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-XLIII. D.L.R., See Pages vii-xviii.

VOL. 43

EDITED BY

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CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 43 INCLUSIVE.

Re LAVERS' HEELS PATENT Ltd. (Annotated).

CAN.

Ex. C.

Exchequer Court of Canada, Cassels, J.E.C. October 30, 1918.

PATENTS (§ II B—15)—OLD ELEMENTS—PATENTABLE COMBINATION—ELEMENTS IN PREVIOUS PATENTS—VALIDITY.

Bringing together old elements in such a way as to be useful and produce a combination which has the essentials requisite to a valid patent entitles an applicant to have patent issue, notwithstanding that each of such elements can be traced in previous patents.

Statement.

APPEAL from a decision of the patent office rejecting an application for a patent. Reversed.

Russel S. Smart, for petitioner.

Cassels, J.E.C.

CASSELS, J.E.C.:—Under the Patent Act, R.S.C. (1906), c. 69, it was provided by ss. 17 and 18 as follows:—

17. The commissioner may object to grant a patent in any of the following cases:—

(*a*) When he is of opinion that the alleged invention is not patentable in law.

(*b*) When it appears to him that the invention is already in the possession of the public, with the consent or allowance of the inventor.

(*c*) When it appears to him that there is no novelty in the invention.

(*d*) When it appears to him that the invention has been described in a book or other printed publication before the date of the application, or is otherwise in the possession of the public.

(*e*) When it appears to him that the invention has already been patented in Canada, unless the commissioner has doubts as to whether the patentee or the applicant is the first inventor.

(*f*) When it appears to him that the invention has already been patented in a foreign country, and the year has not expired within which the foreign patentee may apply for a patent in Canada, unless the commissioner has doubts as to whether the foreign patentee or the applicant is the first inventor.

18. Whenever the commissioner objects to grant a patent as aforesaid, he shall notify the applicant to that effect and shall state the ground or reason therefor, with sufficient detail to enable the applicant to answer if he can the objection of the commissioner.

By a statute passed by the Dominion Parliament in the year 1913, c. 17, it is provided as follows:—

1. The Exchequer Court Act, c. 140 of the R.S.C. (1906), is amended by adding the following section immediately after s. 23:—

23A. Every applicant for a patent under the Patent Act who has failed to obtain a patent by reason of the objection of the commissioner of patents as in the said Act provided, may, at any time within six months after notice thereof has been mailed, by registered letter, addressed to him or his agent, appeal from the decision of the said commissioner to the Exchequer Court.

CAN.

EX. C.

RE LAVERS' HEELS PATENT LTD.

Cassels, J.E.C.

2. The Exchequer Court shall have exclusive jurisdiction to hear and determine any such appeal.

3. The Exchequer Court shall have exclusive jurisdiction to hear and determine any now pending appeals to the Governor-in-council under s. 19 of the Patent Act, and the Governor-in-council shall transfer the said appeals and all documents and proceedings relating thereto to the Exchequer Court.

The applicant for two patents, C. W. Lavers, petitioned for a patent which is called serial No. 191227 and the other serial No. 191228.

After a long and protracted procedure in the patent office the application was finally rejected by the examiner and his decision being adopted by the commissioner, the applicant appeals to this court under the provisions of the statute hereinbefore quoted.

The commissioner was fully notified of the appeal, but did not appear on the hearing of the appeal.

Mr. Smart appeared for the petitioner, and urged his case from the point of view of the applicant for the patent. The court received no assistance from the commissioner, with the result that an enormous number of alleged anticipations have been waded through by the judge unaided by any assistance or help from the patent office.

If applications by way of appeal become numerous in this court, so much time will be required on the part of the judge to delve into all of these prior patents that practically the time of one judge would be occupied as an appellate examiner from the patent office. I do not think it is fair that such a burden should be cast upon the judiciary.

If the patent office take upon themselves to reject the applicant's claim for a patent, it seems to me that they should afford the judge the assistance of counsel to sustain their findings, and that the matter should not be left to the judge to grope through a long lengthy file and any number of previous patents unaided.

Under the circumstances of the case, I have done the best I could. At the same time I feel that I may not be doing exact justice. It has to be borne in mind that the mere issuing of a patent does not make the patent conclusive or binding upon a litigant who desires to raise the question as to its invalidity; and therefore, if, in reversing a decision of the commissioner as I intend to do, I feel that if I have erred, nobody is much hurt, as anyone will have the right to protest the validity of the patent in any other proceeding.

It is a matter of common knowledge that a large number of patents for invention issued by the Department have, in litigated cases, been declared by the courts to be null and void, either because the so-called patents lacked the essentials of patentability or on account of the prior state of the art, etc. Every judge, I think, is familiar with this proposition. I think that the examiner has erred in not granting the patent in the case before me.

Dealing first with the application for a patent, serial No. 191227. The claim put forward is for a very strict construction patent. It is a very narrow patent, but nevertheless I cannot agree with the examiner in his reasons for disallowing the claim.

The first claim of the patent is as follows:—

A detachable heel of flexible, resilient, plastic material, having a plurality of recesses on its inner face or contact for the purpose of moulding the heel properly and permitting the entry afterwards of dome-headed pins for attachment with a plurality of separated locking independent washers, embedded therein at the bottom of said recesses, permitting such heel to slide laterally into the locking position.

The subsequent claims of the patent are mere structural modifications. Probably some of them lack patentability. I have not gone into them, as I do not think it is of much consequence if the patentee is entitled to the main claim.

On April 3, 1918, a letter is written signed by Thomas L. A. Richard, patent examiner, addressed to Messrs. Fetherstonhaugh & Co., Ottawa, the attorneys for the applicant. Mr. Richard states that:—

The heel forming the subject-matter of this application is built up of various separate elements each found in the prior art as disclosed in the references of record.

He refers to certain patents, and then states:—

All the references previously cited and mentioned in this case are shewn to disclose all the features of construction of applicant's device, and they are retained on record for the purpose of anticipations of the general structure as well as of details thereof.

2. From the foregoing it is seen that none of the features of applicant's structure is novel *per se*, each and every one is found in one or the other of the references of record.

All the things united in this heel being old and not performing any joint function, each doing only what it has formerly done in former heels, their adaptation to this heel does not constitute a proper combination and amounts merely to aggregation not involving invention.

I cannot agree with this statement of the law. In nearly all combination patents the claim is for a combination of old elements. It is no answer to a claim for a combination that one element may

CAN.

EX. C.

RE LAVERS' HEELS PATENT LTD.

Cassels, J.E.C.

be found in a prior patent, another element in another patent, etc. If the elements are brought together in such a way as to be useful, and a combination is produced entitling the applicant to a patent I do not see that it is any answer to wade through a series of patents and to state that each of the elements can be traced in other previous patents. Unless there has been a disclosure of a similar combination, the combination would be good, assuming it to have the essentials requisite to a valid patent. To call it an aggregation is to my mind incorrect.

For instance, take the dome-headed pins. Unquestionably these pins perform their ordinary function, but if you remove them from the combination what happens? The whole thing falls to pieces.

It may well be that some of the subordinate claims lack the elements of a proper combination having regard to Mr. Richard's view and his citations. I leave it open to the commissioner to reject, if so advised, any of these subsequent sub-combinations. All I direct is that the patent shall issue with the first claim.

I may add my opinion that I do not see that much harm would be occasioned by allowing it to issue with these subsequent claims. The patentee would take them at his risk, and, if properly advised, would not jeopardise by inserting a lot of useless sub-claims.

In regard to the application for patent serial No. 191228, claim 1 reads as follows:—

1. In combination with a boot or shoe having a permanent heel, a base plate thereon, and a plurality of domed headed pins extending through the base plate, such pins being formed with shoulders adapted to bear against the base plate and retain the same in position, a detachable heel of flexible, resilient, plastic material having a plate embedded therein formed with slots to engage slideably the headed pins, and locking means extending between the permanent heel and the detachable portion.

It is unnecessary to repeat what I have stated in regard to the previous application. Practically the same remarks apply to Mr. Richard's letter of April 3, 1918.

I think the patent should issue for the first claim of this patent, leaving it open to the commissioner whether to grant or reject the sub-combination claims.

There will be no costs of these applications.

Application granted.

ANNOTATION.

Annotation.

By RUSSEL S. SMART of the Ottawa Bar.

What are termed combinations form an important class of inventions. The term "combination" has no statutory foundation. Patents are granted in Canada for any new and useful "art, machine, manufacture or composition of matter." The machine or manufacture or composition of matter may be composed of a number of elements co-operating together, and when this is so the term "combination" is often applied to it.

Frequently the word "combination" is used, especially in the specification of a patent to describe any invention made up of parts more or less complex. Technically, however, the word is used to refer to cases where there is some interaction or functional co-operation of the parts, producing a separate entity having a result and characteristics different from the sum of the individual results and characteristics of its elements. Buckley, L.J., in *British United Shoe Machinery* v. *Fussell* (1908), 25 R.P.C. 631, 657, defined a combination as meaning "a collocation of intercommunicating parts with a view to arrive at a simple result." *Proctor* v. *Bennis* (1887), 36 Ch. D. 740; *Wood* v. *Raphael* (1896), 13 R.P.C. 730; *Crane* v. *Price* (1840), 1 W.P.C. 377, 383, 409; *Murray* v. *Clayton* (1872), L.R. 7 Ch. App. 570.

Combinations when they produce a new result or a known result in a new way are considered to be patentable inventions. (*British United Shoe Machinery Co.* v. *Fussell, supra*; *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Wood* v. *Raphael, supra*; *Anti-Vibration Incandescent Lighting Co.* v. *Crossley* (1905), 22 R.P.C. 441; *Goddard* v. *Lyon* (1894), 11 R.P.C. 354; *Marconi* v. *British Radio Telegraph & Telephone Co.* (1911), 28 R.P.C. 181; *British Westinghouse Electric and Mfg. Co.* v. *Braulik* (1910), 27 R.P.C. 209; *International Harvester Co. of America* v. *Peacock* (1908), 25 R.P.C. 765, 777; *Gramaphone and Typewriter Co. Ltd.* v. *Ullmann* (1906), 23 R.P.C. 752.)

All of the elements of a combination may be old, but the combination may itself constitute an invention. (*Lister* v. *Leather* (1858), 8 El. & Bl. 1004, 120 E.R. 373; *Bovill* v. *Keyworth* (1857), 7 El. & Bl. 725, 119 E.R. 1415; *Crane* v. *Price* (1842), 1 W.P.C. 383.)

The leading Canadian case of *Smith* v. *Goldie* (1882), 9 Can. S.C.R. 46, deals with this point. The headnote reads:—

"An invention consisted of the combination in a machine of three parts, or elements, A, B and C, each of which was old, and of which A had been previously combined with B in one machine, and B and C in another machine, but the united action of which, in the patented machine, produced new and useful results. *Held* (Strong, C.J., dissenting), to be a patentable invention."

In the judgment, Ritchie, J., said, p. 50:—"Where the patent is for a combination, the combination itself is the novelty and also the merit."

And Henry, J:—"The result in this case is produced by the combined and simultaneous action of the draft upwards created by the fan, and the continuous operation of the brush or brushes worked by the machinery as described in the specification. It was the simultaneous action which produced the result. . . . By the co-operation of the constituents, a new machine of a distinct character and function was formed, and a beneficial result produced by the co-operating action of the constituents, and not the mere adding together of the separate contributions."

For other Canadian authorities on combinations see *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co. of Canada* (1885), 2 Can. Ex. 495; *Robert*

Annotation. *Mitchell* v. *Handcock Inspirator Co.* (1886), 2 Can. Ex. 539; *Griffin* v. *Toronto R. Co.* (1902), 7 Can. Ex. 411; *Mattice* v. *Brandon Machine Works* (1907), 17 Man. L.R. 105; *Dansereau* v. *Bellemare* (1889), 16 Can. S.C.R. 180; *Barnett McQueen* v. *Canadian Stewart* (1910), 13 Can. Ex. 186.

A new combination may be formed by the omission of an element from, or by the addition of an element to, the elements of an old combination, provided there is a new result produced by a different interaction of the elements. (*Pneumatic Tyre Co.* v. *Tubeless Tyre Co.* (1897), 15 R.P.C. 74; *Wallington* v. *Dale* (1852), 7 Exch. 888; *Russell* v. *Cowley* (1834), 1 W.P.C. 459; *Morris* v. *Bransom* (1776), 1 W.P.C. 51; *Vickers* v. *Siddell* (1890), 15 App. Cas. 496.) The substitution of a new element in an old combination, if the element substituted is not obviously and demonstrably an equivalent of the one for which it was substituted, may involve invention. (*Unwin* v. *Heath* (1855), 5 H.L. Cases, 508, 522, 1 W.P.C. 551; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1885), 2 R.P.C. 73.)

For American cases on combination see *San Francisco* v. *Keating*, 68 Fed. 351, 15 C.C.A. 476; *Von Schmidt* v. *Bowers*, 80 Fed. 140, 25 C.C.A. 323; *American* v. *Helmstetter*, 142 Fed. 978, 74 C.C.A. 240; *National* v. *Aiken*, 163 Fed. 254; *Hoffman* v. *Young*, 2 Fed. 74; *National* v. *American*, 53 Fed. 369; *Green* v. *American*, 78 Fed. 119, 24 C.C.A. 41; *Gill* v. *Wells*, 89 U.S. 1; *Electric* v. *Hall*, 114 U.S. 87; *Prouty* v. *Ruggles*, (1842), 16 Pet. 336; *McCormick* v. *Talcott*, (1857), 20 How. 402; *Vance* v. *Campbell* (1861), 1 Black 427; *Dunbar* v. *Myers*, 94 U.S. 187.

It is necessary to distinguish combinations from mere aggregations. Aggregation is not invention either in processes, machines or manufactures. (*Hailes* v. *Van Wormer* (1873), 20 Wall 353.) The elements which are collocated in an aggregation may themselves, if new, amount to separate inventions, but assembling these elements, unless there is interaction, can produce no new result, and there can, therefore, be no invention. For example, in *Reckendorfer* v. *Faber* (1875), 92 U.S. 347, a rubber eraser was placed on the end of a pencil and a patent claimed for the alleged combination. The Supreme Court of the United States held that the pencil and eraser each continued to perform its own duty and nothing else. No effect was produced; no result followed from the use of the two and consequently the union was an aggregation and not invention. (See also *Williams* v. *Nye* (1890), 7 R.P.C. 62; *Thompson* v. *James* (1863), 32 Beav. 570, 55 E.R. 224; *Rushton* v. *Crawley* (1870), L.R. 10, Eq. 522.)

The test of combination is the presence of a result different from the individual results of its elements. Buckley, L.J., in *British United Shoe Machinery* v. *Fussell* (1908), 25 R.P.C. at p. 631, thus states the rule:—

"For this purpose a combination, I think, means not every collocation of parts, but a collocation of intercommunicating parts so as to arrive at a desired result, and to this, I think, must be added that the result must be what, for the moment, I will call a simple and not a complex result. . . . It is not every combination of parts which is for this purpose a combination."

