipps, and *C. S. A. Rogers*, for plaintiffs.

A. B. Hudson and *A. C. Ferguson*, for defendants.

Galt, J.

GALT, J.:—The plaintiffs are a corporation carrying on the general business of grain dealers and elevator owners within the provinces of Manitoba and Saskatchewan, and they own and operate some 90 or more elevators in connection with their business. Each elevator is placed in charge of an agent or manager, part of whose business consists in purchasing grain from farmers and paying for it, either in cash or by tickets which may readily be cashed. The questions arising in this action relate to the plaintiffs' elevator at Waldheim in the province of Saskatchewan which was placed in charge of one George E. Youngberg. . . .

Youngberg was a customer of the defendant bank at Rosthern. He was also in partnership with one Vassie under the name of Youngberg & Vassie, doing business as general merchants at Waldheim, and the firm were also customers of the bank

at Rosthern. The arrangement contemplated by the plaintiff, was that the bank should furnish currency to Youngberg at Waldheim for the purpose of purchasing grain. From time to time during the winter of 1911 and 1912 and the spring Youngberg's personal account and also Youngberg & Vassie's firm account at the Rosthern branch were allowed to be overdrawn.

The arrangement which the plaintiffs had made with the bank to furnish currency at the Waldheim elevator was only partially carried out. A certain amount of currency was furnished from time to time and the drafts from the manager at Rosthern upon the plaintiffs at Winnipeg (with express charges added) were duly honoured by the plaintiffs.

It appears from the evidence that Youngberg occasionally made drafts upon the plaintiffs in sums ranging from $500 to $2,000 and instead of taking the cash, he deposited the amounts, sometimes to his own personal credit and sometimes to the credit of Youngberg & Vassie. Rostrup, the defendants' manager at Rosthern, did not fail to notice this conduct on the part of Youngberg, and he realized that Youngberg could always resort to this method of obtaining funds from the plaintiffs for his own purposes. And Rostrup took advantage of the situation accordingly. . . .

When the head office of the bank complained of the overdrafts allowed to Youngberg & Vassie, Rostrup insisted upon Youngberg reducing the overdrafts, which was accomplished by Youngberg signing and delivering to Rostrup drafts upon the plaintiffs, and by Rostrup depositing the proceeds to the credit of Youngberg or his firm, as occasion might arise. The amounts of these drafts were all paid by the plaintiffs, and, so far as the evidence goes, the amounts were chequed out by Youngberg in payment for farming implements and all sorts of stuff other than grain. One cheque of very small amount was in payment for grain, but whether it was grain for the plaintiffs or not does not appear.

It is impossible to believe that Mr. McEachern, or the head office officials of the bank had any actual knowledge of Rostrup's dealings; but the defendants cannot claim immunity on this ground.

MAN.

K. B.

BRITISH AMERICAN ELEVATOR CO. v. BANK OF B.N.A.

Galt, J.

[Reference to *Coleman* v. *Bucks & Oxon Union Bank*, [1897] 2 Ch. 243, 66 L.J. Ch. 564; *Bridgman* v. *Gill*, 24 Beav. 302, 305.]

The defendants' local manager admits complete knowledge of the breaches of trust in question, and he in fact instigated many of them for the express benefit of the defendant bank.

[Reference to Underhill, Law of Trusts, 7th ed. p. 464. *Re Emmet's Estate*, 17 Ch. D. 142, at 150.]

I think that when once it has been shewn that the defendants, through their manager at Rosthern, joined with Youngberg in his breaches of trust, and received, on behalf of the bank, the benefit thereof to the extent set forth in the plaintiffs' statement of claim, the plaintiff is under no obligation to trace his moneys further, but is at liberty to call upon the defendant to return the moneys with interest from the dates of their misappropriation.

I find, therefore, that the plaintiffs are entitled to judgment for $13,528.10, together with interest as above claimed, and costs.

July 16, 1914.

GALT, J.:—An application has been made to me on behalf of the plaintiffs to remove the statutory bar as regards the costs of action which have been allowed by my judgment. I directed notice of this application to be given to the defendants' solicitors and counsel, but, owing to other engagements, they appear to be unable to attend before me this morning, and I am obliged to leave town to-day. I was under the impression that the admissions made by the defendants' manager at Rosthern were so clear that the plaintiffs might well have moved for judgment without the necessity of going to trial. Mr. Phillipps now points out that the nature of the defences raised by the defendants was such that any motion for judgment prior to trial would surely have been refused.

It was necessary to examine the defendants' manager for discovery at Rosthern, because the books and documents of the defendants were there, and it was very necessary for counsel who attended the examination to carefully inspect many of the entries before he could even decide whether or not to put them in evidence. The examination was very ably conducted, so

much so that the depositions of the manager at Rosthern comprised the whole of the plaintiffs' case. It was necessary for the plaintiffs to take a special stenographer to Rosthern, as none could have been found there. The examination lasted two days. Under our tariff of costs it appears that the most which could be taxed by the plaintiffs on this very important examination is $3 per hour, and that no allowance would be made by way of disbursements or otherwise, for counsel's loss of time in attending the examination. Some 173 documents were produced by the plaintiffs and 181 by the defendants, and over 100 of these were put in evidence at the trial, which lasted 2½ days. The defendants' liability was strenuously and ably contested at the trial and no time was lost. Under the above circumstances, I think that this was a case of special difficulty and that it would be unfair to the plaintiffs to impose such a heavy burden of costs upon them as they would have to bear unless the statutory limit were removed. For these reasons I remove the statutory limit.

Judgment for plaintiff.

MACKAY v. GRAND TRUNK R. CO.

Quebec Superior Court, Charbonneau, J. June 12, 1914.

1. Arbitration (§ IV—40)—Railway company—Lands taken possession of—Petitioner—Railway Act, Can.

A railway company cannot be ordered to proceed to arbitration under the Railway Act, Can., in respect of lands already taken possession of by it and which the petitioner claims.

Statement

Petition for arbitration.

Surveyer, Ogden & Mariotti, for petitioner.

H. Jodoin, K.C., for respondent.

Charbonneau, J.

Charbonneau, J.:—The Court having heard the parties by their counsel upon petition filed on June 11, 1914, by petitioner asking that the respondent be ordered forthwith to proceed to arbitration as provided by the Railway Act, etc., and having examined the proceedings and deliberated:—

Considering that the conclusions now prayed for by the petitioner cannot be taken under the Railway Act, the proceedings in expropriation being optional to the company if it requires any land under said Railway Act;

Considering that if the company has taken possession of any land without previous expropriation or caused any damage for which it refuses indemnity, the remedy cannot be by way of the petition now presented.

Doth dismiss said petition with costs.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

B. C.

S. C.

WILSON v. B.C. REFINING CO.

British Columbia Supreme Court, Morrison, J. May 8, 1914.

PLEADING (§ III A—300)—*Pleas and answers—Absolute right to defend—Test for unconditional leave.*]—Application for leave to defend under B.C. Rule 9*b*.

Head, for plaintiff.

W. C. Brown, for defendant.

MORRISON, J.:—The plaintiff applied for judgment under O. 14, rule 1*a*. The defendant shewed cause, and was given unconditional leave to defend. The application extended over several days, and was vigorously pressed and even more vigorously opposed. My mind was directed especially as to whether I should let in the defendant unconditionally to defend, and having been finally satisfied as to that, I simply so stated. Considering the other aspects as of minor importance, I did not delay other numerous applications on the Chamber list by specifically dealing with the form of order. Now, upon settlement of the order, the defendant invokes rule 9 (*b*), and I think he is justified in so doing: *Warner* v. *Bowlby* (1893), 9 T.L.R. 13; especially so having regard to the case of *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T. 262, according to which the defendant is entitled to unconditional leave to defend whenever he alleges facts which, however improbable or suspicious, would, if proved, be a good defence in law to the claim.

Rule 9 gives the Chamber Judge, to whom only it applies, a wide discretion as to costs. The trial Judge cannot interfere with the exercise of that discretion as to costs. In view of the knowledge of the grounds upon which the defendant based his defence placed before the plaintiff, I am of opinion that this matter is of that class of cases contemplated by the rule, and that plaintiff should have his costs as asked for.

Application granted.

B. C.
S. C.

HEALMAN v. DAVID.

British Columbia Supreme Court, Murphy, J. September 8, 1914.

[*Periard* v. *Bergeron*, 2 D.L.R. 293, 9 D.L.R. 537, referred to.]

CONTRACTS (§ V A—379)—*Repudiation*—"*Invoice price*"—*Meaning of.*]—Action to enforce a sale of an insolvent stock at "invoice prices."

Kenneth McRae (*Ridley, McRae & Tobin*), for plaintiff.

Sir Charles Hibbert Tupper, for defendant.

MURPHY, J.:—On the evidence I cannot find it proven that it was understood between plaintiff and defendant that "invoice price" was to mean the prices set out in the stock book, ex. 1.

If, then, that term under the circumstances of the contract is unambiguous, the defendant cannot be allowed to escape from his bargain by alleging that he understood it in some other sense than its real and true meaning: *Eastes* v. *Russ* (1913), 83 L.J.Ch. 329.

When the facts are borne in mind, it seems clear to me that "invoice price" in this contract plainly means the prices charged the insolvent when he bought the goods. This was the view taken by all the Judges, unless I misunderstand their judgments, in *Periard* v. *Bergeron* (1912), 17 B.C.R. 339, 2 D.L.R. 293, 47 Can. S.C.R. 289, 9 D.L.R. 537. I would respectfully refer in particular to the language of Irving, J.A., and of Idington, J., in that case.

I can see nothing in *Plank* v. *Gavila* (1858), 3 C.B.N.S. 807, to conflict with this. Again, *Periard* v. *Bergeron*, *supra*, shews there would have been no difficulty in carrying out the contract if this view had been adopted. David's evidence shews that if his contention be accepted there would really be no contract at all, since he admitted if there were broken lines (of which under the circumstances there were bound to be many) or damaged goods the prices of ex. 1 were not to hold, and there is no suggestion anywhere in the contract as to what was then to be done. This was an ordinary commercial transaction, and it was certainly intended to effect a sale of the insolvent stock. In the result the plaintiff must succeed. I do not, however, think the issue as to damages was sufficiently thrashed out at the trial. There will be a reference to the registrar to determine same.

Reference ordered.

B. C.

S. C.

MERRICK v. LANTZ.

British Columbia Supreme Court, Murphy, J. October 9, 1914.

VENDOR AND PURCHASER (§ I E—27)—*Fraud—Vendor estopped by acquiescence in—Specific performance against vendor.*]—Action against a vendor for specific performance of an agreement of sale.

Bourne & McDonald, for plaintiffs.

S. Livingstone, for defendants.

MURPHY, J.:—I find that Merrick was merely the *alter ego* of the Mercantile Trust Co. I find this company were the agents of the defendants in making the sale. I find that if not guilty of actual fraud they were at any rate guilty of such a breach of the duty they owed to defendants as such agents as would disentitle them if they were plaintiffs herein, and therefore Merrick, to a decree of specific performance if the case stopped at that. I find they never purchased the property, and there is no proof that they made any undue profit out of it, but they did conceal from defendants who the purchaser was—in fact, made the false statement that they did not know who was buying, when they knew, if not who the real purchasers were, at least that Burr was bidding to them for the property. It is not proven that at the time they carried out the deal they knew that Burr's clients were paying a higher price, but they did know this very shortly after. Such conduct would, I think, clearly prevent any decree for specific performance in their favour.

But I find that defendants, through Noble, ascertained the full facts, and thereafter insisted on the real purchasers paying the purchase price they had fixed to the Mercantile Trust Co., and that said defendants actually received from such purchasers the second and third payments, and were quite willing that title should go to them through Merrick. I find a tender of the last payment and of a proper deed was duly made before action brought. Under these circumstances I think plaintiffs are entilted to succeed. It was strenuously argued that defendants did not have full knowledge of all the facts when they did the acts referred to. A careful perusal of Noble's evidence convinces me that they did, and that Lantz himself had this knowledge. I come to this conclusion the more readily inasmuch as Lantz was not called.

Decree granted with costs. *Decree granted.*

HAMILTON v. HARVEY.

B. C.
S. C.

British Columbia Supreme Court, Murphy, J. October 26, 1914.

BILLS AND NOTES (§ VI C—160)—*Defences—Counterclaim based on fraud—Adding parties—Promissory note.*]—Action on a promissory note, with application to add third parties.

E. P. Davis, K.C., for plaintiff.

S. S. Taylor, K.C., for defendant.

MURPHY, J.:—Towards the end of the trial, application was made to amend the counterclaim by adding the other members of the Coast Development Syndicate and new causes of action based on breach of contract and breach of warranty. It was argued that these causes of action were virtually included in the pleadings as they stood. I have carefully read the counterclaim, and I think it sets up solely an action for deceit. This being my view, I consider it would be improper to grant the amendments sought. The action was fought out on the fraud issue, at any rate so far as plaintiffs were concerned, and a trial on the other issues would obviously follow other lines. Plaintiffs would be entitled to examination for discovery of the proposed new plaintiffs by way of counterclaim, and would equally obviously have to be prepared with evidence by way of defence not necessary to meet the deceit issue. I am of opinion I should not grant the applications.

As to the defence of fraud and the counterclaim based thereon, I find them not proven. I credit Hamilton's statement that he delivered the invoices either to Patterson or to Tait in Patterson's presence. As to the various statements made by Hamilton in reference to the machinery being in good second-hand repair, as to its cost to the Athabasca Syndicate, and as to its boring capacity, I find the first two were not proven to be incorrect; but the third was, but I find that all of them and all other statements made by Hamilton were made in good faith. As I therefore expressly find no fraud on Hamilton's part, and as, admittedly, innocent misrepresentation could not, in the circumstances of this case, be a ground either of rescission or damages, there will be judgment for the plaintiffs on the note, and the counterclaim will be dismissed.

Judgment for plaintiffs.

B. C.

S. C.

CAMERON v. CARSE.

British Columbia Supreme Court, Murphy, J. October 9, 1914.

COSTS (§ II—50)—*Unnecessary proceedings—Successful party's misconduct—Effect on apportionment.*]—Application by successful party for costs of the action, where his proceedings were in the circumstances unnecessary.

M. A. Macdonald, for plaintiffs.

C. B. Macneill, K.C., for defendant.

MURPHY, J.:—The question of partnership having been put in issue, and the plaintiffs having succeeded as to that, they would ordinarily be entitled to the general costs of the action. But, under the special circumstances here, I think I should exercise my discretion and refuse them costs for what I consider good cause. Defendant Carse had tendered to solicitors acting for plaintiffs before action brought a declaration admitting the partnership in the identical terms found by me to be the true terms thereof. These negotiations were not conducted, so far as appears, without prejudice, and therefore plaintiffs knew, or ought to have known, that what I found to be the true bargain was admitted by defendants and could be proven in Court. It is true that, through apparently an oversight, this document was not produced on discovery, and that this action was carried on by a different firm of solicitors who had no knowledge of its existence. But I take it I should have regard, not to the solicitors' knowledge, but to that of the parties. This, however, in itself, would not, I think, constitute good cause. In addition, Cameron, who acted throughout for his co-plaintiffs, produced at the trial alleged minutes taken at the time of a certain meeting, and made such minutes a basis of entries in the partnership books to bolster up a set of facts which I found to be untrue. No such meeting alleged took place at all. What did occur was a meeting not of the company but of the partners, and the vital fact verified by such minutes was, as stated above, found by me to be untrue, and was the real subject of this litigation. Under all the circumstances, therefore, I think I should order that defendant should have the costs of the issues upon which he succeeded, and that plaintiffs should have no costs as between party and party.

Application refused.

B. C.

S.C.

ORIENTAL TRANSFER CO. v. WINTON MOTOR CAR CO.

British Columbia Supreme Court, Murphy, J. September 25, 1914.

SALE (§ II B—30)—*By description—"New 1912 cars"—Fraud.*]—Action against the alleged seller of motor cars of a certain class, fraud being set up against the defendant.

Livingstone, Garret & King, for plaintiff.

S. S. Taylor, K.C., for defendants.

MURPHY, J.:—The plaintiffs rest their case on fraud. It is contended in the first place that defendants agreed to sell plaintiffs new 1912 cars, whereas in fact they supplied rebuilt 1910 cars. I cannot find this contention proven. It is contrary to all the documentary evidence, and it is, I think, intrinsically improbable. The committee who represented the plaintiffs to make the purchase were experienced business men, though of course not skilled in motor car construction. They can both read English. They visited several garages before they made the bargain, made inquiries, and obtained catalogues. They inquired of their solicitor as to the standing of the defendant company. Under these circumstances they could hardly have failed to learn—if they did not already know—that new cars such as they wanted could not be bought for the price asked by the defendant company for these cars. On this phase I accept the evidence of Lefevre.

Next it is said the defendants corrupted Levy, who, it is contended, was plaintiffs' agent to make the purchase. Levy, insofar as the facts were brought out before me, does not appear in a creditable light. I do not think, however, it is proven he was plaintiffs' agent. If he were, that fact was not known by defendants. They regarded him as a "curbstone automobile broker," and as such there was no reason why he should not be paid a commission. I find the allegation that exhibit 3 was given by Lefevre to Lei Kai Quong not proven. I find there is no evidence on the record justifying me in holding that it was written by anyone having authority to bind the defendants. In fact, it is not proven who wrote it. The action is dismissed. Judgment for defendant on counterclaim.

Action dismissed; counterclaim allowed.

B. C.

S. C.

COLUMBIA BITULITHIC CO. v. VANCOUVER LUMBER CO.

British Columbia Supreme Court, Murphy, J. September 28, 1914.

[*Union Bank* v. *McKillop*, 16 D.L.R. 701, and *Carter* v. *Columbia Bitulithic Co.*, 18 D.L.R. 520, referred to.]

CORPORATIONS AND COMPANIES (§ IV D—77*a*)—*Rights and powers—Engaging in business foreign to incorporation—Chattel mortgage—Affidavit of good faith.*]—Action involving the corporate power of a company to make enormous loans not incidental to its corporate business.

Bodwell, K.C., for plaintiffs.

E. P. Davis, K.C., for defendants.

MURPHY, J.:—I feel bound by the decision in *Carter* v. *Columbia Bitulithic Co.*, 18 D.L.R. 520, to hold the transaction out of which the chattel mortgage arose to have been *ultra vires* of the plaintiff company. They had no more authority under their corporate powers to make enormous loans than they had to guarantee debts, and I cannot see how the one act can be held any more incidental to their business than the other. The reason for the reluctance frequently expressed to imply a power in a company to become a surety is given in *Union Bank* v. *McKillop*, 16 D.L.R. 701 at 709, 30 O.L.R. 87 at 99, by Hodgins, J.A., delivering the unanimous judgment of the Court of Appeal, as being

> because the result of a guarantee against the debts of another company is to put the assets of the guaranteeing company in peril for liabilities incurred in the carrying on of a business in which the guarantor is not directly interested and whose engagements it has no means of controlling.

By the mortgage in question here an amount of cash assets equal to the total authorised capital of the plaintiff company was placed in the hands of a company in which it was no more directly interested than was the McKillop company in the case cited in the West Lorne Wagon Co.—that company holding some shares in the wagon company just as plaintiff company here does in the Scott-Goldie Company, and just as clearly the plaintiff company had no means of controlling the engagements of the Scott-Goldie Company. If *ultra vires* the transaction can give rise to no debt—legal or equitable: *Re Birkbeck Permanent Benefit Building Soc.*, 81 L.J.Ch. 769, affirmed as to this in *Sinclair* v. *Brougham*, [1914] A.C. 398. These cases shew that equitable rights arise from *ultra vires* contracts, but evidence on these was not led, and, as I understand, the action could not lie. The whole basis of

B. C.
S. C.

these proceedings is contract, and according to the authorities cited no contract can exist. Securities given to cover an *ultra vires* contract cannot be retained as a matter of contract, although they may be effective when equities are shewn, to the extent of such equities: *Cunliffe Brooks* v. *Blackburn Building Soc.*, 9 App. Cas. 857, affirming the decision of the Court of Appeal, 22 Ch.D. 61.

No such equities were proven before me. Further, if there is no legal or equitable debt, how can this chattel mortgage be held good as against creditors, since, putting it on its highest ground, it is intended as a security for a debt, which must be verified by an affidavit of *bona fides*. When the Bills of Sale Act requires that with respect to such chattel mortgages the affiant must state "that the grantor is justly and truly indebted to the grantee," this statement, I think, must mean a debt which is either legal or equitable. If so, the requirements of the Bills of Sale Act have not in reality been complied with, and could not be, and the chattel mortgage is void against the defendants. The issue is decided in favour of defendants.

Judgment for defendants.

[Leave to B.C. Court of Appeal dismissed, Feb. 26, 1915.]

Re FLORENCE CASTLE

British Columbia Supreme Court, Murphy, J. October 28, 1914.

INFANTS (§ I C—11)—*Custody—Parent's right to—Best interests of child.*]—Application for custody of an infant.

Arthur Leighton, for applicant.

Sergeant, for defendant.

MURPHY, J.:—I am not convinced by the argument submitted that Mrs. Castle has the rights of a parent. That being so, I do not feel compelled to hand the child over to her regardless of the child's interest. In my opinion, for the present at any rate, it is better for the child to remain where she is. If, in the future, circumstances change, this decision is not to be a bar to Mrs. Castle renewing her application. I make no order committing the child to the Lee's custody. I merely refuse the writ, with leave to applicant to renew her application under changed cir cumstances—should such come about and she be so advised

Application refused; leave to renew.

B. C.

S. C.

SUTTIE v. PELLETIER.

British Columbia Supreme Court, Macdonald, J. May 18, 1914.

JUDGMENT (§ VII A—271)—*Form and substance—Relief against—Judgment debtor's right to set-off, how limited.*]—Application by a judgment debtor for relief against the judgment setting up a right to offset an alleged claim as chattel mortgagee against the judgment creditor.