For other English authorities see *Crane* v. *Price* (1840), 1 W.P.C. 377; *Cannington* v. *Nuttall* (1871), L.R. 5 H.L. 205; *Huddart* v. *Grimshaw* (1803), 1 W.P.C. 86; *Bovill* v. *Keyworth* (1857), 7 El. & Bl. 725, 119 E.R. 1415; *Minter* v. *Wells* (1834), 1 Cr. M. & R. 505; *Anti-Vibration Incandescent Lighting Co.* v. *Crossley* (1905), 22 R.P.C. 441, 445; *British United Shoe Machinery Co. Ltd.* v. *Fussell* (1908), 25 R.P.C. 257; *Williams* v. *Nye* (1890), 7 R.P.C.

62; *Newton* v. *Grand Junction R. Co.* (1850), 5 Exch. 331, 334; *Boulton* v. *Bull* (1795), 2 H. Bl. 463; *Lister* v. *Leather* (1858), 8 El. & Bl. 1004, 120 E.R. 373; *Morton* v. *Middleton* (1863), 1 Macph. (Ct. of Sess.) 718; *Marconi* v. *British Radio Telegraph & Telephone Co.* (1911), 28 R.P.C. 181; *British Westinghouse* v. *Braulik* (1910), 27 R.P.C. 209. **Annotation.**

The same distinction was drawn in *Hunter* v. *Carrick* (1885), 11 Can. S.C.R. 300, where it was held that a mere aggregation of parts not in themselves patentable and producing no new result due to the combination itself, was not invention, and consequently it could not form the subject of a patent.

For Canadian cases see *North* v. *Williams* (1870), 17 Gr. 179; *Walmsley* v. *Eastern Hat & Cap Mfg. Co.* (1909), 43 N.S.R. 432; *Smith* v. *Goldie* (1882), 9 Can. S.C.R. 46; *Dompierre* v. *Baril* (1889), 18 Rev. Leg. 597; *Wisner* v. *Coulthard* (1893), 22 Can. S.C.R. 178; *Copeland-Chatterson* v. *Lyman Bros.* (1907), 9 O.W.R. 908, 912; *Yates* v. *Great Western* (1877), 2 A.R. (Ont.) 226; *Woodward* v. *Oke* (1906), 17 O.W.R. 881; *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co. of Canada* (1885), 2 Can. Ex. 495; *Robert Mitchell* v. *The Handcock Inspirator Co.* (1886), 2 Can. Ex. 539; *Griffin* v. *Toronto Railway* (1902), 7 Can. Ex. 411; *Mattice* v. *Brandon Machine Works Co.*, 17 Man. L.R. 105; *Emery* v. *Hodge* (1861), 11 U.C.C.P. 106; *Summers* v. *Abell* (1869), 15 Gr. 532.

For United States authorities see *Gill* v. *Wells*, 89 U.S. 1; *Electric* v. *Hall*, 114 U.S. 87; *Prouty* v. *Ruggles*, 16 Pet. 336; *McCormick* v. *Talcott*, 20 How. 402; *Vance* v. *Campbell*, 1 Black 427; *Dunbar* v. *Myers*, 94 U.S. 187; *San Francisco* v. *Keating*, 68 Fed. 351; *Hailes* v. *Van Wormer*, 20 Wall 353; *Reckendorfer* v. *Faber*, 192 U.S. 347; *American* v. *Helmstetter*, 142 Fed. 978; *National* v. *Aiken*, 163 Fed. 254.

Re McNAUGHT AND STOKES-STEPHEN OIL CO.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 17, 1918.

1. ARBITRATION (§ II—14)—WORK OF ARBITRATOR NECESSARILY TO BE DONE AT CERTAIN PLACE—REMOVAL OF ARBITRATOR TO DISTANT PLACE—IMPOSSIBILITY OF ACTING—APPOINTMENT OF NEW.

When what has to be done by an arbitrator can only be done with certain persons and almost necessarily must be done in a certain place, his removal to a place 2,000 miles away with no expectation of returning justifies the appointment of another arbitrator under s. 7 of the Arbitration Act (c. 6, 1909, Alta.).

2. ARBITRATION (§ IV—44)—AWARD—JUDGE DIRECTING EXECUTION ON—AWARD TO BE TREATED AS JUDGMENT—ARBITRATION ACT (ALTA.).

S. 13 of the Arbitration Act (c. 6, 1909, Alta.) does not authorise a judge to direct execution, on an award, where the evident intention of the arbitrators was not to determine how much was due but the basis upon which the amount could be determined. All that the section authorises is the granting of leave by a judge for the award to be treated as a judgment for the purpose of enforcement.

Statement.

APPEAL by the oil company from an order made by Simmons, J., for the enforcement of an award upon an arbitration. Judgment varied.

ALTA.

S. C.

RE McNAUGHT AND STOKES-STEPHEN OIL CO.

Harvey, C.J.

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

The judgment of the court was delivered by

HARVEY, C.J.:—In February, 1915, the parties entered into an agreement for the drilling by McNaught of a well for the company for the discovery of oil or gas.

The agreement provided for the submission to arbitrators of any disputes that might arise, and disputes having arisen, McNaught, on May 26, 1916, notified the company of the appointment by him of an arbitrator. By the terms of the submission the other party was required to name an arbitrator within 5 days, and the two so appointed were to appoint a third. Instead of appointing an arbitrator, the company commenced an action on May 30, and obtained an interim order restraining proceedings for arbitration. They were unable, however, to have the injunction continued to the trial. The arbitrator appointed by McNaught having removed from Calgary to live in Buffalo he notified the company that "he being incapable of acting" a new arbitrator had been appointed. The company then, while denying that there was any dispute and claiming to act without prejudice, appointed an arbitrator and notified McNaught. The two appointed a third arbitrator and on June 28, notice was given of the appointment and of a proposed meeting of the arbitrators for 10 A.M. on June 30. At the time and place named, counsel for both parties met the arbitrators but the third arbitrator did not appear. After some delay a telephone message was received stating that he was unavoidably detained but would arrive as soon as he could. All but Mr. Charman, solicitor for the company, remained till his arrival. Mr. Charman, however, left a few minutes before he arrived having before leaving protested against being forced on without being given time that he considered necessary to procure witnesses and having expressed his willingness that there should be an adjournment until July 3, the intervening days consisting of Sunday and a holiday, when, however, he would ask for a further adjournment. McNaught's solicitor, apparently, was not willing, at that time, to consent to the further adjournment.

After the third arbitrator appeared, an adjournment was made to July 3, of which notice was sent to Mr. Charman, which notice,

however, he did not receive till the morning of that day. The company's arbitrator also personally notified him and he states that he then advised the arbitrator that he could not go on, which is, however, not admitted.

The arbitrators convened and were attended by counsel for McNaught, but Mr. Charman, though present in the Court House, when they met, did not appear at the meeting. The arbitrators proceeded in his absence and took evidence, and on the following day made their award, which was in favour of McNaught and concurred in by all three arbitrators.

It declared that it was not economically practicable to complete the well beyond its then depth and that the delay in arriving at a decision was due to the company. It awarded and directed "that the contractor is entitled to payment at the contract price for the drilling to an estimated depth of 2,400 feet," and directed that the company pay McNaught his costs of the reference and the award. No further action appears to have been taken until February 26, 1917, when the company commenced an action in court claiming damages from McNaught for breach of contract. The defendant, instead of entering a defence, applied under s. 5 of the Arbitration Act for a stay of the action. The application was contested and carried to the Supreme Court of Canada which, on March 25, 1918, gave judgment affirming the judgment of this court (34 D.L.R. 375, 12 A.L.R. 501) granting the stay. Thereafter, on April 2, McNaught gave notice that he would move for an order for the enforcement of the award and that execution be issued for $9,575 with interest from July 4, 1916, and the costs of the reference and of the execution. The company, on April 17, gave notice of motion to set aside the award. The two notices were heard together by Simmons, J., who made the order now appealed from.

The two matters to be dealt with are provided for by s. 13 and sub-s. (2) of s. 12 of the Arbitration Act (c. 6 of 1909).

S. 13 provides that:—

> An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

The other provision is as follows:—

> Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the court may set the award aside.

It will be convenient to consider the company's application

ALTA.

S. C.

RE McNAUGHT AND STOKES-STEPHEN OIL CO.

Harvey, C.J.

first, for, if the award should be set aside, of course no order for its enforcement should be made.

The first ground of objection to the award is that McNaught had no right to name a new arbitrator because the first named was not, in fact, incapable of acting.

S. 7 provides that, if an arbitrator "refuses to act or is incapable of acting or dies" a new one may be appointed in his stead. It is contended that the mere removal of the first arbitrator to a place 2,000 miles away did not render him incapable of acting and in support are cited cases holding that removal did not render a person incapable of exercising a power of appointment. It is, of course, quite apparent that when what one has to do has no relation to any other person or place, he may be just as capable of doing it in one place as another, but when what is to be done can only be done with certain persons, and almost necessarily in a certain place, a person who cannot be with those persons or in that place is incapable of doing what has to be done.

I do not see how a person in Buffalo can be considered capabl of acting as an arbitrator in Calgary and there is nothing to suggest that there was any reason to expect him to return.

The second objection is that there was no dispute or difference to be arbitrated. In face of the proceedings that have been taken and of the appointment of an arbitrator by the company, I do not think this objection should be considered. The Chief Justice of Canada said, with reference to this appointment: "The appellants appointed an arbitrator without prejudice, by which I can only understand that they were willing to wait and see if the award were in their favour and accept or refuse to be bound by it accordingly. This, I think, is also a proceeding to be discouraged and is an additional reason why I would dismiss the appeal."

The third objection is that the submission is too general in that it proposes to submit "all questions between the parties." This objection, I think, should not be open here. It is only a matter of giving notice to the other side, and if objection had been taken before the arbitrators, they could have seen that the company was not prejudiced.

The fourth objection is that no sufficient notice of intention to proceed was given and that the company was not consulted and had no opportunity of being represented before the arbitrators when the day was fixed for proceeding.

From the foregoing relation of the proceedings it appears that the company's solicitor knew of the meeting of the arbitrators but that he ignored it entirely. Perhaps he did not intend any want of respect for them, but it is not surprising that counsel for McNaught and the arbitrators should have supposed, as it is stated they did, that Mr. Charman was remaining away not because he had not had time to prepare his case but because he had no intention of taking part in the arbitration and it is stated on oath that if Mr. Charman had appeared and asked for time it would have been granted and would not have been opposed. I do not think the company has any cause for complaint on this score.

The fifth objection is one of bias on the part of the arbitrator appointed by the company. It is true he did not make himself a party to any obstruction of the proceedings of the arbitrators and joined the other arbitrators in the award, but that is no ground from which to infer bias. It is stated, however, that he was interested in McNaught receiving some money from the company. The arbitrator was called as a witness and gave oral testimony. He denied some of the allegations made against him and stated that he disclosed to the manager of the company his exact relation and the manager stated that there was no objection whatever to his acting as arbitrator. The judge evidently accepted the evidence of the arbitrator and refused to find any bias. I see no reason for disturbing his conclusion.

The sixth objection is "that the arbitrators never became seized of jurisdiction on the subject matter of the arbitration because neither at the time nor place fixed for the arbitration, nor within a reasonable time thereafter, were the then arbitrators present." I think this objection hardly needs serious consideration. The arbitrators did all meet on the first day, though there was a delay of 2 hours before they were all together. They then formally adjourned and met again at the time fixed for adjournment, of which all parties had notice and had the opportunity and ability to be present. I can see no reason for considering that they were not as fully seized of jurisdiction as they could be.

The last objection is that the award is beyond the powers of the arbitrators, who were only required to determine the "reasonable impracticability" and have declared an "economic impracticability."

ALTA.

S. C.

RE MCNAUGHT AND STOKES-STEPHEN OIL CO.

Harvey, C.J.

In view of what I have concluded as to the manner of enforcing the award, this does not appear to me to be of any consequence. If the terms are intended to be synonymous, then the arbitrators have only decided what they were intended to decide while, if not, then they have not decided it at all and that can be well left to be determined when proper steps are taken to have effect given to the award.

I think, therefore, the company's substantive motion to set aside the award was properly dismissed.

It is necessary then to consider the form of the order for the enforcement of the award.

It is clear from s. 13 that the award can only be enforced, on such an application as this, in the same manner as a judgment or order to the same effect and one is at once faced with the question how a judgment to the same effect as this award could be enforced. A judgment for the recovery of money is enforced by a writ of *fieri facias*. A judgment for possession by a writ or order of possession, &c., according to the purpose of the judgment, but I know of no summary process of enforcing a mere declaratory judgment. The rights which arise by virtue of the declaration, if not given effect to, may require an action for their enforcement. In a great number, probably the large majority of actions brought to recover money, there is no dispute as to the rights of the plaintiff, but there is an unwillingness or inability on the part of the defendant to give effect to them and a judgment has to be obtained. In the present case, at least, the primary dispute was as to what McNaught's rights were. The recitals of the notice of appointment of an arbitrator by McNaught indicate that the dispute was whether it was reasonably practicable to drill to a further depth with the same sized casing and as to the delay and neglect of the company's manager. The award finds that it is not economically practicable to proceed further with the present diameter and that the company was to blame for the delay of its manager and awards payment for 2,400 ft. at the contract price. It says nothing about the amount to which McNaught is thus entitled, apparently no question of dispute being considered by the arbitrators as to the contract price or the amount paid on account. The amount for which McNaught asked and obtained leave to issue execution is ascertained as the affidavits shew by multiplying the depth of

2,400 ft. by 13, $13 being the contract price per foot and deducting $21,625 admitted to have been paid on account. It is apparent at once that this is something quite outside the terms of the award. The arbitrators, apparently, did not intend to determine how much McNaught was entitled to but merely the basis upon which the amount could be determined. If the award were, in fact, a judgment, it is difficult to see how an execution for any sum could be issued upon it. To issue execution on a judgment, all that would be necessary would be a præcipe to the clerk but it would be quite impossible for the clerk to say from the terms of this award for what sum McNaught might be entitled to execution. All s. 13 authorised is the granting of leave by a judge for the award to be treated as a judgment for the purpose of enforcement. The order appealed from goes much further and becomes, in effect, a new judgment based upon the award with certain facts to which to apply it.

In *Re A Bankruptcy Notice*, [1907] 1 K.B. 478, it was held that the section, which is in the exact terms of ours, gave no authority to make the award a judgment even in the terms of the award. Fletcher Moulton, L.J., at p. 482, says:—

> It (the section) gives no power to turn such an award into a judgment. It gives to the award the same status as a judgment for the purpose of enforcement but it leaves it what it was before, viz., an award.

I am of opinion, for the reasons stated, that there was no jurisdiction to direct execution for the amount claimed to be due. It may be that McNaught would be entitled to an execution for the amount of the costs which the arbitrators, in the exercise of power given by the statute, ordered the company to pay, but the most that the judge has jurisdiction to do is to give leave that the award be enforced as a judgment, and then the party in whose favour it is will have the same rights as to enforcement as if it were a judgment.

The appeal on this branch of the case should, therefore, be allowed, and the order should be amended so as to strike out the provisions other than the granting of leave to enforce it as a judgment or order. I see no reason, however, for interfering with the judge's disposition as to costs of either application which are in his discretion under the Arbitration Act.

It was suggested that the award might be remitted, but I do

ALTA.