C. M. Woodworth, for plaintiff.

Henderson, Tulk & Bray, for defendants.

MACDONALD, J.:—This is an action for damages arising out of the seizure of the plaintiff's goods by the defendants under a chattel mortgage. I gave judgment in favour of the plaintiff for $600 damages, and the question as to whether such amount should be offset against the chattel mortgage was reserved.

A number of authorities have been submitted in support of the plaintiff's contention that such set-off should be allowed. I do not think they are in point, nor are the facts similar to those in the present case. This action arose out of an unlawful seizure, and, the judgment being for damages, I do not think that, on principle or under authority, it should be a part of such judgment that the amount so recovered is to be set off against the amount due or to accrue due under the chattel mortgage. It was only through the evidence adduced in support of the action that the chattel mortgage came before the Court for consideration. Upon judgment herein being entered, the plaintiff will be at liberty to take such steps, by equitable execution or otherwise, as she may be advised, to secure payment out of the assets of the defendants.

Judgment for plaintiff; defendants' application refused.

BEAVIS v. STEWART.

British Columbia Supreme Court, Murphy, J. September 10, 1914.

[*Temple* v. *North Vancouver*, 13 D.L.R. 492, referred to.]

TAXES (§ III G—150)—*Tax sale—Right to redeem—Notice—Limitation—Land Registry Act.*]—Action to set aside a sale to a tax purchaser.

B. C.

S. C.

Ritchie, K.C., for plaintiff.
Bodwell & Lawson, for defendant.

MURPHY, J.:—As I understand the decision *Temple* v. *North Vancouver*, 13 D.L.R. 492, if the provisions of sec. 3 of the Land Registry Act Amendment Act, 1901, have been duly carried out, the plaintiff cannot maintain this action on the first branch thereof. Steps were taken under that section, and the defendant obtained a certificate of title in consequence. It is objected, first, that there is no proper proof of what was done before the registrar. I think this fails. The originals or certified copies of the papers used before him are filed as exhibits. What better proof could be given? Then it is objected there was no service of notice on Nelson. The Act empowers a Judge to order substitutional service, and such an order was made here and an affidavit is produced, which was used before the Registrar, shewing the terms of the order were complied with. It is objected the order was improperly obtained. Even if it were, it is good until set aside: *Brigman* v. *McKenzie*, 6 B.C.R. 56.

Finally, it is said there is no evidence that the registrar satisfied himself that the sale was fairly and openly conducted. As to this, I think the maxim *omnia praesumuntur rite esse acta* applies, at any rate to the extent of making out a *primâ facie* case. If so, the only ground put forward as shewing that the sale was not fairly and openly conducted is that the collector acted both as auctioneer and as agent for the defendant to buy the property. That appears to be much less objectionable than the method pursued in *Temple* v. *North Vancouver*, *supra*, yet the sale was there upheld.

As to the conclusion that the defendant, having admittedly purchased to protect her interest as mortgagee, she must be held to have done so for the joint benefit of the mortgagor and herself, that, I think, is contrary to the decision in *Shaw* v. *Bunny*, 55 E.R. 460, 46 E.R. 456, when, as here, there is no evidence that the mortgagee had gained any advantage in buying by virtue of her position as such.

The action is dismissed.

Action dismissed.

ONT.
S. C.

TORONTO ELECTRIC LIGHT CO. v. CITY OF TORONTO.

Ontario Supreme Court, Middleton, J. May 14, 1914.

MUNICIPAL CORPORATIONS (§ II F1—171)—*Electric light—Erection of poles—Limits of municipality—Territory subsequently added—Ambiguity—Intention.*]—Action to restrain the defendant, the Municipal Corporation of the City of Toronto, from removing the plaintiff company's poles from certain city streets.

I. F. Hellmuth, K.C., and *A. W. Anglin*, K.C., for the plaintiff company.

G. R. Geary, K.C., and *C. M. Colquhoun*, K.C., for the defendant corporation.

MIDDLETON, J.:—Assuming that the municipality in 1883 gave the necessary consent, is this consent operative beyond the then limits of the city so as to render lawful the erection of poles in territory which has been added to the city between 1883 and the present time . . . what was required was the assent of the municipality to the operation by the company within the civic area. That consent, once given, I think applies not only to the area of the city, as it then was, but to all territory which might be added and which would come within the civic jurisdiction.

There was nothing in the circumstances to indicate that the municipal consent was not a consent operative co-extensively with its legislative jurisdiction. It could never have been contemplated that when a consent was given in general terms, as the statute requires, upon each accession of new territory a further agreement or consent should be had. Rather, the intention was that the company should have the right to supply electricity, if it chose, anywhere within the city limits as they might from time to time be. Again, if the term is ambiguous, the parties have shewn their intention by their conduct; for, since the new territory has been added under the long series of agreements the company has supplied light throughout the entire territory, not only to individual citizens, but for street lighting.

I think the injunction sought must be awarded, and that, if the claim for damages is insisted upon, there should be a reference to the Master to ascertain the amount, unless some agreement can be made.

Costs should follow the event.

OSKEY v. CITY OF KINGSTON.

ONT.
S. C.

Ontario Supreme Court, Britton, J. November 20, 1914.

ALIENS (§ III—16)—*Nation at war with Great Britain—Right of subject to bring action for damages.*]—Action for damages.

A. B. Cunningham, for plaintiffs.

J. L. Whiting, K.C., and *D. A. Givens*, for the defendant, city corporation

BRITTON, J.:—Held, that a workman's widow and children although of a nation with which Great Britain is at war, so long as they reside in Ontario and do not contravene the regulations contained in the Proclamation of August 13, 1914 (Can.) are entitled notwithstanding their status as alien enemies to proceed with their action instituted before the declaration of war, seeking to recover damages under Lord Campbell's Act.

Judgment for plaintiffs.

COUTURE v. LEGACE.

QUE.
S. C.

Quebec Superior Court, Hutchinson, J. October 16, 1914.

GARNISHMENT (§ I C—16)—*Quebec practice—Debtor husband working for his wife without wages.*]—Motion by judgment creditor against garnishee for declaration.

Belanger, K.C., for creditor.

HUTCHINSON, J., held that where a seizure is made by garnishment after judgment against the husband attaching money owing to him by his wife, separate as to property, in respect of his services, and the wife answers that he works for his board and lodging, and after a hearing judgment is given the creditor for payment of one-fifth of the value fixed by the Court of the husband's services over and above his board and lodging, the wife on being called upon several months later to shew cause why she failed to renew her declaration, cannot set up in answer a declaration that the husband's support is worth more than his board and thereupon tax her costs as having no money in hand, but will be ordered to pay on the basis of the proof made at the hearing

Motion maintained.

ONT.

S. C.

JUNOR v. INTERNATIONAL HOTEL CO., LIMITED.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren and Hodgins, JJ.A. and Clute, J. December 7, 1914.

MASTER AND SERVANT (§ II A 4—66)—*Injuries—Death—Appliances—Conditions—Employer—Duty of—Risk unnecessary.*]—Appeal from the judgment of Britton, J., dismissing the plaintiff's claim.

J. E. Irving, for the appellants.

D. L. McCarthy, K.C., for the defendant company, respondent.

MEREDITH, C.J.O. (delivering the judgment of the Court):—An employer is not an insurer of the safety of his employees . . . The full extent of his duty is to exercise reasonable care. That he did not delegate that duty means no more, as applied to the circumstances of this case, than that the respondent could not escape liability for the negligence of its manager if negligence on his part had been established.

The appeal was dismissed with costs, CLUTE, J., dissenting.

LIVINGSTON v. LIVINGSTON

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. December 7, 1914.

PARTNERSHIP (§ VI—28)—*Surviving—Competing business—Purchaser—Lending credit to—Realization of partnership assets—Trustee—Meaning of.*]—Appeal by the plaintiffs and cross-appeal by the defendant from the order of Middleton, J., 4 D.L.R. 345, 26 O.L.R. 246. Order varied.

Wallace Nesbitt, K.C., *H. S. Osler*, K.C., and *Christopher C. Robinson*, for the plaintiffs.

I. F. Hellmuth, K.C., and *J. H. Moss*, K.C., for the defendant.

MEREDITH, C.J.O., held that appeal of the plaintiffs as to the Yale business and the oil mill property should be dismissed, and their appeal as to the Wuerth, Haist & Company business should be allowed, and the defendant's cross-appeal should be dismissed with costs. HODGINS, J., dissenting in part.

ONT.

S. C.

SMITH v. GRAND TRUNK R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell and Lennox, JJ. November 30, 1914.

MASTER AND SERVANT (§ II B 3—153)—*Damages—Damaged car—Defective ladder—Notice—Statutory duty—Railway Act, R.S. C. 1906, ch. 37, sec. 264—Breach of Rules—Proximate cause of injuries.*]—Appeal by the defendants from the judgment of Falconbridge, C.J.K.B., at the trial of the action without a jury, in favour of the plaintiff.

CLUTE, J. (delivering the judgment of the Court):—The plaintiff acted reasonably throughout, assuming that, even under the circumstances detailed by him, he had no right to get on the car while in motion, and his so doing was not the proximate cause of the injury. Having once reached the top of the car, the danger aimed at by the rule was past. He had the right to go where his duty called him, which was to the caboose, and to do so to pass over the cars and to avail himself of the ladder in question. This car was made up and formed part of the train. Its defect was known to the inspector, whose duty it was to remedy the defect to the extent that it should not be dangerous if used. This he attempted to do by removing the lower step, but left the remainder of the ladder in the dangerous condition in which it was at the time of the accident. The plaintiff made a reasonable inspection of the train, he going down one side and his brakeman the other. The morning was dark and the defect was not discovered. The question of contributory negligence was one of fact for the trial Judge, who has disposed of it in favour of the plaintiff. I see no ground to interfere.

Appeal dismissed with costs.

SASK.

S. C.

HUDSONS BAY CO. v. BARRY.

Saskatchewan Supreme Court, Haultain, C.J. November 28, 1914.

CHATTEL MORTGAGE (§ II A—7)—*Consideration; affidavits of—Personal knowledge of affiant.*]—Appeal from the decision of a Local Master on the sufficiency of a chattel mortgage affidavit.

Hoffman, for the appellants.

McEwen, for the respondents.

SASK.
S.C.

HAULTAIN, C.J.:—This is an appeal from that portion of the decision of the learned local Master at Saskatoon in which he overruled and disallowed the preliminary objections taken on behalf of the execution creditors to the affidavit of execution and *bona fides* of the chattel mortgage of the claimant under which it claims. The objection to the affidavit of execution is that it does not state the name, address and occupation of the deponent, the subscribing witness. On this point I agree with the learned Master in holding that the objection was not well taken on the authority of *Commercial Bank* v. *Fehrenbach*, 4 Terr. L.R. 335, cited in his judgment. The objection to the affidavit of *bona fides* is that the deponent being the local manager of the claimant bank which is a corporation with its head office "outside Saskatchewan" does not state that he is "aware of the circumstances connected with the mortgage and has a personal knowledge of the facts deposed to."

The local Master disallowed this objection and cites *Universal Skirt Manufacturing Co.* v. *Gormley*, 17 O.L.R. 114, in support of his opinion. In my opinion the wording of the new sec. 24 of the Chattel Mortgage Act contained in sec. 22 of the Statute Law Amendment Act, 1913 makes the above cited case no longer applicable. If necessary I should venture with great deference to question the correctness of that decision and would adopt the reasoning and conclusions of Mr. Justice Riddell.

Prior to the amendment of 1913, our Act required the affidavit of *bona fides* in the case of a mortgage corporation to be made by "the president, or vice-president, manager, assistant manager, secretary or treasurer of such corporation or by any other officer or agent of such company duly authorized by resolution of the directors in that behalf."

In making that provision the legislature recognized that a corporation can only act through an officer or agent and specified the officers whose authority would be assumed and provided that any other officer or agent must be duly authorized as prescribed. An analogous requirement of authority to act as agent for similar purposes is imposed in the case of the agent for an ordinary mortgagee by sec. 7. The new sec. 24 passed in 1913 is as follows: —

SASK.

S. C.

24. In the case of a mortgage or sale of goods to a corporation, the affidavit of *bona fides* required by this Act, and the affidavit of *bona fides* required upon the renewal of a chattel mortgage may be made and a certificate of discharge or partial discharge of any such mortgage may be signed by the president, vice-president, manager, assistant-manager, secretary or treasurer of such corporation or by any other officer or agent of the corporation duly authorized by resolution of the directors in that behalf, or if the head office of the corporation be outside Saskatchewan, then the said affidavit may be made by any general or local manager, secretary or agent of the corporation within Saskatchewan; any such certificate so signed shall be a valid and effectual discharge or partial discharge without the seal of the said corporation being affixed thereto. Any such affidavit by an officer or agent shall state that the deponent is aware of the circumstances connected with the sale or mortgage, as the case may be, and has a personal knowledge of the facts deposed to.

Universal Skirt Co. v. *Gormley, supra*, was decided on the theory of two classes, the specified officers forming one class, and "any other officer or agent" forming the other. It was held that as a distinction was drawn between these two classes with regard to authorization a similar distinction was intended with regard to the necessity for swearing to personal knowledge, etc. The new section, in my opinion, completely removes any ground there might have been upon which to base the latter distinction. In the case of corporations with head offices outside of Saskatchewan the specified officers and any agent may make the affidavit without express authorization. The section then goes on to say, "any such affidavit by an officer or agent shall state, etc." The several officials mentioned in both parts of the section are "officers" the first list being practically declared to be officers by the following words "any other officer." The policy of the Act is to require, first that the affidavit should be made by the mortgagee or by some person authorized in that behalf by the mortgagee, and secondly, that the affidavit should be made by some person "who is aware of the circumstances, etc., and has a personal knowledge of the facts deposed to" . . . In the case of the first requirement, as a corporation cannot make an affidavit, certain named officers are assumed to have the necessary authorization. In the second case, an ordinary mortgagee is assumed to have a personal knowledge of his own business, but there can be no such assumption in the case of any officer of a corporation with regard to any particular item

SASK.
S. C.

of its business. The Act in my opinion requires any officer whether named by the Act or not to state in the affidavit that he is aware of the circumstances connected with the mortgage and has a personal knowledge of the facts deposed to.

This appeal must therefore be allowed with costs and the second objection to the chattel mortgage be sustained.

Appeal allowed.

IRELAND v. ANDERSON.

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. July 15, 1914.

BILLS OF SALE (§ II—5)—*Consideration—Statutory requirements—Sufficiently shewn on face of instrument, when.*]—Appeal from the order of a District Court Judge dismissing the claimant's application under a bill of sale in an interpleader issue.

A. S. Sibbald, for appellant.

A. G. MacKinnon, for respondent.

T. D. Brown, for sheriff.

The judgment of the Court was delivered by

BROWN, J.:—It was intimated at the close of the argument in this case that the appeal would be allowed. The learned District Court Judge who summarily disposed of this matter in Chambers evidently did not have his attention called to the judgments of this Court in the cases of *Palmer* v. *May*, 18 W.L.R. 676, and *Patterson* v. *Palmer*, 19 W.L.R. 422. In view of those authorities it must be held that the bill of sale in question sufficiently expresses the consideration. The affidavit material which was filed on behalf of the claimant shews a *primâ facie* case in her favour, and entitles her to succeed on a summary disposition of the matter. Counsel for the respondent at the close of his argument contended that the District Court Judge should not have disposed of the matter summarily. That objection, however, if it be one, is not open to the respondent, as he did not cross-appeal.

The appeal should therefore be allowed with costs, the order appealed from varied accordingly, the sheriff ordered to withdraw from seizure of the horse in question, and the execution creditor should pay the claimant's costs of the interpleader proceedings.

Appeal allowed.

LATOURNEAU v. CHRISTIE RIEGER REALTY CO.

SASK.

S. C.

Saskatchewan Supreme Court, Newlands, J. (In Chambers). September 18, 1914.

RECEIVERS (§ I—1)—*Appointment—Jurisdiction to appoint—In whom vested—Scope of Master.*]—Appeal from an order of a Master in Chambers dismissing an application to set aside his appointment of a receiver.

Rose, for defendants (appellants).

J. D. Cameron, for Dominion Trust (receivers).

F. E. Hawkins, for plaintiff.

NEWLANDS, J.:—This is an appeal from an order of the Master in Chambers dismissing an application to set aside an *ex parte* order made by him appointing a receiver. I am not considering the grounds upon which the defendants have asked that this order be set aside, because I do not consider them applicable. The ground on which the application should have been made is that the Master had no power to make the order appointing the receiver in this case. By rule 620 the Master in Chambers may transact all business that may be transacted by a Judge in Chambers. The only power conferred on a Judge in Chambers as to the appointment of a receiver is by rule 537, under which he may appoint a receiver by way of equitable execution, which is not this case, the receiver here being appointed to conserve property pending the disposition of the same in the action. By rule 8 of the Rules of Law, sec. 30 of the Supreme Court Act, a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made. The application, therefore, must be made to the Court and not to a Judge in Chambers in all cases for the appointment of a receiver excepting for one by way of equitable execution. As this application could not be made to a Judge in Chambers, it cannot be made to the Master in Chambers. The provisions of the Judicature Act, 1873, in England, and the English Rules of Court, are similar to the provisions of our Supreme Court Act and rules, and the procedure followed there is as I have above stated. The order appointing the receiver is, therefore, set aside with costs.

Appeal allowed.

SASK.

S. C.

EMERSON BRANTINGHAM IMPLEMENT CO. v. JACKSON.

Saskatchewan Supreme Court, Brown, J. May 19, 1914.

PLEADING (§ I C—20)—*Definiteness; particularity—Uncertain and embarrassing defence—Fraud may be pleaded without using the word "fraud," when and how.*]—Appeal from a decision of a Master refusing to strike out the defendant's counterclaim and part of his amended defence.

T. S. McMorran, for plaintiffs.

H. V. Bigelow, for defendant.

BROWN, J.:—The original statement of defence was, in my opinion, very uncertain and embarrassing, and quite justified the application made in reference thereto. Had I been making the order in that case I would have allowed the plaintiffs their costs of the application as costs to them in any event. That order, however, is not before me. The amended pleading is in much better form, and shews with reasonable clearness what the defendant's real defence is. I am not going to decide on this application whether the allegations made constitute a ground of defence or a right to counterclaim. I think the defendant has acted wisely in pleading in the alternative so as to guard against being shut out from such relief as the trial Judge may find him entitled to.

It is not true, as contended for by counsel for the plaintiffs, that fraud is alleged for the first time in the amended pleading. In par. 9 of the original defence fraud is alleged against the plaintiff, although the word "fraud" is not used, so that the defendant is quite entitled to plead fraud in his amended defence. I am of opinion, however, that the plaintiffs are entitled to further and better particulars as to the fraudulent representations. In what way were they fraudulent? I presume it was because the plaintiffs made them knowing them to be false or with a reckless disregard as to whether they were true or false. (See forms 61 and 62 in Odgers on Pleading, 6th ed.) The plaintiffs are entitled to know with particularity what the real grievance is. I am of opinion also that the plaintiffs are entitled to know whether the representations were made in writing or verbally, and if verbally by whom: Rules 148 and 149.

As to the counterclaim, it is true that the defendant pleaded this counterclaim without leave, and the plaintiffs were entitled

SASK.

S. C.

to apply to strike it out. I think, however, that the learned Master exercised a wise discretion in allowing the counterclaim to stand rather than striking it out and compelling the defendant to go to the expense of making a further application to be allowed to plead the same.

The order, however, as to costs on the application, should have been different. The order of the learned Master will, therefore, be varied, in that the defendant will be required to furnish the particulars as aforesaid within two weeks, and the plaintiffs will have their costs of the motion to the Master, the same to be costs to them in any event. The plaintiffs will also have their costs of this appeal, the same to be costs to them in any event, of the action.

Appeal allowed in part.

POWELL v. NORTH SASKATCHEWAN LANDS CO.

Saskatchewan Supreme Court, Haultain, C.J., Brown and Elwood, JJ. November 28, 1914.

RECEIVERS (§ I—1)—*Appointment—Jurisdiction of Judge in Chambers—Scope of—Original and appellate powers of Supreme Court.*]—Application to continue the appointment of a receiver.

C. W. Hoffman, for applicant.

The judgment of the Court was delivered by

BROWN, J.:—This is an application to continue the appointment of the National Trust Co., Ltd., as receiver. This company was appointed as such for a limited time by the Master in Chambers. An application was then made to a Judge in Chambers to continue the appointment, and as the Judge expressed some doubt as to his power as a Judge in Chambers to make the order, a motion at his suggestion was made direct to this Court. The statement of claim shews that in this case the main item of relief sought is the appointment of a receiver, and the National Trust Co., Ltd., are mentioned in the claim as the parties to be appointed. The defendants have not appeared to the action, and I judge from the material on file that they are quite satisfied that the appointment should be made. There can be no question as to the power of this Court to make the order asked for, and under the circumstances it should, in my judgment, be made, as the plaintiff should not be delayed longer in getting his relief. I think

SASK.
S. C.

it should be stated, however, that the plaintiff's proper course was to have had his application dealt with by a Judge in Chambers in the ordinary way, and to have come before this Court by way of appeal. It seems advisable that any doubt as to the proper practice should be removed. I am of opinion that under our rule of Court No. 130 the Judge in Chambers had jurisdiction in this matter. This rule is very general in its scope. It stipulates that in all cases not otherwise provided for, where there has been default in appearance, the plaintiff may apply to a Judge in Chambers for judgment. There is no rule under the English practice similar to this. As the appointment of a receiver was, as already intimated, a portion of the relief sought for in the statement of claim, application to a Judge in Chambers, in my opinion, would come within the scope of the rule. The order should therefore go, and, as the trust company is one approved of by the Government, their appointment should be continued without the necessity of security being furnished. The plaintiff should have leave to apply to a Judge in Chambers for such further relief as he may at any time desire and be entitled to.