RE McNAUGHT AND STOKES-STEPHEN OIL CO.

not think that this should be done without the company being given a proper opportunity to meet such an application. As success is divided on the appeal I would give no costs of the appeal to either party. *Judgment varied.*

B. C.

C. A.

BANK OF HAMILTON v. HARTNEY.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. October 1, 1918.

LAND TITLES (§ III—33)—CHARGES—PRIORITY ACCORDING TO REGISTRATION —LAND REGISTRATION ACT (R.S.B.C., c. 127, s. 73).

Charges under s. 73 of the Land Registration Act (1911, R.S.B.C., c. 127) must be given priority according to date of registration not of execution. The section applies to priority between charges under a judgment and under a mortgage.

Statement.

APPEAL by plaintiff from the judgment of Clement, J., in an action to determine priorities of charges. Affirmed.

W. C. Brown, for appellant; *G. E. Housser*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I entirely agree with the trial judge and with his reasons for judgment, and desire only to emphasise the distinction between this case and *Entwisle* v. *Lenz* (1908), 14 B.C.R. 51; and *Jellett* v. *Wilkie* (1896), 26 Can. S.C.R. 282. In each of these cases the contest was not between conflicting *charges* but between a beneficial right to the fee as against a charge. It is important to bear in mind, when considering questions affected by the Land Registry Act of this province, that a clear line of demarcation has been drawn between ownership of the fee and of a charge. S. 73 of the Act gives priority to charges according to date of registration, not of execution.

There is no question in this appeal of priorities between the person to whom the property has been conveyed or assigned and the person claiming a charge on the fee. In this case both parties are chargees, the one under a judgment, the other under a mortgage. They, therefore, come within the precise and unambiguous language of s. 73 and priority of registration must prevail.

I would, therefore, dismiss the appeal.

Martin, J.A.

MARTIN, J.A., dismisses the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—With great respect to the trial judge, I find myself entirely unable to accept the view arrived at in the judgment under appeal, namely, that s. 73 of the Land Registry Act (c. 127, R.S.B.C., 1911) is in itself conclusive of the

subject-matter of the action, and that that section is operative to give priority of position to the respondents, *i.e.*, that the judgment creditors under the registered judgment have priority to the admittedly prior mortgage but subsequently registered mortgage of the judgment debtors to the appellant bank. The action cannot be looked at as one only to settle priorities, it is one claiming that the judgment constitutes a cloud on the title of the appellant —a cloud upon the title to lands previously to the registration of the judgment granted and conveyed by way of mortgage to the appellant. It becomes necessary in the inquiry to consider what the nature of the charge is when a judgment is registered under the provisions of the Land Registry Act. To determine this, we turn to s. 27 of the Execution Act (c. 79, R.S.B.C., 1911) and (s. 27 (1)) it will be seen that it is

> from the time of registering the same, the said judgment shall form a lien and charge on all the lands of the judgment debtor in the several land registry districts in which such judgment is registered in the same manner as if charged in writing by the judgment debtor under his hand and seal.

Now the judgment was registered on April 18, 1916, and the mortgage was executed in the month of March, between the 10th and 16th of March, 1916, as found by the trial judge, so that on April 18, 1916, the judgment creditors could not then charge in writing under their hands and seals lands already granted and conveyed by way of mortgage to the appellant. See *Jellett* v. *Wilkie* (1896), 26 Can. S.C.R. 282, Sir Henry Strong, C.J., at pp. 290-91; and *Yorkshire Guarantee and Securities Corp.* v. *Edmonds* (1900), 7 B.C.R. 348 (McColl, C.J., at pp. 351, 352).

It is true that s. 73 (c. 127, R.S.B.C., 1911) raises some difficulty in applying the legal principles that govern in the matter, but with close analysis it occurs to me the difficulty disappears. To arrive at this conclusion, it is instructive to refer to the language of Strong, C.J., in *Jellett* v. *Wilkie*, *supra*, upon the point of what rights and remedies the judgment creditors really have. In that particular case the Chief Justice, at p. 290, said:—

> According to the ordinary rules of courts of equity, the appellant could have made his execution a charge on, and have sold for the satisfaction of his judgment, just what beneficial interest the execution debtor had in these lands and nothing more. And this, which is said to be a "broad rule of justice" and to depend, as is well pointed out by Wood, V.-C., in *Benham* v. *Keane*, 1 J. & H. 685, 70 E.R. 919, 3 DeG. F. & J. 318, upon the obvious distinction between a purchaser who pays his money relying on getting the specific land he buys and a creditor who is in no such position, was from early

B. C.

C. A.

BANK OF HAMILTON v. HARTNEY.

McPhillips, J.A.

times enforced by courts of equity in order to protect the title of equitable owners and chargees. And it must have been the obvious right of the respondents to have the benefit of this protection in the way in which the judgment now impugned afforded it to them, unless the statute has abrogated the principle.

Has s. 73 (c. 127, R.S.B.C., 1911) "abrogated the principle," —in fact, can it be said to be operative or effective at all in determining the question? And it is to be remembered that the statute was in like terms when *Yorkshire Guarantee and Securities Corp.* v. *Edmonds, supra*, was decided. In my opinion, the whole statute law has to be read together and s. 75 cannot be held to be applicable; and to shew its inapplicability, it is only necessary to note that the section is dealing with charges created independent of statute, "the charges shall as between themselves have priority according to the dates at which the applications respectively were made and not according to the dates of the creation of the estates or interests." Now, in the case of the judgment in question, the obtaining of the judgment was not the creation of any estate or interest. No estate or interest was created until the registration was effected, and then by force of the statute (Execution Act, c. 79, s. 27 (1), R.S.B.C., 1911) the judgment constituted a charge on the lands of the judgment creditors. But can it be said that a charge was created on lands already conveyed away by way of mortgage? To arrive at this conclusion one must be constrained by intractable statute law, as it is in denial of all true principles of law and of natural justice. See Lord Moulton in *Loke Yew* v. *Port Swettenham Rubber Co. Limited*, [1913] A.C. 491, at 504, 505:—

> Indeed the duty of the court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. . . . The court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly.

The present case is not the case of a purchaser for value, and not until registration is there a charge—no transfer of legal estate in the lands is effectuated, as in the case of the mortgage to the appellant; also see Lamont, J.A., in *Boulter-Waugh & Co.* v. *Phillips* (1918), 42 D.L.R. 548, at 557 (Sask. Court of Appeal):—

> The Land Titles Act provides that instruments registered in respect of or affecting the same lands shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution.

It also provides that a trustee for the purposes of the Act shall be treated as the beneficial owner. But *that is for the purposes of the Act only.* The *Loke Yew* case, *supra*, shews clearly that the courts will enforce the obligations of a trustee subject only to the rights of *bonâ fide* purchasers for value without notice.

Proceeding from this premise it will be seen that in *Yorkshire* v. *Edmonds*, *supra*, although legislation in similar terms to s. 73 of the Land Registry Act now relied on was existent, being s. 41 of the Land Registry Act then in force (c. 111, R.S.B.C., 1897) and was pressed as being absolutely determinative of the point, the exact point, arising upon this appeal, yet we find the Chief Justice, that eminent judge, McColl, C.J., refusing to give effect to the contention in the following words, p. 351:—

I have given repeated consideration to the arguments strongly pressed by the bank founded upon the words of the sections of the Land Registry Act applicable, but in my judgment the company must succeed on the short ground that as the registration of the bank's judgment admittedly did not affect the company's mortgage before its registration no question of priority in the proper sense of the term could arise as between them.

Here we have the same situation, and this decision of McColl, C.J., was of the year 1900, and has remained unchallenged for now 18 years. Further, in the interim, we have had *Entwisle* v. *Lenz*, 14 B.C.R. 51, a decision of the then Full Court, to the same effect, although it is to be noted that the section then standing similar to s. 73, being s. 53 of the Land Registry Act (c. 23 of the Statutes of B.C., 1906), was apparently not referred to; and this fact gives colour for what may be said to have been a well understood view of the law since the decision in *Yorkshire* v. *Edmonds*, that the point now so strongly pressed was untenable. The head-note in the *Entwisle* case, *supra*, in part reads as follows:—

That the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor, and that in this case the debtor having conveyed the land to plaintiff so long before the execution creditor's judgment was obtained was a dry trustee of the land for plaintiff.

The governing statute now as to the effect of a judgment when registered is the Execution Act (c. 79, R.S.B.C., 1911), but the statute law for all purposes in the consideration of this appeal is the same as that under consideration in the *Entwisle* case.

Then, it may be said that, in the present action, it is not the question of priorities in the books of the Land Registry. It may well be that the registrar will be called upon to so state the priorities

B. C.

C. A.

BANK OF HAMILTON v. HARTNEY.

McPhillips, J.A.

in giving out certificates as to the state of the title as appearing upon the books. But there is no express legislation in s. 73 giving any greater right to the judgment creditor than that given under the provisions of the Execution Act. It is under the provisions of the Execution Act that the judgment creditor must assent and substantiate his right to a charge, and it is plainly evident, unless s. 73 is conclusive upon the point, as held by the trial judge, that the charge of the respondent is superseded by that of the appellant (*Yorkshire* v. *Edmonds* and *Entwisle* v. *Lenz*, *supra*).

In my opinion s. 73 is merely a provision for the guidance of the registrar but cannot have the effect of destroying the title of prior equitable owners. It cannot be thought, nor was it the intention of the legislature to interfere in this way with the well known "broad rule of justice" (Strong, C.J., *Jellett* v. *Wilkie*, 26 Can. S.C.R., p. 290). Finally, that which fully sets the point at issue at rest, in my opinion, is s. 34 of the Land Registry Act (c. 127, R.S.B.C., 1911), which is the enacting provision as to the effect of the registration of a charge. That section reads as follows:—

> 34. The registered owner of a charge shall be deemed *primâ facie* to be entitled to the estate or interest in respect of which he is registered subject only to such registered charges as appear existing in the register and to the rights of the Crown and he shall be entitled to a certificate of the registration of his charge without payment of any fee. (Amended 3 Geo. V. 1913, c. 36, s. 12).

It is plainly evident that the charge may be displaced upon sufficient evidence, and the evidence in the present case is conclusive that the *primâ facie* statutory charge has no place as against the previously existing mortgage of the lands in question to the appellant, *i.e.*, the judgment upon registration then, and then only, became a lien and charge (s. 73 Execution Act), but that lien and charge could only, in the language of the Chief Justice of British Columbia (Hunter, C.J.B.C., in the *Entwisle* case), be upon "those lands in which the judgment debtor has a real or beneficial interest." In the present case the judgment debtors had, previous to the time of registration of the judgment, granted and conveyed the lands by way of mortgage to the appellant. It can only be as against that interest which remains in the judgment debtors, the equitable right of redemption thereof.

B. C.

C. A.

BANK OF HAMILTON v. HARTNEY.

McPhillips, J.A.

that the judgment has affected by way of lien and charge, and a declaration of that interest could only be the decree of the court upon proper proceedings being taken to enforce the charge created by the registration of the judgment, under the provisions of the Execution Act (c. 79, s. 27 *et seq.*, R.S.B.C., 1911).

In *Howard* v. *Miller*, [1915] A.C. 318, 22 D.L.R. 75, their lordships of the Privy Council had under consideration the Land Registry Act (c. 23, B.C., 1906) which may be said in connection with this appeal to be, in all its provisions, the same as the present statute. Lord Parker, in delivering the judgment of their Lordships, at p. 78, said:—

> The registered owner of a charge is to be deemed to be *primâ facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (s. 29). The certificate of title is not conclusive but only *primâ facie* evidence of the title of the owner of a registered charge.

The lien and charge, therefore, could only when registered affect that interest which the judgment debtors had in the lands, not the interest shewn in the books of the Land Registry Office. Note what Hunter, C.J.B.C., said on this point in the *Entwisle* case, at p. 54:—

> It will be observed that the language is "on all the lands of the judgment debtor" and not on all the lands registered in the name of the judgment debtor.

In this view of the matter, the further language of Lord Parker at pp. 79-81, *Howard* v. *Miller*, *supra*, is apposite, as the judgment we are considering may be rightly likened to the agreement under consideration in that case.

It is, therefore, evident that it is for the court to say what the lien or charge is and, at best, all the respondents can be said to be entitled to by reason of the registration of the judgment is a declaration of the (adopting the language of Lord Parker at p. 326, *Howard* v. *Miller*, *supra*) "interest commensurate with the relief which equity would give by way of specific performance," and that interest could only be an interest subject to the prior mortgage to the appellant. The appellant in this case is entitled, in my opinion, to similar consequential relief as that granted in the *Miller* case, and also to the declaration that notwithstanding the entry on the register, the appellant is entitled to be entered thereon as having a lien and charge in respect of the mortgage in priority to the judgment of the respondents, the lien and charge of

B. C.

C. A.

BANK OF HAMILTON v. HARTNEY.

McPhillips, J.A.

the respondents to be subject to the mortgage of the appellant. That is that the registration of the judgment as it stands at present is a cloud on the title of the appellant, and the appellant is entitled to a declaration to that effect and that all proper amendments of such registration be made by the registrar.

I am, therefore, of the opinion that the appeal should be allowed.

Eberts, J.A.

EBERTS, J.A., dismisses the appeal. *Appeal dismissed.*

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S. C.

CANADIAN GENERAL SECURITIES Co. Ltd. v. GEORGE.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Kelly, JJ. March 25, 1918.

CONTRACTS (§ II D—170)—FOR SALE OF LAND—INDEPENDENT COLLATERAL AGREEMENT—NOT NECESSARY, TO BE INCLUDED IN AGREEMENT FOR SALE.

In the case of an agreement for the sale of land with an independent collateral agreement for the resale of the lots, it is not necessary for the collateral agreement to appear in the agreement for sale. The collateral agreement, being an agreement to sell land, not for the sale of land, is not within the Statute of Frauds.

Statement

APPEAL from the judgment of Masten, J. Reversed in part.

W. J. McLarty for appellant.

G. G. S. Lindsey, K.C. for respondents.

The judgment of the Court was read by

Riddell, J.

RIDDELL, J.:—This is an appeal from the decision of the trial Judge, Mr. Justice Masten, in favour of the plaintiffs.

The plaintiffs' claim is on a specially endorsed writ, for principal, interest, and taxes due under an agreement made between the defendant and the Port Weller Securities Corporation, and by that company assigned to the plaintiff company. Most of the facts of the case are sufficiently set out in the reasons for judgment of my brother Masten.

The Port Weller Securities Corporation owned certain lots in the township of Grantham, which it sold to the plaintiffs by an agreement of the 13th December, 1913—the Port Weller Securities Corporation allowing the plaintiffs to use its name in effecting sales of the lots etc.; the plaintiffs appointed William T. Clancy their "general manager to supervise the sale of the company's lots." In the agreement between the plaintiffs and Clancy it was expressed that he had no authority to make any representations as to the company's properties other than those contained in the company's printed matter, and that he should have authority to accept offers for the purchase of lots according to the company's price-list.