Application granted.

BLACK v. MAGILL.

Saskatchewan Supreme Court, Elwood, J. April 11, 1914.

[*Stephens* v. *Bannan*, 14 D.L.R. 333, and *Meighen* v. *Couch*, 9 D.L.R. 829, referred to.]

VENDOR AND PURCHASER (§ I B—5)—*Payment of Purchase Money—Recovery of—Failure of Title.*]—Appeal from the decision of a Local Master fixing the measure of damages on failure of title upon a sale of lands.

J. C. Martin, for appellant.

Williams, for respondent.

ELWOOD, J.:—This is an appeal from the judgment of the Local Master at Saskatoon, holding that the measure of damages sustained by the plaintiff should be the difference between the contract price and the value of the land at the time the contract was broken, and directing a reference to the Local Registrar to ascertain the value of the property at the time the contract was broken.

It was admitted before me that the agent of the registered owner of the land in question purported to sell the land to one

SASK.

S. C.

Rayfuse, that Rayfuse sold to Schwalm, who sold to Paquette, who sold to the defendant; that the defendant entered into an agreement of sale to one Boyce, who assigned his agreement to the plaintiff. Apparently the various transactions were by agreements of sale. It was also admitted that before the final payment became due from the plaintiff to the defendant the registered owner repudiated the authority of the agent to sell to Rayfuse, and he, Rayfuse, brought an action against the registered owner for specific performance, but the action was dismissed.

On behalf of the appellant it was contended that the agreement itself provided that in the event of the failure of title the purchaser was only entitled to the return of his money with interest, and in any event, apart from the agreement the plaintiff was only entitled to the return of his money and interest. I am of opinion that the first contention is well taken, and that the agreement itself provides that if there is claim by any person affecting the title to the land, then the purchaser shall have no claim for damages, but shall only be entitled to the return of his money and interest. So far as the second contention is concerned the respondent referred to the cases of *O'Neill* v. *Drinkle*, 1 S.L.R. 402; *Hutchinson* v. *Schleuter*, 8 W.L.R. 687; *Hopkins* v. *Grazebrook*, 6 B. & C. 31; *Engel* v. *Fitch*, 38 L.J.Q.B. 304. The leading cases in favour of the appellant's contention are *Flureau* v. *Thornhill*, 2 Wl. Bl. 1078, and *Bain* v. *Fothergill*, L.R. 7 H.L. 158. In the latter case the various decisions up to that time are fully dealt with including the cases of *Hopkins* v. *Grazebrook*, 5 L.J.K.B. 65, and *Engel* v. *Fitch*, *supra*, and it would appear from a consideration of *Bain* v. *Fothergill* that that decision overruled *Hopkins* v. *Grazebrook*. *Engel* v. *Fitch* appears to have been decided on the ground that the defendant, having failed to do everything in his power to compel possession to be given up, and having failed to do all he could to complete the conveyance, was liable for damages. In *O'Neill* v. *Drinkle*, 1 S.L.R. 402, while the learned Judge expressed his opinion that under the system of land transfer which we have in this province the principle of *Flureau* v. *Thornhill* did not apply here, yet he did not actually decide the point. In the case of *Stephens* v. *Bannan*, 14 D.L.R. 333, the Court *en banc* of the province of Alberta held that the English rule as to damages

SASK.

S. C.

in the case of breach of contract for sale of land should be applied in that jurisdiction, notwithstanding the fact that they have the Torrens System of Land Titles. I agree with the view of the Supreme Court of Alberta rather than that expressed in *O'Neill* v. *Drinkle*. It is quite true that our system of land transfer is simpler than that of England, but even under our system difficulties with regard to equitable titles may arise. It was expressly held in the case of *Bain* v. *Fothergill*, L.R. 7 H.L. 158, at 195, that a vendor who had merely an equitable estate and who agreed to sell the land would be entitled to the benefit of the rule if it should appear that his title were defective and the sale should not be completed on that ground.

It will be quite clear that difficulties which would arise as to the condition of an equitable title would not be any less under our system of transfer than under the English. In *Morgan* v. *Russell*, [1909] at 1 K.B. 357, *Fleureau* v. *Thornhill* and *Bain* v. *Fothergill* were followed. In *Rankin* v. *Sterling*, 3 O.L.R. 646, *Bain* v. *Fothergill* was also followed, as was done in the province of Manitoba in *Meighen* v. *Couch*, 9 D.L.R. 829. In some of the cases in England which have been distinguished from *Bain* v. *Fothergill* and *Flureau* v. *Thornhill* the defendant had expressly covenanted that he had a good title and would give a good title; in the case at bar it will be noticed that by the agreement the purchaser accepted the title of the vendor, and there was nothing to my mind that the defendant could have done to obtain a good title to the property; the registered owner of the property repudiated the original sale by the agent, and the purchaser under that sale brought an action for specific performance and was unsuccessful. The defendant derived his title through a chain which originated in this sale by the agent which the Court refused to enforce. There was therefore nothing that the defendant could do; and the case to my mind appears to come squarely within the principle of *Bain* v. *Fothergill*, *supra*. The appeal will therefore be allowed and the order appealed from varied by providing that the plaintiff shall be entitled to the return of the purchase price paid by him together with interest thereon. There is no allegation in the claim that the plaintiff has been put to any expense in connection with searching of the title. The defendant will have his costs of this appeal.

Appeal allowed.

McNEILL v. McEACHREN. P.E.I.

S. C.

Prince Edward Island Supreme Court, Haszard, J. February 18, 1914.

LIMITATION OF ACTIONS (§ IV C—167)—*Interruption of Statute—Removal of Bar—Promise or Acknowledgment, Conditional or Otherwise—When Ineffective.*]—Action tried before HON. MR. JUSTICE HASZARD at the last November term of the Court at Summerside.

The action was brought to recover the amount of a bill of exchange dated April 6, A.D. 1905, at 3 months for $561.38, drawn by plaintiffs (under the name and style of the Gaspe Lumber Mfg. Co.) and accepted by defendant, together with interest.

The declaration contained two counts, one count on the bill of exchange and a second money count for interest and on accounts stated. To this the defendant as to the first count denied the acceptance of the said bill, and second as to the second count, never indebted, and for a third plea as to the first count that the cause of action did not arise within six years. Upon these pleas issue was found. On the trial it was claimed by the plaintiffs' counsel that a verdict must of necessity be found for the plaintiffs on the count for interest as the plea of the Statute of Limitations was not made to extend to that count. An application being made by defendant's counsel to amend—by extending the plea of the Statute of Limitations to the whole declaration the amendment was allowed.

Judgment was given for the defendant.

W. E. Bentley, K.C., for plaintiff.

W. S. Stewart, K.C., for defendant.

HASZARD, J.:—In addition to proving the acceptance of said bill by the defendant some evidence was given by Mr. H. H. Acorn that defendant had been working at New Glasgow, N.S., with J. M. Clark during the last two years.

One of the plaintiffs, Roderick McNeill, also gave evidence that defendant had been working with Clark he understood at $2.50 per day. Witness also said that he wrote defendant for payment at different times, and produced a letter dated April 1, 1908 (which was put in evidence by plaintiff) from defendant, he said in writing defendant he asked for payment of draft and said the letter produced was an answer to his request. He further said that he had a conversation with defendant just before June

P.E.I.
S. C.

29, 1912, in which conversation defendant said he would pay him. This in effect comprised the evidence in behalf of the plaintiffs. Putting aside the letter of April 1, 1912, the debt would be barred by the Statute of Limitations as the 6 years would expire on July 9, 1911, from the due date of the acceptance.

The question, therefore, to be decided is as to whether the statement made by defendant in the letter of April 1st, 1908, is a sufficient acknowledgment of the debt or promise to pay so as to take it out of the statute.

As the letter is the all important factor in the case, I give its full text; it is as follows:—

Souris,

Mr. R. J. McNeill, April, 1st, 1908.

Dear Sir,—I received your letter of the 28th inst., and do say that you are misinformed about me getting $5 per day. There is no such wages paid here. I got $3 per day for six months in 1907. I was idle the winter of 1906-1907 and I am idle this winter of 1908. I have a family of six to support and rent to pay and school tax to pay and to support a family these times when everything is so very dear, it takes all I can earn to live. I will not sign a warrant of attorney of any man as it would put me in a worse position than I am at present; there is no benefit to you to have it either. You must wait until I am in a position to make you a payment. At present I can do nothing; I have been unwell all winter.

Yours truly,

It is necessary in order to take any case out of the operation of the statute or to deprive any party of the benefit thereof that the acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.

Many decisions have been given and much conflict of opinion existed for many years as to the effect of written promises and undertakings until eventually it was set at rest in 1827 by the decision of the King's Bench in *Tanner* v. *Smart*, 6 B. & C. 603, which has ever since remained a leading case. In that case the defendant was proved to have said, "I cannot pay the debt at present, but will pay it as soon as I can." There was no evidence of his ability to pay. It was there held that proof of ability to pay was necessary to turn the conditional promise into an absolute one; and there was, therefore, no sufficient acknowledgment to take the case out of the statute.

In the 2nd ed. with supplement of Darby & Bosanquet's Statutes of Limitations, p. 68, referring to this case of *Tanner* v. *Smart*, it is stated as follows:—

P.E.I.
S. C.

Ever since the decision in *Tanner* v. *Smart* it has been settled law that nothing can take a debt out of the Statute unless it amounts to an express promise to pay or an unconditional acknowledgement of the debt from which such an express promise may be implied.

In a large number of cases since *Tanner* v. *Smart* the law as there laid down has been approved of.

Hart v. *Prendergast* (1845), 14 M. & W. 741, 744, Parke, B., says:—

There is no doubt of the principle of law applicable to these cases, since the decision of *Tanner* v. *Smart;* namely, that the plaintiff must either shew an unqualified acknowledgement of the debt, or, if he shew a promise to pay coupled with a condition, he must shew performance of the condition.

Smith v. *Thorne* (1852), 18 Q.B. 134, 143, Parke, B., says:—

There has been no question since *Tanner* v. *Smart*, that an acknowledgement of a debt must in order to take it out of the operation of the Statute of Limitations be sufficient to support the promise laid in the declaration, namely to pay on request. . . . That acknowledgement must now be in writing; but it must still support a promise to pay on request either by shewing on the face of it an unconditional promise to pay or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified.

Buckmaster v. *Russell* (1861), 10 C.B.N.S. 745, Williams, J., in his judgment at p. 749-750, says:—

The principle upon which the acknowledgement of a debt operates to bar the Statute of Limitations has been settled ever since the case of *Tanner* v. *Smart*, and has been fully expressed on different occasions since in Courts of common law, but it has never been better expressed than it was by Vice Chancellor Wigram in *Philips* v. *Philips*, 3 Hare 299, where that very learned Judge with characteristic lucidity, says: The legal effect of an acknowledgement of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt the law implies from that simple acknowledgement a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise given him. That is the true principle.