The plaintiffs, using the name "The Port Weller Securities Corporation," employed E. S. George (the defendant's cousin) to sell their lots. Apparently there was a contest between the agents of the plaintiffs for a $100 bonus. George in Toronto called up the defendant (who lives in Port Elgin) by telephone and induced him to buy two of the plaintiffs' lots for $2,500, under the express agreement that the company would resell these lots by the end of June and not later than the 1st August, so that he would make $100 on each lot—George informed the defendant that he was authorised by the manager, Clancy, to make this arrangement. Clancy was present with George in the Toronto office of the plaintiffs when this representation was made—George's account is as follows:—

"Q. What passed between you and Mr. Clancy immediately after the conversation was finished? A. When I hung up the receiver Mr. Clancy was sitting back a little piece in the office. He came in and said, 'George, you should not have said that the company will resell the lots.' I said, 'Why? I understood the company was to resell the lots.' And he said, 'No, George, you should not have said the company will resell the lots, because we are selling lots, not reselling them.' I says, 'I never knew that before, I am glad you told me, because I have a couple of deals on this way, and I will correct them, but, as far as Gus's arrangement goes, it must stand; the others I will change and make sure that the company is not bound by them.'

"Q. What else was said? A. I don't know just exactly how he worded it afterwards, but it was really that there was no danger about it anyway, that we would take care of them, that they would be taken care of. The gist of it was, that it was allowed."

Clancy was not called at the trial. On the hearing of the appeal it was suggested to counsel for the plaintiffs that Clancy's evidence should now be taken, but this suggestion was declined. The learned trial Judge has found as a fact that the conversation alleged did take place; and there can be no room for doubt that Clancy by implication ratified the representations made in his name and ostensibly by his authority.

George had already sent two blank agreements to the defendant; and he asked him to sign these in blank and send them down to Toronto: "If you will fill it in (i.e., sign) I will take care of it

ONT.

S. C.

CANADIAN GENERAL SECURITIES CO. LIMITED v. GEORGE.

Riddell, J.

for you and see to it." "I told him to sign these things in blank, and I would fill them and see that they were filled up and handed in."

The defendant signed the agreements in blank, and sent them with the down-payment to George; George filled in the numbers of the lots, added a seal, and handed in the documents to Clancy, who affixed the name of the Port Weller Securities Corporation; one duplicate was sent to and kept by the defendant. George says concerning the undertaking to resell:—

"It never occurred to me to put this in. I relied on what Mr. Clancy had done. If you will pardon me, I was green in the real estate business. I knew nothing about it. I just filled in the application, handed it in, and it never occurred to me that what I guaranteed had anything to do with the application" (i.e., the agreement).

George tried to sell the lots on several occasions, and Clancy said, "We will speak to the rest of the agents and get them to assist in the sale of this thing." In June, in conversation with Clancy, the defendant told Clancy that he did not buy the lots to hold for business purposes, but he had only taken them "because they were going to resell them for me." Clancy does not seem to have contradicted this statement. The efforts to sell the lots failed: the Great War came on, and "it was impossible to get any person to look at them."

The defendant went on paying money to the plaintiffs till June, 1917; in July, 1917, the plaintiffs sent him an account shewing a balance of $2,235.35 owing: the defendant paid $25, and then ceased paying. On the 5th September, the plaintiffs took a formal assignment from the Port Weller Securities Corporation (as the agreement had been made in the name of that corporation), and launched this action.

It seems to me that we have here the case of a sale of land with an independent collateral agreement, not unlike such cases as *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215 (C.A.), and others mentioned in the notes to Halsbury's Laws of England, vol. 7, p. 528, para. 1058. There is no necessity for such a contract to appear in the agreement for sale. It is, however, objected that there was no authority in George to make such a contract; but that is answered by Clancy's ratification. Clancy being made

general manager to sell the plaintiffs' land, the secret restriction of his authority (if there was such) would not affect the defendant, who relied upon Clancy being the general manager: *McKnight Construction Co.* v. *Vansickler*, 51 S.C.R. 374, 24 D.L.R. 298; *Vansickler* v. *McKnight Construction Co.* (1914), 31 O.L.R. 531, 19 D.L.R. 505; *Clarke* v. *Latham*, 25 D.L.R. 751, and cases cited. It is impossible, I think, to hold that the general manager of a company has not the power to make such a contract for his company as is here disclosed.

Then the Statute of Frauds, sec. 4 (sec. 5 of our statute), is set up as an answer. But the contract is not one of sale of land but a contract to sell land, and that is not within the statute—20 Cyc., cases mentioned in notes 34 and 35 on pp. 234 and 235—just as there is no need of a writing to appoint an agent to sell lands—Fry on Specific Performance, 5th ed., p. 269, para. 526, and cases mentioned in notes 4 and 5.

If it should be considered that such an agreement is within the statute, another principle may be appealed to:—

"If one be induced to sign a written contract for the . . . purchase of land on the faith of . . . the performance of some collateral stipulation, oral evidence of the . . . stipulation so agreed upon will not be excluded by reason of the statute:" Williams on Vendor and Purchaser, 2nd ed., vol. 1, p. 12, and see cases in note (*m*)—*cf.* Dart on Vendor and Purchaser, 7th ed., vol. 1, p. 224. And the party making the collateral promise will not be allowed to enforce the promises made to him in the contract for purchase without being bound by his own promise: *Pember* v. *Mathers* (1779), 1 Bro. C.C. 52, 2 Dick. 550; *Pearson* v. *Pearson* (1884), 27 Ch. D. 145, 148.

Nor do I think any difficulty arises from the circumstance that George was in a sense acting for the defendant, when he was acting for the plaintiffs in filling in the blanks in the agreement. Either it was intended that the contract to resell should appear in the agreement, or it was not—if not, *cadit quæstio:* if it was, it was left out by mistake.

Moreover, to allow the plaintiffs to take advantage of the omission would be a gross fraud.

For these reasons, I think the contract to sell for the defendant was binding on the plaintiffs.

ONT.

S. C.

CANADIAN GENERAL SECURITIES CO. LIMITED v. GEORGE.

Riddell, J.

It is, however, argued that the defendant, by paying on the agreement after there was a breach of the contract to resell by the 1st August, has put it out of his power to enforce the contract made with him.

Were the agreement on his part to pay the price of the land to the plaintiffs and theirs to resell the land for him dependent, there would be much force in this argument.

But *Neveren* v. *Wright* (1917), 39 O.L.R. 397, 36 D.L.R. 734, and the cases there cited, shew that they cannot be considered dependent. The case is that there were two independent promises, each of which could be enforced by the promisee without reference to his own promise. The payments by the defendant may well be considered an acknowledgment of his liability to pay, but they are in no sense a waiver of his right to enforce the contract with him.

I think the case must be treated as though in the agreement for purchase there had been an express covenant by the plaintiffs to resell the land for the defendant on or before the 1st August, 1914, so as to realise for the defendant a profit of $100 on each lot.

The appeal should be allowed so far as the claim for damages for breach of the agreement to resell the lots is concerned; and, if the parties cannot agree, it should be referred to the Master to determine these damages—the judgment in favour of the plaintiffs should stand, but the damages above mentioned (if any) should be set off. Success being divided, there should be no costs of action or appeal—if a reference should be necessary, the Master should dispose of the costs thereof.

It will be seen that I propose to deal with the case as though the collateral agreement had been pleaded as a counterclaim; in case the matter goes further, it may be thought advisable to change the pleadings accordingly—leave should be given for that purpose.

The damages to be found by the Master will, of course, be the difference between the amount the defendant should have received for the lots had the plaintiffs carried out their contract (viz., the purchase-price and $200 added), and the value of the lots.

Appeal allowed in part.

N. B.

S. C.

MURPHY v. McMILLAN.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 20, 1918.

1. ACTION (§ I A—4)—NOTICE OF—SUFFICIENCY OF NOTICE—MUNICIPALITIES ACT, N.B.

A letter giving notice of action required by s. 104 of c. 165 (C.S.N.B., 1903) is sufficient, although only the signature of the solicitor, without any addition, appears at the end of the notice. If such solicitor's name appears on the letterheading as attorney and counsellor-at-law, and the notice states that he will bring action "at the suit of" the plaintiff, naming her, the fact that the plaintiff threatened an action "for trespass" and in fact brought an action for trover is immaterial if the notice gave the defendant a clear idea of the grounds upon which the action would be brought and the reason therefor.

2. AFFIDAVITS (§ I—5)—OF DEBT—TAKEN OUT OF NEW BRUNSWICK—REQUISITES—COMMISSIONERS FOR TAKING AFFIDAVITS OUT OF THE PROVINCE ACT.

The authority for taking an affidavit of debt out of New Brunswick for use in N.B. is found in c. 62, C.S.N.B., 1903, s. 3, which provides that when any person shall take any oath under said section his act shall be certified or authenticated in the same manner and with the same formality in all respects as though such act were the taking by him of the proof or acknowledgment of a conveyance. A jurat, as follows: "Sworn to at the City of Toronto in the County of York in the Province of Ontario this day before me. , a Notary Public in and for the Province of Ontario, does not comply with the requirements of this statute.

Statement.

APPEAL from a judgment of McLatchy, J., Judge of the Restigouche County Court, directing a verdict to be entered for the plaintiff in an action of trover. Affirmed.

Hazen, C.J.

HAZEN, C.J.:—This case was tried before the Judge of the Restigouche County Court in March, 1917, with a jury, and a verdict was found in favour of the plaintiff for $50.

T. F. Bowser and Co., Inc., having obtained a judgment against the plaintiff, Matilda Murphy, before W. Alder Trueman, who is a stipendiary or police magistrate in and for the County of Restigouche, with civil jurisdiction within the Parish of Addington Civil Court, an execution was issued and sent to the defendant, a constable for the county, who thereupon seized certain goods and chattels of the plaintiff and sold the same, the proceeds of the sale amounting to $21.70.

The plaintiff brought this action, which is one of trover, alleging that the defendant took and carried away certain of her goods and chattels of the value of $80, and converted and disposed of the same to his own use, while the defendant, in his statement of defence, sets out the execution issued out of the stipendiary's court as aforesaid, and claims that the goods were seized and sold

N. B.

S. C.

MURPHY v. McMILLAN.

Hazen, C.J.

by him acting under and by virtue thereof, and that the proceeds of the sale were forwarded by him to the said Trueman.

The Attorney-General, who appeared for the plaintiff, contended that under the provisions of C.S.N.B. (1903), c. 122, s. 21, the magistrate had no jurisdiction to enter up judgment, as no bond for security for costs was given, and if the plaintiff resided outside the province such bond would be necessary before the magistrate could acquire jurisdiction. The same question arose in *Massey-Harris Co., Ltd.* v. *Stairs* (1899), 34 N.B.R. 595, it being held that the omission to give security for costs did not relieve the magistrate of jurisdiction to try the case; it was further held by Barker, J., that the defendant by not demanding the security at the trial waived the benefit of the Act.

Before the County Court Judge, on the return of the summons taken out by the defendant's solicitor to set aside the verdict in favour of the plaintiff, the point was taken that the notice of action to the defendant required by s. 104 of c. 165, C.S.N.B. (1903), was not sufficient. The section provides that no action shall be brought against any person for anything done by virtue of an offence held under any of the provisions of the chapter, unless within three months after the act committed, and upon one month's previous notice thereof in writing.

The defendant seized and took away the plaintiff's goods on February 18, 1916. The notice was given on the 22nd of the same month, and the suit was commenced on April 1 following. There can be no objection, therefore, so far as the times of giving the notice and the commencement of the suit are concerned. The question is with regard to the notice itself.

The notice was given by plaintiff's attorney, James P. Byrne, and informed the defendant that he would bring an action against him at the suit of Matilda Murphy for seizing and carrying away the property which he had seized, and that, unless he returned it, he would bring an action against him for trespass. It concluded: "This is a notice of action to you—Yours truly, J. P. Byrne." The paper on which the notice was written bore the following letter-head, "James P. Byrne, LL.B., Attorney and Counsellor in Equity, Bathurst, N.B."

As I understand it, there are two objections to the notice. The first is that the signature of J. P. Byrne without any addition was

not a sufficient notice by the plaintiff. As, however, the name of Mr. Byrne as attorney and counsellor-at-law was on the letter-head, and as he gave notice that he would bring an action "at the suit of Matilda Murphy," this objection is not well taken.

The second objection arises because the plaintiff threatened an action "for trespass" and in fact brought an action for "trover." The notice, however, must have given the defendant a perfectly clear idea of the grounds upon which the action would be brought, and the reason therefor. It stated that it would be brought against him for seizing and carrying away certain property, naming it in detail and forbidding him from selling the same. In it Mr. Byrne further stated, on behalf of the plaintiff, that he understood defendant claimed he seized under an execution, but that Mrs. Murphy had no knowledge of any judgment against her, and was never served with process, and advised defendant before selling to obtain a bond of indemnity. There could be no misunderstanding of the meaning of this notice; it gave the defendant all the information that would enable him to appreciate the reason and cause of the action, and is in compliance with the statute, so that the defendant must also fail on this ground.

The judge who tried the cause was of the opinion that the defendant should have pleaded want of notice, and quoted vol. 1 Hals., p. 26, and vol. 23 Hals., p. 350, in support of this view. The want of notice was not pleaded and no objection was taken to it on the trial, it being raised for the first time on the return of the summons before the County Court Judge. I agree with the judgment appealed from in this respect.

Another question is with regard to the decision of the County Court Judge in holding that the judgment of T. F. Bowser Co. against Matilda Murphy, the respondent herein, in the Stipendiary or Police Magistrate's Court in and for the County of Restigouche, was void because the affidavit of debt was defective. The authority for taking affidavits out of the province is found in c. 62, C.S.N.B. (1903), s. 3, and provides that when any person shall take any oath under said section his act shall be certified or authenticated in the same manner and with the same formality in all respects as though such act were the taking by him of the proof or acknowledgement of a conveyance. The affidavit, in this case, was taken at Toronto, in the Province of Ontario, before a notary public. The jurat was as follows:—

N. B.

S. C.

MURPHY v. McMILLAN.

Hazen, C.J.

Sworn to at the City of Toronto in the County of York in the Province of Ontario, this 23rd day of December, A.D. 1916, before me.

H. F. PARKINSON, a notary public in and for the Province of Ontario.

L. S. (Signed) J. H. GREEN.

This does not comply with the requirements of the statute, for it cannot be argued that the act of the notary public who administered the oath was certified or authenticated in the same manner and with the same formality as though he had taken proof or acknowledgement of a conveyance. The appellant relied on *Hess* v. *Lawrence* (1891), 30 N.B.R. 427, but in that case the certificate was entirely different, and the court held that as it substantially followed the forms used in practice for many years it would not say that it was insufficient.

I agree with McLatchy, J.'s, judgment, that the affidavit was insufficient, and, therefore, the judgment against the respondent in the stipendiary's court was improperly signed, and, in consequence, the execution issued thereon and upon which the appellant relied was invalid. Appeal dismissed with costs.

White, J.

WHITE, J (oral):—While I agree with the conclusion reached by the Chief Justice, I think it well, in order that this case may not be cited as a precedent for something it was not intended to decide, to point out that both sides seem to have assumed that the defect in the affidavit was such that the execution, even though regular upon its face, would afford no protection to the constable, owing to want of jurisdiction on the part of the magistrate. I may say that matter was not argued here, and I do not want to be taken as having decided in favour of that view. We simply have disposed of the questions that were raised before us.

Grimmer, J.

GRIMMER, J., agrees with Hazen, C.J. *Appeal dismissed.*

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES Co. Ltd. and MacPHERSON. DANNECKER v. INTERNATIONAL SECURITIES Co. Ltd. and MacPHERSON.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 2, 1918.

VENDOR AND PURCHASER (§ I E—27)—SALE OF LAND—FRAUD OF AGENT—MISREPRESENTATION—DAMAGES—RESCISSION OF CONTRACT.

An agent for the sale of land who without knowledge or justification makes false statements in regard to the land and thereby induces a sale to purchasers who rely on such representations is liable in damages for such representations to the amounts paid on the contracts of purchase and as against the vendor company the purchasers are entitled to have the contracts rescinded.

[*Derry* v. *Peek* (1889), 14 App. Cas. 337, followed.]

APPEAL by defendant MacPherson from the judgment of Sutherland, J. Affirmed.

The judgment appealed from is as follows:—

SUTHERLAND, J.:—By consent these actions were tried together, the evidence taken in each case, so far as possible, to be applicable to both. The actions were commenced by writs of summons issued on the 11th January, 1915. The defendant company did not appear, though duly served with the writ and later with notice of assessment of damages.

The actions first came on for trial on the 4th May, 1915, before the late Chancellor, who directed judgment in the Yost case to be entered for the plaintiff as against the defendant company for payment of $1,100 and interest from dates of payment and costs of action, and for the plaintiff Dannecker against the said defendant company for $834 and interest from dates of payment and costs of action.

The plaintiffs having applied to the Chancellor to postpone the trials of the actions as against the defendant MacPherson, the Chancellor endorsed on the records the judgments against the company as already indicated, with this addition in each case: "This without prejudice to further prosecution of action against either defendant."

In and prior to the year 1913, the defendant company, a real estate agency, with head office in the city of Winnipeg, in the Province of Manitoba, and claiming to be the owners of certain lots in the town of Canora, in the Province of Saskatchewan, a small town with glowing expectations in the opinion of some people, and particularly of real estate agents, had appointed a firm of real estate agents doing business in the city of Toronto, as Spicer Graham & Company, to sell some of these lots for them.

On or before the 16th April, 1913, one Sweet, a real estate agent, and Spicer, one of the firm just mentioned, went to Stratford and met the defendant MacPherson, a financial agent and man of affairs there, and a fellow-townsman of and well and favourably known to the plaintiffs. They enlisted the co-operation and assistance of MacPherson in connection with the proposed sales of the lots. It is said that Spicer Graham & Company were to get a commission of 16 per cent. on sales made by them

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

for the defendant company, and that the arrangement arrived at between Spicer and Sweet and MacPherson was that, for the latter's assistance in introducing likely purchasers and furthering the sales to them, he was to get 20 per cent. commission thereon, out of which he was to pay 2 per cent. to Sweet, and also any expenses incurred in connection with the sales. Part of the arrangement was also that he should take over any lots or stock in any company, received as part payment on the sale of lots.

Some sales were made in or in the vicinity of Stratford before the last-named date, as a result of which the defendant MacPherson earned and received commissions.

The plaintiff Dannecker is a baker and confectioner, doing a good business at and around Stratford, and with some experience in the purchase and sale of real estate.

The plaintiff Yost is a carriage-builder and blacksmith, and apparently a shrewd and intelligent man. He had previously been a purchaser of western lands. It is apparent from the evidence that they knew the lots were of a speculative value, and were dealing on the basis of their expectation of a rapid rise in their value.

Dannecker says that on or about the 15th April, 1913, Sweet, whom he had not known before, called at his place of business with the defendant MacPherson, and the latter introduced him as representing the defendant company in selling lots in Canora. He says that a map was shewn, and the lots pointed out as centrally located, of good value, high and dry, and that the town was a thriving town and going ahead. He says that MacPherson mentioned that he had been to see him once before with lots to sell in another place, which lots had meantime increased in value, and that these lots were even better. He says also that MacPherson said he had been through the Canora district, and that the lots were high and dry. He says further that, while he saw the map, no copy of it was left with him. He also says that both stated that the title was good and direct from the "Government." It was arranged that Sweet was to call next day, and he did. Dannecker had concluded from the representations made that the lots would be a good investment at the prices mentioned. Sweet called next day and made a sale of four lots for $1,000. The

plaintiff paid to him $500 on account, receiving a receipt as follows:—

"Agent's Receipt.

"Formal receipts will be issued by the company immediately the order is entered.

"Stratford, April 16, 1913.

"Lots 5, 6, 7, & 8, block 79.

"Property Canora, Sask.

"Received of Conrad Dannecker, Esq., the sum of five hundred dollars being one-half payment on above.

"J. E. Sweet, Agent."

"$500.00.

"Make all future remittances direct to International Securities Co. Ltd."

Dannecker later received a letter, dated the 23rd April, 1913, on paper having in large print at the top "International Securities Company Limited," and in similar print lower down "Spicer Graham & Company, Mgrs.," acknowledging receipt of the $500 as the first payment on the lots in question purchased from Sweet, and stating: "The official receipt and contract will be forwarded from the head office in due course." The formal agreement, dated the 10th June, 1913, was enclosed to the plaintiff Dannecker in a letter bearing date the 11th June. In this agreement Spicer Graham & Company appear as vendor and the plaintiff Dannecker as purchaser; it contains the statement, "All payments to be made at the office of the vendor in the city of Toronto in the Province of Ontario;" and it contains a covenant on the part of the purchaser that he will pay the remaining instalments, namely, $166.65, on the 1st November, 1913, and a like amount on the 1st February and the 1st May, 1914.

The document also contains an agreement on the part of the vendor to convey to the purchaser by transfer "under the Torrens system or under the Land Titles Act, whichever the case may be, without covenants other than against incumbrances by the vendor," and contains also a clause that "time shall in every respect be of the essence of this agreement." The document is under seal and signed as follows, "International Securities Company Limited" (apparently stamped on with a rubber stamp), below which appears in printing "Spicer Graham & Company,"

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

underneath which is the signature "W. C. Graham, Sec.-Treas." The plaintiff Dannecker also signed copies, returning one to Spicer Graham & Co.

The plaintiff Yost says that on the evening of the 13th April, 1913, Sweet and MacPherson called at his house, and the latter introduced the former as representing the defendant company of Winnipeg. He says that both did a good deal of talking, that a map was got out shewing the town of Canora, that they represented it to be a rapidly growing town with seven mills in it, three elevators, a railway centre; pointed out the post-office, and that the lots were three blocks from it, represented the lots as cheap lots, a cheap buy and worth more money than they were offering them at; that if he did not take them he would lose his chance, as the town was rapidly growing; that the lots were "central lots in the centre of the town." They represented to him that he would get a Government title. He says that that evening he was induced to sign "a little agreement or paper written out by Sweet," and taken away by him, by which he (Yost) was to buy three lots at $1,100. No money was paid. He says that next morning they came to his shop; and, having considered the matter overnight, he told them the deal was off, as made against his will, and that he threw it up. He says that they began to talk again, the defendant MacPherson being the principal speaker, and stated that the place was rapidly growing, that he (Yost) would miss his chance and never get such a chance again. He says that finally he was out-talked, went to the bank with them, drew $550, paid it to Sweet in the defendant MacPherson's presence, and got a receipt as follows:—

"Agent's Receipt.

"Formal receipt will be issued by the company immediately the order is entered.

"Stratford, April 28th, 1913.

"Property Canora, Sask. "Lots 13, 20, 21, block 75.

"Received of Henry Yost, Esq., the sum of five hundred and fifty dollars being one-half payment on above.

"$550.00, J. E. Sweet, Agent.

"Make all future remittances direct to International Securities Co. Ltd."

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

Later he received a letter, dated the 30th April, 1913, from Spicer Graham & Company, similar to the one sent to Dannecker, and later a letter, dated the 11th June, similar to the one also sent to Dannecker, and enclosing an agreement similar in form for execution.

On the 28th July, 1913, and the 31st July, 1913, letters were written from Winnipeg to the plaintiffs Dannecker and Yost respectively, by one A. E. Reid, and received by them in due course of mail, notifying them that their respective agreements of sale, "issued by Messrs. Spicer Graham & Company of Toronto," had been assigned to him, and intimating that future payments should be sent to him at 845 Somerset Building, Winnipeg. It was said that Reid was an employee of the defendant company, and the letters were written on their paper.

Sweet was not called as a witness at the trial. The account of the defendant MacPherson as to what took place is as follows: He admits going with Sweet to Dannecker's, and that a map and some literature were produced, shewn, and discussed. He says that he himself told Dannecker that large towns had grown up along the lines of the Canadian Pacific Railway, and the same thing would probably occur as to the Grand Trunk Pacific, the country being better, if anything, along that line. He says that he had driven through that part of the country in 1906, and formed that impression. He says that he said to Dannecker that if he wished to speculate in town-sites the chances were as good, if not better, than they had been along the line of the Canadian Pacific Railway. He says that Sweet said there would be a Government title; and, upon hearing him make that statement, he said, "That means a Torrens title."

He denies that he said the lands were high and dry, or that Canora was thriving, or that the property was increasing rapidly in value. He adds that there was a long talk between Dannecker, Sweet, and himself, and that Sweet was a vigorous salesman.

As to Yost, MacPherson's story is, that he made an appointment with him in the latter's shop, that he and Sweet would go to his house in the evening, and they went. He admits that he said to Yost that these lots would be better speculation than lots in the town of Saskatoon, and said this because he understood

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

that he had bought lots there at a pretty high figure. He says that again the question of title came up, and that Sweet stated that the title would be from the Government, but added that that would be a Torrens title. He says, with reference to the location of the lots, that they were pointed out on the map, and their location indicated as compared to the post-office and the like—that this was done by Sweet. He says he does not think it was said that the lots were worth more than the price they were being offered at for sale. He said he did not say it at all events. He thinks that Sweet said Canora was growing rapidly by reason of the two railways and the good country around it. He says that Yost consulted his wife and daughter, who were present, and that the latter urged him to buy. Thereupon he signed the memorandum or receipt already referred to. He says that next morning when he saw them, he intimated that the deal was off and very distinctly and definitely refused to carry it out. He said that he himself then said to Sweet, "We had better leave," and he himself did leave. He says that Sweet remained, and he had nothing more to do with the matter afterwards. As a matter of fact, tax notices were sent to him, indicating apparently that he was assessed as owner.

A document was, however, produced at the trial and admitted to have been signed by him, as follows:—

"Application for Purchase of Lots.

"International Securities Co. Ltd.,

"Somerset Building, Winnipeg, Manitoba.

"Date April 14th, 1913.

"I hereby make application to purchase the within described lots.

"Property
"Canora, Sask.
"Lots 5, 6, 7, 8,

"Block 79,
"Price $800.

"Payment $300.
"Cheque
"Currency
"Money order

"In the event of the above lots being sold, I authorise you to select for me the best of the lots remaining unsold nearest to those which I have selected, and at the same price.

"It is understood that the title to these lots must be by good and valid deed and that no interest will be charged on deferred payments.

"On receipt of my application you will please make out and forward to me your formal 'Agreement for Sale' which I will sign and return.

"I agree to purchase the above described lots with the understanding that while the company guarantees the correctness in all material particulars of its advertising matter as to the said lots, it is not bound by the representations of its sales-agents if other or different statements or representations are made than those contained in its printed matter.

"Terms
"Bal. 6, 9 & 12 months.

"It is important that full name and occupation be given.

"Occupation, Financial Agent. A. J. MacPherson,
"Purchaser.

"Witness, J. E. Sweet,
"Agent,
"P.O. Address, Stratford, Ont.

"Total value of lots to be purchased under this application $800.00."

A similar document bearing date the 28th April, 1913, referring to the Yost lots, and signed by the defendant MacPherson, was also produced. His explanation as to how he came to sign these papers is as follows. Sweet and Spicer, he says, came to him some time before the sales to Dannecker and Yost, and stated that the defendant company had objected to the way the sales of lots had been made in the town of Biggar, and wanted the sales in Canora put through in the name of a third person, as they suspected that the Toronto agents were getting more commission than they should, and therefore wanted the sales to be shewn as going through the name of a third person. He said he had done this in the case of some previous sales for them; and, without much thought, signed these applications with respect to the lots in question. He was not able to give any satisfactory explanation as to why he did it. He says that agreements were actually issued to him which he got about a month later, and that he then assigned them over to Spicer Graham & Company. MacPherson received his commissions on the sales in question from or through Spicer Graham & Company. He says that Spicer Graham & Company intended to put the sales through with the defendant company on the basis of his agreement with them. He says, however, that

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

they intended to provide for his commission in this way. His commission on the Yost deal, on the basis of 20 per cent., would be $220. In his own ledger he gives credit for this commission at $225, apparently for his own commission on this sale. He admits that personally he did not know the value of lots being sold to the plaintiffs, and that he took an active part in introducing Sweet to them and promoting the sale.

On the 20th October, 1913, the plaintiff Yost wrote to the defendant company, and in reply received a letter, dated at Toronto, informing him that future payments should be made to A. E. Reid, "as he holds the agreement of sale. You may send him a money order or cheque and he will send you a receipt for same."

The plaintiff Yost completed his payments, sending the last instalment of $275 on the 1st May, 1914, to Reid, and asking for his conveyance. On the 5th May, 1914, Reid replied stating: "Owing to different transfers having to be executed, there may be some delay in finally getting out your papers."

It appears that the title never was in the defendant company, but stood in the name of one Andrews in trust. When the plaintiffs began, in the summer of 1914, to communicate directly with the defendant company at Winnipeg, as to the title, they were told by the company that they, the plaintiffs, had never been heard of by the defendant company there in connection with the lots in question. The company repudiated its alleged signatures to the agreements held by the plaintiffs, intimating that MacPherson was the purchaser from the company and was still owing $800 on the lots.

The plaintiffs had made all their payments when they learned that the defendant company was taking this position. Thereupon the plaintiffs employed solicitors and endeavoured to get the title from the defendant company or some satisfaction, failing which they brought these actions. In each case they allege that they were induced to purchase the lots in question through the fraud and misrepresentation of the defendant MacPherson and Sweet, an agent of the defendant company.

The specific allegations of fraud are set out in paragraph (6) of the statements of claim, which in each case is as follows:—

"The plaintiff alleges that he was induced to buy said lots by the defendant MacPherson and said J. R. Sweet falsely and

fraudulently stating and misrepresenting to him that the defendants the International Securities Company Limited were at that time the owners of the said lots, and that his title to the same would come direct to him from the Government, when the fact was that the defendant MacPherson was the owner of said lots at the time of the sale to the plaintiff, he having previous to that time purchased the same from the defendant company; that the said lots were high and dry, and were close to the centre of the town, and were worth much more than he was paying for them, and that the town of Canora was a thriving town, increasing rapidly in value, all of which statements were untrue; and that he is entitled to a rescission of the contract for the purchase of the said lots and to repayment of his money and damages for fraud and misrepresentation."

And the plaintiffs ask from the defendants in each case: (1) repayment of the purchase-money and interest; (2) a rescission of the contract and repayment of the money and interest; and (3) damages for fraud.