In the case of *Chasemore* v. *Turner* (1875), L.R. 10 Q.B. 500, Lord Chief Justice Coleridge, in a very lengthy and learned judgment, and although delivering a minority judgment, reviewing the previous cases bearing upon the question, says:—

That the question throughout has been simply upon the interpretation of a few words in the document (sued on) because upon the principles that are to be applied to the construction of this document, I apprehend there ought to be, and I believe there is, no difference of opinion at all; indeed it has

P.E.I.
S. C.

been settled not merely by the case of *Tanner* v. *Smart*, and by other cases to which we should be bound to pay great deference, but which are not binding authorities; but it has also been settled by a Court which does bind us, by the Court of Exchequer Chamber, in the case of *Smith* v. *Thorne* (one of the cases before referred to).

Applying the law, therefore, as I believe it to be now settled by the case of *Tanner* v. *Smart*, 6 B. & C. 603, and *Smith* v. *Thorne*, 18 Q.B. 134, is there anything in the letter of the defendant produced in evidence which amounts to an express promise to pay or an unconditional acknowledgment of the debt from which an express promise may be implied? I am of opinion that there is not. The words are: "You must wait until I am in a position to make you a payment, at present I can do nothing." In those words, in my opinion, there is neither an express promise to pay or an unconditional acknowledgment of the debt, but even if there was a conditional promise then there has not been any sufficient evidence given of defendant's ability to pay. On the contrary, defendant's letter put in by plaintiff negatives any such ability.

The verdict will be entered for the defendant.

Judgment for defendant.

CAN.
Ry. Com.

CANADIAN PACIFIC R. CO. v. CALGARY.

Board of Railway Commissioners. October 29, 1914.

RAILWAYS (§ II B—17*a*)—*Cost of highway pavement through subway.*]—Application by the City of Calgary for an order adding the cost of the highway pavement through the subway ordered on its application in which the plan then submitted did not shew any street paving. The cost of the subway had been apportioned 60 per cent. to the railway and 40 per cent. to the city.

CHIEF COMMISSIONER DRAYTON said the practice of the Board had been not to interfere with the municipal right to lay any kind of street pavement it chose; but where pavements already laid at the expense of the municipality had been destroyed by the construction of a subway ordered, the new pavements and the cost thereof have been treated as part of the undertaking called for by the order of the Board. But where as here the street had not been paved prior to the construction of the subway, the cost of paving should not be so considered. The application would be dismissed.

COMMISSIONER GOODEVE concurred.

CAN.

Ry. Com.

DOMINION SUGAR CO. v. GRAND TRUNK, CANADIAN PACIFIC CHATHAM, WALLACEBURG & LAKE ERIE AND PERE MARQUETTE R. COS.

Board of Railway Commissioners, April 30, 1914.

CARRIERS (§ IV C 3—536)—*Through freight—Two companies' lines—Local shunting—One company for same distance—Charges—Railway Commission.*]—Application for a reduction in commodity rates on sugar in carloads from Wallaceburg to Hamilton and Toronto.

THE CHIEF COMMISSIONER:—I am of the opinion that the minimum loading must be increased. I would increase it at the present from thirty to forty thousand pounds, with the result that while the applicant is treated absolutely fairly, and gets a proper reduction in its rate, the two objecting lines—the Grand Trunk and Canadian Pacific—will actually earn $6.75 per car more than they get at the present time.

THE ASSISTANT CHIEF COMMISSIONER concurred.

MR. COMMISSIONER MCLEAN:—The situation as now presented is that there exists all the year round from Montreal to Toronto and Hamilton, rates of 14 cents and 15 cents respectively. Admitting that the summer basis is attributable to water competition, it is not satisfactorily shewn in evidence why this basis is continued during the winter. To the extent that it is so continued, what is before the Board is a commodity rate on a rail basis. Looked at from this standpoint the disparity in the rate on a rail basis from Wallaceburg, as compared with that from Montreal, has not been justified. The disposition recommended brings about a parity, and I agree.

MONTREAL LIGHT, HEAT AND POWER CO. v. GRAND TRUNK RY. CO.

Board of Railway Commissioners, May 20, 1914.

1. RAILWAYS (§ II B—15)—JURISDICTION—QUESTION OF LAW—PUBLIC INTEREST—INDEMNITY—LOSS, DAMAGE OR INJURY—PROPERTY—EMPLOYEES—TRAVELLING PUBLIC—RAILWAY ACT, SEC. 250.

Under sec. 250 the Board has jurisdiction to authorize the laying of a gas main under the tracks of a railway company, by a public utility company, an adjacent land owner, and to fix the amount of damages payable for the privilege, imposing as terms and conditions precedent, that the applicant must undertake full responsibility for maintaining the gas main and indemnify the respondent from any loss, damage or injury to its property, employees, or the travelling public.

CAN.

Ry. Com.

APPLICATION for authority to lay a gas main from the applicant's new works to the Lachine Canal, across the leasehold property of the respondent.

The application was granted.

G. H. Montgomery, K.C., for the applicant.

W. C. Chisholm, K.C., for the respondent.

THE CHIEF COMMISSIONER decides that there is no question at all as to the public necessity of the work, nor is there any other way in which the necessary access can be reasonably obtained except across the railway company's property, and that an Order should be made.

COMMISSIONER MCLEAN concurred.

Order granted.

FONTHILL GRAVEL CO. v. GRAND TRUNK R. CO.

Board of Railway Commissioners, Canada. February 9, 1914.

CARRIERS (§ IV C—525)—*Regulation of Rates and Tolls.*]—Application against the G.T.R. and the Niagara, St. C. & T. R. Co. for the re-establishment of a rate on moulding sand, which had been increased from 90c. to $1.00.

COMMISSIONER MCLEAN held that the through rate was not unreasonable. It has been recognized that a two-line or a three-line haul, may, within limits, have a justification for being higher than the single-line rate for the same distance. Here the rate for the two-line haul is the same as for the one-line haul.

CHIEF COMMISSIONER DRAYTON concurred.

Order accordingly.

QUE.

K. B.

DEMERS v. LÉVEILLÉ.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. April 29, 1914.

[*Demers* v. *Léveillé*, 11 D.L.R. 22, affirmed.]

BILLS AND NOTES (§ I A—4*a*)—*Filling in blanks.*]—Appeal from Quebec Court of Review.

Desaulniers & Valleé, for appellant.

Lamothe, St. Jacques & Lamothe, for respondent.

Appeal dismissed.

HOME BANK OF CANADA v. MIGHT DIRECTORIES.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 1, 1914.

PARTY WALL (§ I—12)—*Lateral support—Placing floor-joists—Easement—Extent of right.*]—Appeal by the defendant from the judgment of Falconbridge, C.J.K.B., in favour of the respondent.

R. McKay, K.C., and *Gideon Grant*, for the appellant Co.

E. D. Armour, K.C., and *A. E. Knox*, for the plaintiff bank.

MEREDITH, C.J.O.:—The inference I would draw from the evidence, and the circumstances I have mentioned is, that the wall in question is not a party wall, and that the most that the circumstance that in erecting the building on the respondent's land provision was made for placing the floor joists of a building in the south wall and supporting them by the wall, and for the fire-places and flues, indicates, is, that the south wall was intended to be used for those purposes, and that all that the appellant has acquired is the right to use the wall for those purposes.

Upon the whole, I am of opinion that the Chief Justice came to the right conclusion, and that the appeal should be dismissed with costs.

See also *Barry* v. *Desrosiers* (1908), 14 B.C.R. 126.

MACLAREN and HODGINS, JJ.A., agreed.

MAGEE, J.A., dissented. *Appeal dismissed.*

ABITIBI POWER & PAPER CO. v. SMART.

QUE.
S. C.

Quebec Superior Court, Bruneau, J. September 12, 1914.

CORPORATIONS AND COMPANIES (§ V B 1—176)—*Action for price of shares—Tender of shares—Exception.*]—Motion of dilatory exception by defendant.

Casgrain & Co., for plaintiff.

Chauvin & Co., for defendant.

BRUNEAU, J., held that it was not a ground for a dilatory exception asking the stay of the action that plaintiff suing for the price of company shares had not tendered the shares either before or with the action. *Motion dismissed.*

QUE.

S.C.

SHIP v. CROKER.

Quebec Superior Court, Bruneau, J. September 16, 1914.

1. PLEADING (§I N—110)—MOTION FOR PARTICULARS—WRITTEN AGREEMENT—NECESSITY—DISMISSAL.

MOTION for particulars.

Jacobs, Hall, Couture & Fitch, for plaintiff.

Brown, Montgomery & McMichael, for defendant.

BRUNEAU, J.:—The Court, having heard the parties by their counsel; having examined the pleadings and documents of record, and deliberated:—

Whereas the plaintiff's motion for particulars alleges:—

Whereas the defendants allege in paragraph 6 of their plea that the plaintiffs entered into an agreement with the lessees of a hall known as "New Grand" without stating when the said agreement was entered into and whether the same was a written agreement or a verbal agreement:—

Therefore that this Court be pleased to order the defendant to give within three days from judgment to be rendered on the present motion, the date on which the said alleged agreement was made, and to state whether said agreement was made in writing or verbal. In all with costs.

Considering that the defendants' motion does not allege the necessity of the particulars asked for;

Considering that the plaintiffs must have knowledge of those particulars if it is true that they entered into such agreement;

Considering the motion is unnecessary and unfounded:—

Doth dismiss the said motion with costs.

GUAY v. PROVIDENT, ETC., INS. CO.

Quebec Superior Court, Panneton, J. June 30, 1914.

INSURANCE (§ III D—60)—*Accident insurance—"Confined to the house" and unable to travel.*]—Action upon an accident insurance policy.

Howard, McLennan & Aylmer, for plaintiff.

Mousseau & Gagné, for defendant.

PANNETON, J., held that where an accident causes neurasthenia, for the treatment of which the patient has to lead an outdoor life though incapable of travelling any considerable distance, the risk is not covered by an accident insurance policy which limits liability to injuries which not only prevent the assured from travelling but by reason whereof he is "confined to the house."

Action dismissed.

QUE.
S. C.

FORTIER v. BRUNET.

Quebec Superior Court, Weir, J. January 5, 1914.

HUSBAND AND WIFE (§ II I—114)—*Marriage contract—Enforcement of.*]—Action by the widow to recover balance of money due under the marriage contract.

Archambault & Co., for plaintiff.

Pelletier & Pelletier, for defendant.

WEIR, J., held that the non-registration of the marriage contract during the lifetime of the husband did not invalidate a stipulation thereof whereby the wife was, in the event of her surviving her husband, to receive a specific sum in lieu of dower; the grant being an onerous contract and not a gratuitous donation.

Judgment for plaintiff.

MAJOR v. BIRCHENOUGH.

Quebec Superior Court, Charbonneau, J. February, 1914.

MOTIONS AND ORDERS (§ II—11)—*Debtor Garnishee—Order to produce books of account.*]—Motion by plaintiff for an order to inspect books of account in the hands of the garnishee.