The defendant MacPherson in his statement of defence denies that he made any false or fraudulent misrepresentations. He further denies that he ever acted as agent for the defendant company, or that the lots in question were transferred to or purchased by him on the 1st November, 1913. Why this date is mentioned, I am unable to say.

It is clear that the defendant MacPherson knew that the defendant company, as alleged principals of Spicer Graham & Company, with whom he associated himself for the purpose of making sales of the lots in question, were prepared to sell the said lots, not at the prices named in the agreements with the plaintiffs, but at prices much less, namely, the prices mentioned in the applications to purchase, signed by himself.

Ordinarily, and in default of any different arrangements made with proposed purchasers, agents receive their commissions from their principals, and based upon and usually out of the price fixed as between such principals and purchasers. In the first place, therefore, Spicer and Graham would be entitled to their 16 per cent., a fairly high commission in itself. It seems apparent that Spicer Graham & Company and the defendant MacPherson made a secret arrangement and agreement between themselves, by which the defendant MacPherson was to appear to be the actual

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

purchaser as between the principals and himself, and other purchasers were to be obtained at sufficiently higher prices to enable the defendant MacPherson to secure another high rate of commission, namely, 20 per cent., less the 2 per cent. and expenses already referred to, and at the same time Spicer and Graham be enabled out of the said additional price also to obtain a further commission than the 16 per cent. stipulated for between them and their principals.

The arrangement between Spicer Graham & Company and the defendant MacPherson was that the latter should, as between them and the defendant company, appear to purchase the lots and be recognised as the purchaser by the defendant company; and, having regard to the document signed by him, the defendant MacPherson cannot be heard to say that he did not buy and become the purchaser of the lots. It was part of the agreement between him and Spicer Graham & Company, however, and in this it was intended to deceive the defendant company, that purchasers were to be obtained who should be led to think they were dealing directly with the defendant company. As a matter of fact, the form of the agreement received by them represented Spicer Graham & Company as the vendors, and did not refer to the defendant company, except to the extent of its stamp-impressed name, as already indicated.

Upon the evidence, I think it is clear that MacPherson was a party to representations being made to the plaintiffs that they were dealing with the defendant company as vendor and owner, at the prices named in their respective agreements, when he knew as a matter of fact that he and Spicer Graham & Company had arranged that he should purchase the lots and was to be treated as having purchased them at the prices mentioned in his application to purchase, and that payments to the defendant company were to be made by or through him, or in his name by Spicer Graham & Company, to the defendant company. I think in this respect misrepresentation and deception were practised upon the plaintiffs. I think it is clear, too, that representations were made to the plaintiffs that the lots were worth more than they were paying for them, and would rapidly increase in price owing to the thriving character of the town of Canora.

I cannot think that such representations were justified by the facts; and I think that, so far as the defendant MacPherson is

concerned, he was a party to their being made, and either knew they were untrue or was reckless as to whether they were or not.

In the circumstances, I think the plaintiffs are entitled to have the contracts rescinded, and as against the defendant MacPherson to recover the amounts paid by them under their contracts respectively, as damages resulting from such misrepresentations.

Judgment will therefore go in favour of the plaintiffs as against the defendant MacPherson for payment of the said sums, without interest, and with costs of suit.

R. T. Harding, for appellant; *R. S. Robertson*, for respondents.

The judgment of the Court was read by

FERGUSON, J.A.:—The plaintiff Dannecker in evidence asserts that the defendant MacPherson represented to him that Sweet "was representing the International Securities Company in selling these lots. . . . They (Sweet and MacPherson) had these lots to sell, and it was a good investment. Lots close to the centre of the town. . . . Good value . . . high and dry . . . in the centre of the town of Canora—it was a thriving town—going right ahead. He had been through that country, through the Canora district—price $1,000; that it was a good buy; had a great future. It was worth the money we paid . . .as an investment . . . we were getting the money's worth at the time . . ."

"Q. They both said it was a good proposition? A. Yes, we were getting our money's worth, good value for the money."

The plaintiff Yost in evidence asserts that the defendant represented: "They were cheap lots—cheap buy—worth far more money than what he offered them at . . . Canora was a growing town, rapidly growing. They were central lots—in the centre of the town . . . three blocks from the post-office . . .; the plaintiff bought three lots, price $1,100."

I am convinced that the defendant MacPherson made these statements, and a perusal of the evidence taken on commission convinces me further that these statements were untrue, and that no person with any knowledge of the actual facts and values could make such representations believing them to be true, either as statements of fact or as statements of an opinion; and that, unless the defendant MacPherson was himself misled by accepting Sweet's statements, the representations were made without knowledge or justification. The defendant MacPherson does not

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

Ferguson, J.A.

assert that he relied on Sweet, or that he made these statements honestly believing them to be true; he denies making some of them, and says he cannot remember making others; but he admits that Sweet, with whom he was sharing his 20 per cent. commission, made the others. Neither in his pleading nor his evidence does he attempt to justify his statements or Sweet's statements on the ground that they were true or that he believed them to be true.

As I read the evidence of location and value, these lots could not, by any stretch of imagination, be truthfully represented to be good value or worth the prices asked and paid, nor could they be truthfully described as "in the centre of the town of Canora," nor should Canora be represented as rapidly growing.

To my mind, the evidence on these points demonstrates that these lots as town-lots had very little, if any, value; and, by reason of the subdividing of the section, that the property as farm property was rendered useless and valueless.

For these reasons, I think that the defendant MacPherson, with the intention of inducing the plaintiffs to purchase these lots, and so that he might earn a commission of 20 per cent. of the purchase-price, took upon himself either to make statements he knew to be untrue or to assert his belief and knowledge in reference to matters on which he had no real belief or knowledge; in other words, these representations were made with a reckless disregard as to their truth or falsity, and without caring whether they were true or false, so long as they served the purpose of securing the plaintiffs' contracts to purchase. Viewed in the most favourable light to MacPherson, he took upon himself to warrant his own belief of that which he asserted and in reference to which he was entirely ignorant, and he should, I think, be held as responsible as if he had asserted that which he knew to be untrue: *Derry* v. *Peek*, 14 App. Cas. 337, and cases collected and considered in Halsbury's Laws of England, vol. 20, pp. 688 to 694.

It is argued that the judgment taken against the defendant company precludes the prosecution of this action against the defendant MacPherson. The judgment against the defendant company is copied at p. 30 of the transcript of the evidence, and it is urged that the recovery was upon the claim for deceit, and that the taking of judgment against one of two joint wrongdoers

releases the other. For this proposition the defendant MacPherson relied on the cases collected at p. 384 of Holmested's Judicature Act. It is, however, to be noted that our Rules differ from the English Rules: Holmested, p. 864.

The point was considered in the Court of Appeal in the recent case of *Goldrei Foucar and Son* v. *Sinclair* (1917), 34 Times L.R. 74, [1918] 1 K.B. 180, and I think we can here, as was done there, treat the judgment against the defendant company as being entered upon a motion for judgment on the claim for return of moneys had and received, and not on the claim for damages for deceit.

I do not think that we must, and unless forced to I would not, construe the judgment against the company as being pronounced on the claim for damages for deceit. The statement of claim alleges and makes out a claim for the return of moneys had and received without consideration or on a total failure of consideration.

The defendant company did not appear to the writ or plead to the claim; and, as I read Rules 35, 220, 354 to 358 (Holmested, p. 862), it was quite open to the learned Chancellor to pronounce judgment in favour of the plaintiffs for a return of the moneys paid—instead of assessing the plaintiffs' damages for deceit. He directed judgment to be entered for a sum equal to the moneys paid and interest (see p. 14 and endorsements on the records), and also directed that the judgment should not prejudice the plaintiffs' right to proceed further against the defendant MacPherson. I am of the opinion that, had this judgment been pronounced in the absence of MacPherson, it could still be properly construed as a judgment entered on the cause of action for return of money received on a failure of consideration, so as to take it from under the principle stated in the cases now relied upon by the defendant MacPherson. But this judgment was pronounced in the presence of the defendant MacPherson, and he did not then appeal against that part which adjudged that "the entry of this judgment shall not prejudice the plaintiffs' right," etc., but allowed it to become a final and binding pronouncement on his rights—and, for this reason, I do not think he can now question the authority of that pronouncement.

I would dismiss the appeal with costs.

Appeal dismissed.

ONT.

S. C.

YOST v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

DANNECKER v. INTERNATIONAL SECURITIES CO. LIMITED AND MACPHERSON.

Ferguson, J.A.

QUE.

C. R.

ARCHAMBEAULT v. LAPIERRE AND OWENS.

Quebec Court of Review, Archibald, A.C.J., Letellier and Lane, JJ. June 5, 1918.

VENDOR AND PURCHASER (§ II—32)—PURCHASER ASSUMING OBLIGATION OF HYPOTHECARY CREDITOR—CREDITOR ACCEPTING OBLIGATION—LIEN DE DROIT—QUEBEC JURISPRUDENCE.

Under Quebec jurisprudence, where a purchaser assumes the obligation to pay the hypothecary creditor any sum of money which may be due him on the property purchased, the creditor can at any time accept that obligation and establish a direct *lien de droit* against such purchaser as a personal debtor to pay the money.

Statement.

APPEAL from the Superior Court, Mercier, J. Affirmed.

J. O. Lacroix, K.C., for plaintiff.

Brossard & Pepin, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—The statement made in the appellant's factum treats the various deeds as containing an undertaking on the part of the purchasers to pay the mortgage in question to Decarie in lieu of to their immediate vendor. This writing, which is the sale by Dupré to Lapointe, Lavoie and Lapierre, is in the following language:—

Quant à la balance de $16,000 restant due sur le présent prix de vente, ledit vendeur délègue et charge les acquéreurs de la payer conjointement at solidairement pour et à son acquit et décharge auz personnes ci-après nommées et de la manière ci-après mentionnée, savoir: une somme de $8,000 à Jérémie Décarie aux termes d'une obligation à lui consentie par P. Archambeault devant Me J.-A. Mainville, notaire, etc.

The deed contains no special undertaking on the part of the purchasers to pay the amount in question. The only deed of the whole series which contains an undertaking on the part of the purchasers is the last deed of all of Lapointe to Fournier. There is no question under our jurisprudence that where a purchaser assumes the obligation to pay the hypothecary creditor any sum of money which may be due him upon the property purchased, that the creditor can at any time accept that obligation and establish a direct *lien de droit* against such purchaser as a personal debtor to pay the money, nor can there be any question in this case that the present defendant never renounced any obligation which was resting upon him to pay the money in question to Décarie, nor can there be any question that the present plaintiff armed with his subrogation from Décarie did accept what is called the delegation of payment as against Lapierre the present defendant.

The real questions in the case then are, did Décarie by any act of his in connection with his hypothecary action against Fournier

implicitly deprive himself of the right to accept the several delegations of payment made by the successive vendors in his favour and so acquire new personal debtors as long as his claim was not fully paid up? Did the subrogation made by Décarie to the present plaintiff upon making payment, enable the present plaintiff to accept such delegation in Décarie's place?

Could Dupré, an insolvent, during the period of his insolvency, transfer to the plaintiff any rights which he might have against the present defendant, resulting from his deed of sale of the property in question to the defendant and others?

With regard to the first question proposed, the appellant argues the analogy of principal and surety, that when the creditor does anything which deprives his debtor of the right to reimburse himself upon sureties held for the payment of the debt, then the creditor's right against the debtor is extinguished, as, for example, a creditor holding a pledge for the payment of the debt, had disposed of the pledge, he could not afterwards recover from the debtor who was entitled to receive the pledge upon making payment. There is no question of the general correctness of this view with regard to principal and surety, but the present case is not in my judgment at all like the position of principal and surety. Leaving out of view Lapointe and Lavoie, defendant's two associates in purchasing the property from Dupré, and supposing the defendant to have sold directly to Fournier, we may say that the defendant charged Fournier to pay Décarie the money in question and Fournier accepted that charge, but there was no delegation because there was no acceptation on the part of Décarie. Fournier never was the personal debtor of Décarie, because Décarie never accepted the delegation of payment in his favour.

Laurent, vol. 18, No. 312, reads as follows:—

On voit par là quelles sont les personnes qui jouent un rôle dans la délégation et qui, par conséquent, y doivent consentir. Le délégant doit consentir, car c'est lui qui fait l'offre au créancier ou, comme dit l'article 1275, qui donne au créancier un autre debiteur; peu importe qu'il y ait novation ou non, il ne peut y avoir de délégation sans un délégant. Le délégué s'oblige envers le créancier, donc il faut qu'il consente. Le délégataire doit aussi consentir, quand il décharge l'ancien débiteur, la nécessité de son concours est évidente; elle l'est également quand il ne se fait pas de novation, il y a toujours une nouvelle obligation contractée envers le créancier par le délégué; or, il ne peut y avoir d'obligation sans le consentement du créancier.

At the time when the hypothecary action was taken, there

QUE.

C. R.

ARCHAMBEAULT v. LAPIERRE AND OWENS.

Archibald, A.C.J.

did not exist any personal action against Fournier in favour of Décarie, because Décarie had never accepted Fournier as his personal debtor, therefore, in taking the hypothecary action he did not discharge Fournier from any debt whatever.

It follows, as a matter of course, that if the present defendant should be obliged to pay Décarie the amount of the mortgage in question, Fournier could not escape from his obligation towards Lapierre on his personal contract to pay in Lapierre's place on the ground of his having made a *delaissement of* hypothecated property.

It seems then that this ground raised by the appellant is unfounded.

With regard to the question as to the effect of the subrogation made by Décarie to Archambeault when Archambeault paid him the balance of the mortgage, it may be said that it is clearly proved that while Décarie had not accepted any of the *délégués* who had been offered to him in the successive sales of property, he had not released any of them so that these offers at the time of payment by Archambeault were still open to acceptation by Décarie. If Décarie had not been paid by Archambeault, he could, certainly, under our jurisprudence, have obtained the several debtors delegated to him in the several deeds of sale by making an express acceptation of those several delegations.

Archambeault pays him the money (he was personally indebted by the first deed of obligation) and obtained subrogation in his rights with regard to the several debtors in question, and by taking a personal action against the present defendant, accepted the delegation so far as he was concerned.

There can be no doubt under our jurisprudence that the subrogation by Décarie to Archambeault enabled Archambeault to exercise the rights which he, Décarie, could have exercised in reference to the acceptation of such delegated debtors. But when we come to consider the question further, we find that in the deed between Dupré and his immediate purchasers, including the defendant, that such purchasers did not by the deed, accept the delegation and promise to pay Décarie to the discharge of Dupré.

There is, therefore, in that deed, no acceptation on the part of the present defendant to pay Décarie, which Décarie could accept and constitute the defendant his debtor.

However, the jurisprudence of our courts is to the effect that

acceptation of a delegation either by the *délégué* or by the *délégataire*, need not be express and can be inferred from the acts of the parties.