Perran & Co., for plaintiff.

Brown, Montgomery & Co., for garnishee.

CHARBONNEAU, J., held that under article 591 C.P. Que. the Court may order the production of any books or documents shewing the debtor's assets and the examination of any person capable of giving information thereon. The garnishee must permit inspection of all records of the garnishee company relating to its transactions with the defendant.

Order made.

BIGLANDS v. JOHN McDOUGALL CALEDONIAN WORKS CO.

Quebec Superior Court, Bruneau, J. September 8, 1914.

PLEADINGS (§ I J—65)—*Particulars—Action by workman against employer—Personal injuries.*]—Motion for particulars.

Goldstein & Beulac, for plaintiff.

McLennan, Howard & Aylmer, for defendant.

BRUNEAU, J., held that plaintiff, suing for personal injuries said to have been received in the course of his employment with defendant, should be ordered to give particulars under his declaration as to the nature of the accident, when and by whom he was employed for the defendant, the nature of his employment, and the check number under which he worked, also the nature of the injuries and why he claims his incapacity therefrom is permanent.

Motion allowed.

QUE.

K. B.

COX v. PHŒNIX INSURANCE CO.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. April 29, 1914.

INSURANCE (§ III E 1—87)—*Fire insurance—Policy describing as "occupied"—Failure to notify of vacancy on renewal.*

Greenshields & Co., for appellant.

Foster & Co., for respondent.

THE COURT affirmed the judgment of the Superior Court, Sir M. M. Tait, C.J., dismissing the action. The failure to disclose to the insurance company when the policy was renewed that the house in which the insured household furniture were situate was vacant, although the goods were described in the policy as situate in a dwelling house "occupied by the assured," and its continued vacancy for two years, constituted a concealment of a material fact which rendered the policy void.

Appeal dismissed.

WILD v. KLEKER.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 25, 1914.

PARTNERSHIP (§ I—3)—*Creation—Condition of amalgamation contract—Payment of prior trade debts as of a fixed date.*]—Appeal by defendant from the judgment of the Superior Court maintaining the action.

Elliott & Co., for appellant.

Atwater & Co., for respondents.

THE COURT held, affirming the judgment appealed from, that on the amalgamation of two businesses into a partnership with a condition that each party should pay off the liabilities of his own business "as at the first day of May," a reasonable time must be allowed to make the payments. It is sufficient if the party has acted promptly and without causing trouble to the other. The other party cannot repudiate because payment of debts was not made at that date. He will be liable in damages for his refusal to carry out the agreement where payment was promptly made and vouchers were produced for all but an insignificant amount before the end of May. The damages awarded by the verdict were not excessive, and were warranted by the evidence.

Appeal dismissed.

QUE.

K. B.

REDDY v. RUTHERFORD.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Carroll and Gervais, JJ. January 10, 1914.

[*Reddy* v. *Rutherford*, 43 Que. S.C. 289, affirmed.]

BROKERS (§ II B—12)—*Compensation—Option.*]—Appeal from 43 Que. S.C. 289.

Gouin & Co., for appellant.

Foster & Co., for defendant Rutherford.

L. T. Maréchal, K.C., for respondent Drummond.

THE COURT held, affirming the judgment appealed from, that an option to sell within a certain delay and a subsequent agreement, within the delay or an extension thereof, to sell to a third person at an advanced price and to divide the surplus between the owner and the optionee, does not, on the failure of such subsequent agreement, constitute a mandate between the owner and the optionee entitling the latter to a commission on a later sale made by the owner.

Appeal dismissed.

HALLIDAY v. MAXWELL.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. June 25, 1914.

[*Maxwell* v. *Halliday*, 44 Que. S.C. 52, affirmed.]

FRAUDULENT CONVEYANCES (§ VIII—41)—*Alimony decree—Voluntary conveyance pendente lite.*]—Appeal from the Montreal Court of Review, *Maxwell* v. *Halliday*, 44 Que. S.C. 52.

McKeown & Boivin, for appellants.

Cotton & Westover, for respondent.

THE COURT held, affirming the judgment appealed from, that a married woman who obtains a decree for separation and for alimony against her husband becomes his creditor in respect of the alimony and may maintain an *action paulienne* against him and his donee to set aside his voluntary conveyance made pending the separation proceedings whereby the realization of the alimony might be defeated. *Ivers* v. *Lemieux*, 5 Que. S.C. 128, applied.

Appeal dismissed.

QUE.

K. B.

ROY v. DENIS.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Carroll and Gervais, JJ. January 24, 1914.

APPEAL (§ VII E—310)—*What reviewable—Question of Costs.*

J. Cartier, for appellant.

J. Demers, for respondent.

THE COURT of King's Bench, Que., will refuse to interfere with a judgment upon appeal solely upon a question of costs unless some principle has been violated in the disposal made as to costs. The appeal was dismissed, but without costs on account of the respondent's position before the Court.

Appeal dismissed.

ROSENTHAL v. CITY OF MONTREAL.

C. R.

Quebec Court of Review, Archibald, Saint-Pierre and Hutchinson, JJ. November 29, 1913.

HIGHWAYS (§ IV A 6—156)—*Obstruction in Roadway—City Permit for Alterations—Bringing in Party Responsible—Montreal Charter, sec. 548.*]—Appeal in an action for damages due to an automobile running into a pile of earth left unprotected by lights on a city street. The jury found liable both the city and Lafrance the *mis-en-cause* brought in under sec. 548 of the Montreal Charter, 62 Vict. ch. 58

Trihey & Co., for plaintiff.

Archambault & Co., for defendant.

A. Delisle, K.C., for *mis-en-cause*.

ARCHIBALD, J. (for the Court of Review) said the judgment would be confirmed. Section 548 of the Charter requires a plaintiff suing the city of Montreal for damages of this kind to make such person a party as the city shall indicate by notice as having acted under its permit. On the city giving the name of such party in a notice after action brought against it, the plaintiff served a copy of his action upon the *mis-en-cause* calling him in as party to the suit, together with the notice of the city alleging that any fault was the fault of the *mis-en-cause*. This was sufficient without the necessity of any special allegations of fault by the plaintiff against the *mis-en-cause*.

Judgment affirmed.

PLANTE v. DALMAS PULP CO.

QUE.

C. R.

Quebec Court of Review, Lemieux, A.C.J., McCorkill and Belleau, JJ. June 30, 1914.

CORPORATIONS AND COMPANIES (§ VI A—313)—*Winding up—Leave to sue company in liquidation—Jurisdiction.*]—Appeal from the Superior Court, Lettelier, J., dismissing the plaintiff's action on an exception to the form.

J. E. Baily, for plaintiff.

Choquette, Galipeault & Co., for defendants.

The Court of Review held (BELLEAU, J., dissenting) that the authorization to sue a company in liquidation for an alleged balance of salary due the plaintiff cannot be effectively given by a Judge of the Superior Court for the district of Roberval in the Province of Quebec when the winding-up order had been made by a Judge of another district of the province, to wit, a Judge of the Superior Court for the district of Quebec at the city of Quebec. Such authorization, whether it be to sue in the same district or elsewhere, can be granted under sec. 22 of the Winding-up Act, R.S.C. 1906, ch. 144, only by the tribunal of the judicial district in which the winding-up proceedings are being carried on.

Per MCCORKILL, J.:—The public interest demands not only that the winding-up order should be applied for and granted in the district in which the corporation had its principal place of business (R.S.C. 1906, ch. 144, sec. 13), but that all proceedings relating to the winding up should also be taken in the same district. I do not mean to say that the plaintiff might not have sued in the district of Roberval, but, before doing so, he must have been authorized by a Judge of the district of Quebec upon petition presented to him there in Chambers. *Appeal dismissed.*

ROBILLARD v. GALERIES PARISIENNES, LTD.

Quebec Court of Review, Sir Charles P. Davidson, C.J., Archibald and Saint-Pierre, JJ. June 12, 1914.

LANDLORD AND TENANT (§ I—2)—*Creation of Relationship—Formal Lease not Executed.*]—Appeal by review from the Superior Court, Lafontaine, J.

Angers, De Lorimier & Co., for plaintiffs.

Fontaine and *Labelle*, for defendant.

THE COURT OF REVIEW said that the dispute was wholly upon a question of fact as to whether there was a contract of lease, and upon the evidence reversed the judgment appealed from and dismissed the action. *Appeal allowed.*

QUE.

C. R

SCHLIEFER v. KAUFMAN.

Quebec Court of Review, Archibald, Saint-Pierre, and Mercier, JJ. March 7, 1914.

BROKERS (§ II B—10)—*Real estate broker—Sale—Variation in terms—Commission contract—Right to commission.*]—Inscription in review of a judgment rendered in the Superior Court, by which the plaintiff's action was dismissed with costs.

Trihey, Bercovitch & Kearney, for the plaintiff.

R. G. deLorimier, K.C., for the defendant.

SAINT-PIERRE, J.:—In the present case, it has been proved beyond doubt that the agent who first found the purchaser and who was the procuring cause of the sale of Kaufman's property, was Auerbach, and not Schliefer. Auerbach was therefore entitled to the whole commission.

In my opinion Schliefer was duly appointed the agent of Kaufman and authorized by the latter to find a purchaser for his property; (2) that at the time of that appointment, another agent for the same object had already been appointed; (3) that Lehrer was first discovered by Auerbach, the first agent who began negotiations with Kaufman in the name of his prospective purchaser; (4) that when Schliefer discovered Lehrer as a purchaser he simply met the man who had already been discovered by the first agent Auerbach; (5) that Schliefer's having put Lehrer in communication with Kaufman, constitutes the full extent of his participation in this affair. This probably contributed to bring the sale to an earlier issue, but it did not have the effect of depriving Auerbach of his acquired right, resulting from the fact that he had been the first discoverer of the prospective purchaser and that he had already begun negotiations in his name with Kaufman, the vendor; (6) that in the absence of a special agreement to that effect, the commission, which, as a matter of fact, represents the price of the agent's services cannot be divided between two agents who might have been entrusted with the sale of the same property; (7) that it having proved that Auerbach had been the first discoverer of Lehrer and the procuring cause of the sale, he alone was entitled to the commission.

For these reasons, but not for the reason assigned in the judgment pronounced in the first instance, I have come to the conclusion that said judgment of the first instance should be maintained and it is so maintained with costs.

ALLEN v. CREPEAU.

Quebec Court of Review, Tellier, De Lorimier and Greenshields, JJ.
June 30, 1914.

CONTRACTS (§ II C—140)—*Time—Services of Consulting Engineer Reporting on Mining Property—Per Diem Rate.*]—THE COURT OF REVIEW increased the amount allowed in the Superior Court. Where a civil engineer is engaged to go to a distant place, in this case another province of Canada, to inspect and report on a mine at an agreed remuneration of $50 a day, this is presumed to apply to all the time he is necessarily away from his office on that business.

Casgrain & Co., for plaintiff.
Crépeau & Coté, for defendants.

Appeal allowed.

WOO CHONG KEE v. FORTIER.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ.
March 13, 1914.