Laurent, vol. 18, No. 315, makes the following remarks:—

Comment les parties intéressées doivent-elles donner leur consentement? On a demandé si le créancier doit accepter d'une manière expresse l'offre de délégation qui lui est faite. La question implique une confusion d'idées. Aux termes de l'article 1275, la délégation n'opère point de novation si le créancier n'a expressément déclaré qu'il entendait décharger son débiteur qui a fait la délégation. Il faut donc une déclaration expresse de volonté de nover pour que la délégation opère novation. Autre est la question de savoir si une une acceptation expresse est nécessaire pour qu'il y ait délégation. La négative est certaine. En effet, cette acceptation n'est rien qu'une manifestation de consentement; or, tout consentement peut se donner tacitement quand la loi n'exige pas un consentement exprès. Et, dans l'espèce, la loi ne dit rien, elle maintient par cela même le droit commun. L'article 1275 en tant qu'il exige une déclaration expresse de volonté pour opèrer novation, n'es pas applicable à notre question; nous ne supposons pas de novation; nous demandons seulement quelles sont les conditions requises pour qu'il y ait délégation. et cette question est décidée par les principes généraux qui régissent le consentement. La doctrine et la jurisprudence sont en ce sens. Le consentement tacite suffit. C'est aux tribunaux de décider si les faits que l'on allègue impliquent le consentement.

In this case, the proof establishes that defendant Lapierre, when called upon in the action in *arrière-garantie* by Dupré, had taken up the *fait et cause* of the defendant Archambeault in the case of Décarie against Archambeault and had so accepted the obligation of defending Archambeault against the action by Décarie, which he would not have been obliged to do unless he had accepted the delegation made to him in the deed from Dupré.

The proof also shews that the defendant Lapierre had paid the sum of $280 to the present plaintiff Archambeault for interest on the obligation in question.

I am of opinion that these facts, taken in connection with the entire absence on the part of Lapierre of any plea denying or questioning the fact that he had accepted the delegation contained in the deed of Dupré to him, constitute a sufficient indication that Lapierre had, in fact, accepted the delegation and promised to pay Décarie the sum in question.

As a matter of fact, in the defendant's factum, that position is assumed in express language. If that be the case and if the subrogation by Décarie to Archambeault authorized Archambeault to exercise Décarie's rights as to the acceptation of the new debtor

QUE.
C. R.
ARCHAMBEAULT v. LAPIERRE AND OWENS.
Archibald, A.C.J.

offered to him in the deed from Dupré to Lapierre, then the plaintiff's action against Lapierre was an acceptation of that delegation and constituted Lapierre the personal debtor of Archambeault in the sum of money claimed.

In this view of the case, it would not be necessary to consider the last question proposed that whether Duprè being insolvent could cede to Archambeault his rights against Lapierre under the deed of sale from Dupré to Lapierre. There is no admission in the record that this particular right of Dupré was not taken over by the assignees in Dupré's insolvency. It was a mere right of defence and not of acquisition; it was manifestly of no value to the estate of Dupré.

Dupré was indebted to Décarie, if Décarie had chosen to accept the delegation made in Archambeault's deeds to Dupré, otherwise he was indebted to Archambeault in the sum of money in question. On the other hand, Dupré had received from Lapierre a promise to hold him harmless with regard to that indebtedness.

Neither the claim of Décarie or Archambeault against the estate of Dupré, nor the right of Dupré to be indemnified against that claim by Lapierre, was dealt with upon the insolvency of Dupré. It would not, in any event, have constituted an asset of the estate.

Our proceedings for the winding up of the insolvent estates under the Civil Code do not release a debtor from his obligation. The assignees are acting only as the agents of the debtor and of the creditors at the same time.

I am, therefore, of the opinion that Dupré had, under the circumstances, the right to cede to Archambeault his right to be indemnified by Lapierre for anything which he might be obliged to pay in respect of the claim of Décarie or Archambeault.

Lapierre was personal debtor to Dupré and the cession from Dupré to Archambeault and the signification of that cession constituted Lapierre personal debtor to Archambeault.

I am therefore of opinion that the judgment which has condemned Lapierre is well founded and must be maintained.

I have examined the authorities cited by the appellant and I find them in most cases inapplicable to the circumstances of the present case. *Appeal dismissed.*

GAVIN v. KETTLE VALLEY R. CO.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. October 1, 1918.

NEW TRIAL (§ II—9)—ACTION FOR DAMAGES—NEGLIGENCE—MUTUAL OBLIGATIONS—INSUFFICIENCY OF ISSUES SUBMITTED TO JURY.

In an action for damages for injuries sustained in a collision between a motor car and a passenger train when both parties have been guilty of negligence, a new trial will be ordered where the court has failed to submit the mutual obligations of the parties to the jury, with proper and complete directions on the law and as to the evidence applicable so as to enable them to come to a reasonable conclusion.

Statement.

APPEAL by defendant from a judgment of Macdonald, J., in an action for damages for injuries received in a collision between a motor car and a passenger train; new trial ordered.

E. P. Davis, K.C., for appellant; *A. H. MacNeill*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The jury found the defendant negligent "in delaying the application of brakes"; that the plaintiff's wife, the driver of the automobile, was guilty of contributory negligence "in not exercising sufficient watchfulness by looking to the right as well as to the left"; but that the defendants' servants nevertheless could have prevented the occurrence "by the speedy application of the brakes." Mrs. Gavin, plaintiff's wife, admits that she actually saw the train coming when she was yet from 30 to 35 ft. away from the railway tracks; she also stated that she could stop her car at the rate she was then driving, namely 10 miles an hour, in a distance of from 20 to 25 ft.

The jury's findings excluded negligence on defendant's part other than that expressly found as above set forth.

The brakeman saw the approaching automobile in time, as the jury found, to have stopped the train before reaching the point of impact with the plaintiff's car. The train was moving at about the same rate of speed as the automobile, namely, 10 miles an hour. The brakeman expected, with good reason I think, that the driver of the automobile would stop before reaching the track, but when this reasonable expectation was disappointed, he made some efforts to avoid the collision, but failed. The negligence of the plaintiff's wife as found by the jury was her neglect to look for the approaching train. That negligence was displayed the moment she actually saw the train. If, thereafter, by the exercise of reasonable care and skill she could have stopped her car before reaching the

B. C.
C. A.
GAVIN v. KETTLE VALLEY R. CO.
Macdonald, C.J.A.

railway track, then, I think, the plaintiff was not entitled to succeed in this action.

While the jury were asked whether, when defendants' employees became aware that the automobile was in danger, they could, by the exercise of reasonable care, have avoided collision with it, yet they were not asked a like question in respect of the plaintiff's wife, nor were they instructed to consider whether or not, after she actually saw the train coming, she could, by the exercise of reasonable care and skill, have avoided injury. The obligation was mutual. It was just as much the duty of the driver of the automobile to take reasonable care to avoid the collision after she became aware of the danger as it was the duty of the defendant's servants to do likewise, but, as the case was left to the jury, though the obligation of defendants was submitted, that of Mrs. Gavin was ignored. While no objection in this connection was taken by defendants' counsel at the trial, yet it was the duty of the judge to leave the issues to the jury with proper and complete directions on the law and as to the evidence applicable to such issues: S.C. Act, s. 55. This duty has been emphasized in the recent decision of the Supreme Court of Canada in *Ashwell* v. *Canadian Financiers* (not yet reported). The said section also authorized an appeal, notwithstanding counsel's failure to take objection at the trial. I have, therefore, no doubt as to the propriety of ordering a new trial. Mrs. Gavin's evidence alone puts that beyond question. Damaging as is her evidence to the plaintiff's case, I do not think it necessarily conclusive against him, I think it must go back to a jury to draw the proper inferences from the whole of the evidence.

Martin, J.A.

MARTIN, J.A., agreed in ordering a new trial.

Galliher, J.A.

GALLIHER, J.A.:—I agree in ordering a new trial.

McPhillips, J.A.

MCPHILLIPS, J.A. (after a statement of the facts and a review of the evidence):—In my opinion, there was no sufficient direction upon the points pressed by counsel for the appellant, in particular upon the question of joint negligence, and it was not passed upon by the jury; further, the facts advanced at the trial only admitted of two views thereof, either that the driver of the motor car was solely at fault, or that the accident was a combination of negligence on the part of the driver of the motor car and the servants of the railway company, and in either case the plaintiffs would fail. Shortly stated, the jury did not arrive at a "sensible conclusion." The jury have not, in this case, "come to a conclusion which on

the evidence is not unreasonable," on the contrary, in my view, the jury have upon the evidence as adduced at the trial come to an unreasonable conclusion, therefore, the proper course to now follow in this case would be to direct a new trial.

EBERTS, J.A., agrees in ordering a new trial. *New trial ordered.*

Re CITY OF TORONTO and TORONTO and YORK RADIAL R. Co. and COUNTY OF YORK.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Clute, Riddell, Sutherland and Kelly, JJ. March 25, 1918.

1. APPEAL (§ XI—720)—COUNTY CORPORATION—SPECIAL ACT—NO EXPRESS RIGHT GIVEN—JURISDICTION OF APPELLATE COURT TO GRANT LEAVE.
S. 48(1) of the Ontario Railway and Municipal Board Act (R.S.O. 1914, c. 186), which provides that an appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, applies to the jurisdiction given to the Board by the Ontario Act, 1917, 7 Geo. V. c. 92, s. 4, by which power is given to the City of Toronto to expropriate part of the Toronto and York Radial Railway, and although under the later Act no right of appeal is expressly given to the County of York, the appellate court has jurisdiction to grant leave.

2. EXPROPRIATION (§ III C—135)—CITY OF TORONTO—COUNTY OF YORK—STATUTORY RIGHTS—ABANDONMENT OF PROPERTY—COMPENSATION.
The rights of the County of York to damages for expropriation by the City of Toronto of the Toronto and York Radial R.W. Co. and all its real and personal property within the city are statutory under the Act of 1897, and are not affected by the fact that by a by-law the county has abandoned certain roads over which the line is operated to minor municipalities of the county.

Statement.

APPLICATION on behalf of the Corporation of the County of York for an order granting the corporation leave to appeal from an order of the Ontario Railway and Municipal Board dated the 1st February, 1918, on the following among other grounds:—

(1) That the order was wrong in law and should not have been made.

(2) That the applicant corporation had a claim against the city corporation, for which it should receive compensation upon hearing and award pursuant to an Act respecting the City of Toronto, passed by the Legislature of Ontario in 1917, 7 Geo. V. ch. 92, sec. 4.

(3) That the county corporation was entitled to be heard and to give evidence in support of the particulars of its claim against the city corporation by reason of the exercise of the powers conferred upon the city corporation by the said statute.

(4) That the county corporation had an interest in the highways in question, for which it should receive compensation under the said statute.

ONT.

S. C.

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO. AND COUNTY OF YORK.

(5) That, under the several agreements between the county corporation and the Metropolitan Street Railway Company, the county corporation had the several rights against the Toronto and York Radial Railway Company shewn in the particulars of claim, and that the said rights were prejudiced and would be seriously impaired by the exercise by the city corporation of the said powers to the damage of the county corporation, for which it was entitled to compensation under the said statute.

The county corporation also appealed from the said order, upon the grounds aforesaid.

The particulars of claim were as follows:—

The Corporation of the County of York says that under various franchise agreements made between it and the Metropolitan Street Railway Company, now the Toronto and York Radial Railway Company, evidenced by certain indentures or writings dated respectively the 25th June, 1884, the 20th January, 1886, the 28th June, 1889, the 17th December, 1889, the 20th October, 1890, the 2nd March, 1891, and the 6th April, 1894, certain privileges and franchise rights enured to its benefit in respect to "that portion of the railway of the Toronto and York Radial Railway Company (Metropolitan Division) upon Yonge street within the limits of the City of Toronto and all the real and personal property used in connection therewith, and necessary for the operation thereof, including all franchises, rights and privileges, which it" (the Toronto and York Radial Railway Company) "now has or may enjoy respecting the construction, maintenance, and operation of a railway within the city limits on the said street."

Some of the said privileges and franchise rights of the Corporation of the County of York are the following:—

(1) The contingent right to authorise the railway company to lay down a double track or railway on Yonge street, under para. 2 of the agreement of the 28th June, 1889, and under paras. 13 and 32 of the agreement of 1894.

(2) The regulation of the speed of travel and the stops for loading and unloading of milk-cans, under para. 21 of the agreement of 1894.

(3) The fixation of the maximum rate for fares under para. 25 of the agreement of 1894.

(4) The conveyance of freight, goods or merchandise, by the railway company on rates that may be agreed upon, and, in case of a difference as to the rates, as may be fixed and settled by the Lieutenant-Governor in Council under para. 26 of the agreement of 1894.

(5) The renewal of the privileges and franchise rights to be granted to the Toronto and York Radial Company on the 3rd February, 1929, for a period of 35 years thereafter, upon new terms and conditions, under para. 32 of the agreement of 1894.

(6) The renewal of the privileges and franchise rights to be granted to the Toronto and York Radial Railway Company on the 3rd February, 1964, and on each successive future term of 35 years, on further new terms and conditions, under para. 32 of the agreement of 1894.

(7) The contingent right to the Corporation of the County of York to take over the real and personal property of the railway company at a valuation to be determined by arbitration under para. 33 of the agreement of 1894.

The Corporation of the County of York says that, by reason of the exercise by the Corporation of the City of Toronto of the powers conferred upon them by sec. 5 of the Act 7 Geo. V. ch. 92, the said enumerated privileges and franchise rights enuring to the benefit of the said Corporation of the County of York will be, in whole or part, taken away, terminated, or otherwise interfered with, and an injury will be caused to the Corporation of the County of York thereby.

The Corporation of the County of York hereby makes claim on the Corporation of the City of Toronto, by reason of the foregoing, for the injury which will be sustained by the said county corporation; and, in the event of disagreement between the Corporation of the County of York and the Corporation of the City of Toronto as to the money payment therefor, or generally in regard thereto, the Corporation of the County of York asks that its claim be adjudicated upon and determined in accordance with the provisions of sub-sec. 7 of sec. 5 of the Act 7 Geo. V. ch. 92.

By the order of the Board, the claim of the County Corporation was disallowed and dismissed.

The reasons of the Board were given in writing. The concluding portions were as follows:—

ONT.

S. C.

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO. AND COUNTY OF YORK.

In argument Mr. McGregor Young based the right of the county to intervene in this reference upon two grounds:—

1. That, notwithstanding the provisions of by-law No. 712, some residuum of interest in this highway (Yonge street) still resides in the county corporation.

2. That, if it should now be held that the county is excluded from all interest in the part of Yonge street in question, the county will be prejudiced at the expiration of the franchise period in 1929 in its negotiations with the company for a renewal of the franchise, or for the expropriation of the railway, by reason of the fact that the fruitful, profitable part of the railway—that within the city of Toronto—is severed from the main portion to the north, situate in the county.

The Board is of the opinion that neither of these grounds of claim is tenable.

(1) Dealing first with the first contention set out above. As to that part of Yonge street situate within the district which was annexed by the Board's order of 1908, it is clear that the operation of by-law No. 712 of the County of York had effectually put all title out of the county. The words of disposition used in paras. 3 and 4 of the by-law are that Yonge street "shall hereafter become the property of and be owned as a public highway by," etc. No more comprehensive words of devolution could be used; "property" being the highest right a man can have to a thing; and "owner" being the person in whom for the time being property is beneficially vested. Emphasis was sought to be laid in argument on the phrase "as a public highway," as indicating an intention to reserve to the county some interest in the subject-matter of the disposition; but surely that was the only quality in which the property could be disposed of by the county council, and the words used were competent to dispose of the county's entire interest.