AUTOMOBILES (§ III C—305)—*Car operated by other than owner—Owner's liability by statute.*]—Appeal from the Superior Court, Mercier, J. Appeal dismissed.

E. G. Place, for plaintiff.
Pelissier & Co., for defendants.

THE majority of the Court (TELLIER, J., dissenting) held that under article 1406, R.S.Q. 1909, if a person receiving injuries from an automobile establishes a fault on the part of any one in charge of that automobile, the owner of the automobile who had allowed it to be operated by the person at fault is liable for the resulting damages. This action was governed by the law prior to the statute 3 Geo. V. ch. 19, sec. 3, which in effect relieves plaintiffs in future cases from proving fault. The judgment below was confirmed as to the result.

MAN.

C. A.

NORTHERN TRUST CO. v. COLDWELL.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. November 30, 1914.

[*Northern Trust Co. v. Coldwell*, 18 D.L.R. 512, affirmed.]

DEBT (§ I—1)—*Life insurance gift to creditor—Effect on right of action for creditor's debt.*]—Appeal from Manitoba King's Bench, Mathers, C.J.

C. P. Wilson, K.C., and *W. C. Hamilton*, for defendant, appellant.

Sir James Aikens, K.C., and *A. C. Ferguson*, for respondent, plaintiff.

Appeal dismissed.

McKEOWN v. LECHTZIER.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. May 15, 1914.

[*McKeown v. Lechtzier*, 15 D.L.R. 15, affirmed.]

LANDLORD AND TENANT (§ III D—99)—*Rights and liabilities of parties—As to rent—After surrender of premises.*]—Appeal from decision of Curran, J., *McKeown v. Lechtzier*, 15 D.L.R. 15.

A. J. Andrews, K.C., and *W. H. Curle*, for defendant.

The Court dismissed the appeal without calling upon respondent's counsel.

Appeal dismissed.

K. B.

McKAY v. SEXSMITH.

Manitoba King's Bench, Macdonald, J. July 14, 1914.

1. LANDLORD AND TENANT (§ III A—40)—*Crops—Agreement—Forfeiture of lease—Rights and liabilities of parties*]—Action in respect of a lease.

A. McLeod, for plaintiff.

A. W. Bowen, for defendant.

MACDONALD, J., reviewed the facts and held that plaintiff must stand by the settlement he had made with defendant.

Action dismissed.

DUNN v. RURAL MUNICIPALITY OF ST. ANNE.

MAN.

K. B.

Manitoba King's Bench, Galt, J. July 14, 1914.

DAMAGES (§ III U—365)—*Apportionment of—Defendant—Breach of duty—Liability of municipality—Municipal Act, 1904 (Man.).*]—Action in damages for interference with drainage of plaintiff's lands.

C. P. Fullerton, K.C., and *G. C. Lindsay*, for plaintiff.

H. P. Blackwood, for defendant.

GALT, J.:—I think that in the present case when the defendant municipality took upon themselves to put in the culvert they were under obligation to provide and maintain an outlet sufficient to carry off the water that otherwise would have flowed across the road at that point.

I think, moreover, that when the municipality deflected the water from Little River into the ditch along Pelland's road they were under an obligation to so construct the ditch that it would carry off the water without injury to the plaintiff's contiguous land. . . . Upon the facts I think the plaintiffs are entitled to recover.

The learned Judge also held that no preliminary notice of action such as is required under the Municipal Act (Man.), sec. 667, relating to highways and bridges, is necessary in an action under sec. 516A (added in 1904) for damages for the overflow of water on adjoining lands from the damming up of a highway ditch by the municipality, and that sec. 516A, as to arbitration, is permissive only, and the claimant may instead bring an action.

Judgment for plaintiffs for $812.50 and costs.

QUEBEC, MONTREAL AND SOUTHERN R. CO. v. THE KING.

CAN.

EX. C.

Exchequer Court of Canada, Audette, J. November 19, 1914.

STATUTES (§ II A—104)—*Construction—Meaning of words—Mandatory or discretionary.*]—Petition of right to recover a sum alleged to be due to the suppliants as a railway subsidy.

Hon. F. L. Beique, K.C., for the suppliants.

F. L. Laverty, K.C., for the respondent.

AUDETTE, J.:—The authority to grant a subsidy under the

CAN.
EX. C.

statute is not mandatory but purely discretionary, and essentially a matter of bounty and grace on behalf of the Crown; creating no liability to pay the same enforceable by petition of right. Moreover, on the facts of the case the suppliants are not entitled to the relief sought herein. There will be judgment in favour of the respondent.

Judgment accordingly.

THE KING v. MACPHERSON.

Exchequer Court of Canada, Cassels, J. April 27, 1914.

EMINENT DOMAIN (§ III C—154)—*Expropriation—Compensation—Rights of Mortgagor—Bonus.*]—On the 14th April, 1913, the Crown, represented by the Minister of Public Works, registered a plan and description under the Expropriation Act for the acquisition of certain property in the city of Toronto for post-office purposes. Five days prior to such registration the defendant H., on behalf of certain other defendants, entered into an agreement for the purchase of the property in question for the sum of $100,000. The Court found that at the date of the agreement to purchase neither H. nor the defendants for whom he bought were aware of the intended expropriation by the Crown, although the property had not been previously in demand in the real estate market.

Anglin, K.C., and *Defries*, for defendants.

CASSELS, J.:—Held, that the price paid for the property by the defendant H. should be taken as its actual market value for the purpose of compensation.

2. That the defendants were not entitled as a matter of right to have ten per cent. added to the market value of the property.

3. Where there is a mortgage upon property in which the mortgagor stipulates for a bonus to be paid him in case the principal is sought to be paid before the mortgage falls due, the Crown expropriating before that event must assume the payment of such bonus in addition to paying the value of the property taken.

RHEINHARDT v. THE "CAPE BRETON."

CAN.
Ex. C.

Exchequer Court of Canada (Nova Scotia Admiralty District), Drysdale, Local Judge.

COLLISION (§ I A—1)—*Shipping—Damages—Measure of.*]—Motion to vary the registrar's report. The claim was against defendant steamship for damages for collision with plaintiffs' schooner, the "Guide."

W. A. Henry, K.C., for plaintiffs.

H. Mellish, K.C., for defendant steamship.

DRYSDALE, L.J. in ADM., held that in a case of collision between a steamship and a fishing schooner owing to the fault of the steamship, by which the fishing vessel is so much injured as to prevent her continuing on her trip to the fishing grounds, the fair measure of damages is the estimated value of a prospective catch of fish by the injured vessel had she been able to make the trip.

Order confirming report.

THE "BELLAS."

Exchequer Court of Canada (In Prize), Cassels, J. December 15, 1914.

ADMIRALTY (§ II—8)—*Prize Court—Agreement of purchase by neutral prior to war—Subsequent completion by bill of sale—Detention order.*]—Application on behalf of the Crown for an order for the detention of the German vessel "Bellas," which reached Rimouski on July 29, 1914, to take on a cargo of lumber, and was in process of loading at the declaration of war between Great Britain and Germany on August 4, 1914. The ship was seized on August 5 by the Canadian authorities, and later removed to the port of Quebec.

E. L. Newcombe, K.C., Deputy Minister of Justice, for the Crown.

A. C. Hill, for the claimant, Orlando do Mello de Rego, of Lisbon, Portugal, who claimed the ship had been sold to him by the former German owners on July 3, 1914, although there had been no change of flag up to the time of seizure.

Mr. Newcombe put in the ship's papers in evidence, produced with the affidavit of the Collector of Customs at Quebec. These included the muster roll, the ship's certificate, and the certificate

CAN.
Ex. C.

of admeasurement, and proved the German nationality of the vessel with a registered home port at Hamburg. He also proved notice of the issue and service of the writ had been published five times in the Montreal and Quebec newspapers, designated under Order II, rule 21, of the Prize Court Rules, 1914. Translations were also produced and filed under Order XV, rule 20. The Collector of Customs at Quebec was called as a witness for the Crown.

Mr. Hill, for the claimant, called C. Bollen, the master of the "Bellas." He also put in certain cablegrams to shew the claimant's interest in the vessel and the *bona fides* of his claim; also a formal bill of sale of the ship dated Lisbon, November 10, 1914. It was conceded that the claimant had no right to fly the Portuguese flag until October 7, 1914, the date on which it was said that the Portugese authorities had authorized the nationalizing and enregistering of the vessel.

CASSELS, J.:—Both under the old authorities and under the decisions of our own Courts, the transfer must be perfected before declaration of war, by a proper bill of sale. Here there is no claim put forward that would entitle this defendant (the claimant), a Portuguese subject, to have this ship handed over. His claim would be dismissed with costs, and the order for detention of the ship and cargo until further order would go against the German owners, as in the "Chile" case.

S. C.

HARBOUR COMMISSIONERS OF MONTREAL v. SYDNEY, CAPE BRETON AND MONTREAL STEAMSHIP CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. May 18, 1914.

[*Sydney, C. B. etc., Steamship Co. v. H. C. of Montreal*, 20 D.L.R. 828, affirmed, 11 D.L.R. 814, overruled.]

STATUTES (§ II A—95)—*Construction of—Exchequer Court—Action in—Board of Commissioners—Negligence—Authorities Protection Act*, 1893.]—Appeal from the judgment of the Exchequer Court of Canada. The appeal was dismissed.

A. R. Angers, for the appellants.

Meredith, Macpherson, Hague, Holden & Shaughnessy, for the respondents.

HOWARD v. STEWART.

CAN.
S. C.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. October 13, 1914.

[*Howard* v. *Stewart*, 23 Que. K.B. 80, reversed; but see 9 Edw. VII. (Que.) ch. 24, sec. 4, R.S.Q. art. 1572.]

PUBLIC LANDS (§ II—22)—*Rights of locatee—Colonization lands in Quebec.*]—Appeal from the Court of King's Bench, appeal side, Province of Quebec, *Howard* v. *Stewart*, 23 Que. K.B. 80, affirming the judgment at trial in favour of defendant.

The matters in question related to the validity of a transfer of his settlement rights on Crown lands, as holder of a "location ticket" issued prior to July 1, 1909, and consequently not affected by the Quebec statute, 9 Edw. VII. ch. 24, sec. 4. That statute provides that lots sold or otherwise granted for settlement after July 1, 1909, should not for five years following the date of the location ticket be sold by the holder.

J. E. Martin, K.C., and *Ferdinand Roy*, K.C., for plaintiff, appellant.

G. G. Stuart, K.C., and *Rousseau*, for defendant, respondent.

The majority of the Court held (DAVIES, J., dissenting) that the holder of a location ticket issued prior to July 1, 1909 (9 Edw. VII. ch. 24, sec. 4), for colonization lands in Quebec had an interest in the land capable of being sold. In case of sale the purchaser's title became absolute on issue of the letters patent. Such title was good, even if unregistered, against a purchaser from the locatee after the issue of letters patent who had notice of the prior sale.

Appeal allowed.

INDEX

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

WORDS AND PHRASES—*continued.*