Even though the by-law were ineffectual to vest the highway in the local municipalities concerned, it was effectual as an abandonment of the highway by the county corporation, under clause 7 of sec. 566 of the Municipal Act, 1892; and thereupon, by virtue of sec. 527 of the same Act, the highway became vested in the several local municipalities in which the highway was situated.

Upon the issue of the Board's order of 1908, that part of Yonge street embraced in the district annexed by that order passed to the City of Toronto, both as to jurisdiction and ownership.

As to that part of Yonge street which was assumed by the County of York in 1911, under its by-law No. 1053, the only sound conclusion seems to be that thereafter, upon the issuing of the Board's orders dated 1912 and 1914, the portions of Yonge street embraced within the districts thereby annexed passed to the City of Toronto, both as to jurisdiction and ownership. This was the view adopted by the Lords of the Privy Council in *Toronto Suburban R. Co.* v. *Toronto Corporation*, [1915] A.C. 590, 24 D.L.R. 269. In speaking of a similar franchise agreement in question there, Lord Haldane says, at p. 594: "This agreement was made between the Corporation of the Township of York, within the limits of which was at that time the land on which part of the railway was situate, and the railway company. In 1909 this land was included within the municipal limits of the respondents" (the City of Toronto), "who succeeded to the rights and obligations of the other corporation."

The claim made here by the County of York bears no likeness to that successfully pressed in the recent case *County of Wentworth* v. *Hamilton Radial Electric R.W. Co. and City of Hamilton* (1914-16), 31 O.L.R. 659, 35 O.L.R. 434, 28 D.L.R. 110, 54 S.C.R. 178, 33 D.L.R. 439. It is to be noted that in that case, though the trial Judge held that the Board's order did not vest the highway in question there in the City of Hamilton, the decision of the Supreme Court of Canada proceeded rather upon the view that the County of Wentworth was entitled to recover upon a right in contract—a covenant to pay a sum certain—quite irrespective of the question whether or not the highway had vested in the city. Here there is no suggestion of a claim in gross, as in the *Wentworth* case, but rather the assertion by the county of claims which directly challenge the jurisdiction and ownership of the City of Toronto in respect of the highway in question. These claims are, in the opinion of the Board, without vestige of right, either jurisdictional or proprietary. It will be noted that, under sec. 433 of the present Municipal Act, in the absence of other express provision, the ownership of a highway is vested in the municipality having jurisdiction over it.

ONT.

S. C.

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO. AND COUNTY OF YORK.

(2) The contention that, by reason of the severance of the highway, the county will be prejudiced in its negotiations with the company upon the expiry of the latter's franchise in 1929, is singularly wanting in merit, coming from a corporation which, upwards of 20 years ago, voluntarily abandoned the entire highway then in the county as an unwelcome incumbrance. True, many years after, with a juster sense of its duty, it assumed it as a part of its system of county highways. Still, for the reasons above given, the Board is of the opinion that the orders of the Board have been effective in divesting the county of all jurisdiction and ownership in respect of the part now within the City of Toronto, and that there is outstanding in the County of York no interest which entitles it to intervene upon this reference.

Irving S. Fairty, for city corporation, respondent.

McGregor Young, K.C., for the County Corporation, the applicant.

[THE COURT decided to hear the application as upon an appeal on the merits, subject to the objection.]

Clute, J.

CLUTE, J.:—Application by the County of York for leave to appeal from an order of the Ontario Railway and Municipal Board, dated the 1st February, 1918, disallowing and dismissing the county's claim.

The question arose under the Ontario Act, 1917, 7 Geo. V. ch. 92, sec. 4, which gives power to the city to expropriate part of the Toronto and York Radial Railway.

Sub-section (7) of sec. 4 provides that, in the event of the County of York making any claim against the city by reason of the exercise of the powers conferred by sec. 4, the corporation of the county, within one month after the passing of the Act, shall furnish particulars of its claim to the city, and such claim, in the event of disagreement, shall be adjudicated upon and determined by the Ontario Railway and Municipal Board. If such claim is not made within a month, or if it is disallowed by the Board, or upon payment by the city to the county of the amount of such award, after taking over the railway as therein provided, the rights, if any, of the said Corporation of the County of York shall cease and be determined.

Mr. Fairty, for the city, made the preliminary objection that no appeal would lie to this Court from a decision of the Board.

It was arranged to argue the preliminary objection and the merits of the appeal together. I am of opinion that the objection to the right of the county to appeal to this Court from a decision of the Board is not well taken. The only right of appeal given by the Act is under sec. 4 (1), which makes the power to expropriate on the part of the city "subject to either party having the right to one appeal to the Appellate Division of the Supreme Court of Ontario." "Either party" evidently refers to the City of Toronto and the Toronto and York Radial Railway Company, and no appeal is given under sub-sec. (7) to the County of York.

The Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48, provides that an appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, but such an appeal shall not lie unless leave to appeal shall be obtained from the Court within one month after the making of the order.

It was objected that this right of appeal has no application to the present case, inasmuch as it arises under an Act of the Legislature. The answer to this, I think, is, that the jurisdiction of the Board under the Railway and Municipal Board Act covers a case like the present. Sections 21 to 27 inclusive deal with the question of jurisdiction and powers of the Board.

Section 21 gives general jurisdiction in respect of railways and public utilities; sub-sec. (3) provides that the Board, as to all matters within its jurisdiction, shall have authority to hear and determine all questions of law or of fact; and sec. 22 declares that the Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act *or by any other general or special Act.* Then sec. 48 declares that an appeal shall lie to the Divisional Court, upon a question of jurisdiction or any question of law, upon leave of the Court.

In my opinion, the county having given the requisite notice and applied within the time, this Court has jurisdiction to grant such leave.

The Board declined to hear evidence offered by the county, upon the ground that the county was not entitled to present any claim by reason of the effect of certain Acts and by-laws. That was a question of law, as well as a question of fact.

ONT.
S. C.
RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO. AND COUNTY OF YORK.
Clute, J.

The judgment of the Board proceeded mainly upon the ground that the county, under by-law 712, had abandoned the York roads and transferred the same to minor municipalities of the County of York; and, having so disposed of their interest and control of Yonge street, the county ceased to have any claim in respect of damages under the Act of 1917; and that the county had no such interest under its agreement of the 6th April, 1894, as to give it any right "in gross" arising out of the said agreement for any claim to damages under the said Act.

The agreement with the Toronto and York Radial Railway Company arises out of its original agreement, found in schedule A. to the Ontario Act respecting the Metropolitan Street Railway Company, 1897, 60 Vict. ch. 93, by which the said agr ement is made a part of the Act "in the same manner as if the several clauses of such agreements were set out and enacted as part of this Act:" sec. 15.

The county's claim for damages is set forth in the particulars and in the notice of motion.

In my opinion, by-law 712, giving to the minor municipalities the duty and right of making repairs to Yonge street, does not in any way affect the county's claim to damages, if otherwise entitled. This does not affect the county in respect of its agreement with the Radial. It is not necessary, nor do I think it proper, to express an opinion as to which of the clauses of its agreements with the Radial the county has the right to make claim under, or whether all. That is a question of law and fact, and ought not, I think, to be prejudged before the evidence which the county may offer is submitted.

The appeal should be allowed upon its merits, the order of the Board set aside, and the county permitted to offer such evidence as it may be advised in support of its claim. The city should pay the costs of this appeal upon taxation.

Mulock, C.J.Ex. Sutherland, J.

MULOCK, C.J. EX., and SUTHERLAND, J., agreed with CLUTE, J.

Riddell, J.

RIDDELL, J.:—By the Act of 1917, 7 Geo. V. ch. 92, sec. 4 (O.), the City of Toronto was authorised to acquire that portion of the Toronto and York Radial Railway upon Yonge street, within the limits of the city, paying compensation, to be determined (in

case of disagreement) by the Ontario Railway and Municipal Board, "subject to either party having the right to one appeal to the Appellate Division of the Supreme Court of Ontario."

Section 4(7) provides that, in the event of the Corporation of the County of York making any claim against the City of Toronto by reason of the exercise of the powers conferred by sec. 4, the claim "shall be adjudicated upon and determined by the Ontario Railway and Municipal Board . . . If such claim is not made within . . . one month or if it is disallowed by the said Board, or upon payment by the . . . City of Toronto to the . . . County of York of the amount of such award after taking over the railway . . . the rights, if any, of the . . . County of York shall cease and determine." No right of appeal is given to the County of York by the statute.

The County of York made a claim as provided for by sec. 4(7): the Board disallowed the claim in the following terms:—

"1. This Board doth order and adjudge that the claim herein of the said respondent the Corporation of the County of York be and the same is hereby disallowed and dismissed."

A perusal of the reasons for judgment makes it plain (as is not indeed disputed) that the disallowance of the claim of the county was on questions of law, and not of fact—the facts, so far as they enter into the judgment, are all admitted, and the disallowance of the claim is substantially what in the former common law practice would be called allowing a demurrer.

The county applied to this Court for leave to appeal under R.S.O. 1914, ch. 186, sec. 48(1). We reserved judgment upon this motion till we heard the merits—these have now been argued, and we proceed to dispose of the case.

The first point to be decided is as to the right to appeal at all.

Admittedly the right to appeal must be given expressly and by unmistakable legislation: *Attorney-General* v. *Sillem* (1864), 10 H.L.C. 704.

It is argued that sec. 48(1) of the Ontario Railway and Municipal Board Act does not apply to the present case, for two reasons: (1) because the powers of the Board *pro hâc vice* are given by the Act of 1917, and not by the Ontario Railway and Municipal Board Act, and are of a special nature not contemplated by this Act; (2) in any event sec. 4(1) gives an express power of appeal, whereas there is none in sec. 4(7)—"*expressio unius est exclusio alterius.*"

ONT.

S. C.

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO. AND COUNTY OF YORK.

Riddell, J.

But the general Act plainly contemplates other matters being added to the jurisdiction of the Board; in addition to the jurisdiction expressly mentioned in sec. 21(1), sec. 22 provides that "the Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act;" *cf.* secs. 23(2), 49. I see no reason why the provisions of sec. 48 do not apply to such jurisdiction given by other Acts, general and special, as well as to the jurisdiction given by sec. 21 (1) of the Ontario Railway and Municipal Board Act.

In the Assessment Act, R.S.O. 1914, ch. 195, sec. 80 (6), there is a special provision as to appeal, i.e., "upon questions of law" only, which is not the same as in the Ontario Railway and Municipal Board Act, sec. 48, "upon a question of jurisdiction or upon any question of law," and the time is not limited as in the latter Act. No doubt, the provisions of the Assessment Act would be looked at in an appeal under that Act; but, as we shall see, there is nothing of the kind in the Act of 1917.

Of the many sections of the Municipal Act conferring jurisdiction on the Board, there seems to be only one which requires particular notice, viz., sec. 469. In that section the order of the Board there contemplated is declared to be "final and not subject to appeal," plainly indicating that, in the view of the Legislature, such orders would be subject to appeal in the absence of such provision.

A provision contained in another statute that there shall be a right of appeal, a superfluous provision, has by no means the same argumentative force as a prohibition would have: see Maxwell on Statutes, 4th ed. (1905), p. 467.

(2) The maxim "*expressio unius est exclusio alterius*" has been overworked; useful as it sometimes is, it is oftener misleading. I do not think it applies in the present case at all.

The appeal given in the general Act is: (1) on questions of jurisdiction or law only; and (2) only by leave of the Divisional Court. The appeal given by sec. 4(1) of the Act of 1917 is (1) on questions of fact or law and (2) without the leave of the Divisional Court. This is a right given to the city and the railway company, superadded to, not inconsistent with, the right given in the general Act. It cannot be effective to take away from one not

named in the sub-section the right to appeal which he otherwise would have had.

It is not necessary to express an opinion as to whether the city and the railway company are restricted to this special appeal. It may be so. The grant of an appeal (1) as of right and (2) on all points may (3), even if it be final, be considered more than the equivalent of an appeal (1) by leave and (2) only on questions of law or jurisdiction (3) with a further appeal; but no equivalent or substitute is given to the county.

I think we are not concluded from hearing the appeal; we should grant leave and now treat the appeal as properly before us.

The claim of the County of York is based in substance on the agreement of the 6th April, 1894, which will be found as schedule A. to the Ontario statute (1897) 60 Vict. ch. 93.

I may say at once that, in my opinion, counsel for the appellant placed the rights of his client quite too low. This agreement is not simply validated by a statute, but it is itself a statute; sec. 15 of the Act makes the "privileges and franchises thereby created . . . existent and valid . . . to the same extent and in the same manner as if . . . set out and enacted as part of this Act." Whatever difficulties might have been encountered had the agreement been simply validated, there can be none when we remember that the privileges and franchises are given by statute.

The history of Yonge street, built from what is now Queen street to Holland Landing, by Simcoe, in the earliest days of the Province's life, is curious but need not be here detailed—sufficient is given in the lucid and able judgment of the Board. The County of York was from 1865 onward the owner in fee of that part of Yonge street now in controversy, and made certain agreements with the predecessor of the Toronto and York Radial Railway Company—see schedule A. to 56 Vict. ch. 94 (O.) and schedule A. to 60 Vict. ch. 93 (O.), those in the former schedule being "confirmed and declared to be valid" by sec. 2 of the statute, the latter being (as we have seen) made part of the statute.

The Legislature, by the Act (1917) 7 Geo. V. ch. 92, gave to the City of Toronto the power of expropriating the railway and all its real and personal property within the city; but authorised the County of York to make such claim as it might be advised against

ONT.

S. C.

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO. AND COUNTY OF YORK.

Riddell, J.

the city for damages by reason of the exercise by the city of its powers so given. The county made a claim as set out in the particulars of claim annexed hereto.

The grounds upon which the Board disallowed the claim seem to be (1) that the county has parted with its ownership of part of Yonge street, and (2) there is no agreement "in gross."

Both may be considered together. I have already pointed out that the rights of the county are statutory under the Act of 1897. They do not depend upon any ownership of the highway, although of course they would not have been given were it not that the county owned the highway. They are "in gross," in the sense in which the expression is used in the reasons for judgment of the Board. So far as any of them becomes valueless by the county alienating the street and ceasing to be the owner, such an alienation is of importance, but only in the view of quantum. The by-law No. 712, referred to, does no more than make certain portions of Yonge street "the property of and . . . owned by" other municipal corporations. It does not operate as a conveyance of anything else than the fee, and the statute under which the by-law was passed does not in any way affect other rights of the county.

This is not at all such a case as the Farnham Avenue case, *Toronto and York Radial R.W. Co.* v. *City of Toronto* (1913), 15 D.L.R. 270. There by an indenture the county had conveyed to the city the whole of its interests in the portion of Yonge street within the city (p. 320). Here there is no such conveyance.

It is much more like *Vancouver Power Co. Limited* v. *North Vancouver District Corporation*, [1917] A.C. 598, 36 D.L.R. 462, where such rights as these were held to remain in the original contracting municipality, notwithstanding a statute which provided that the agreement should be adopted and carried into effect by a new municipality.

I can find nothing here which divests the county of the rights given it by statute. The mere transfer of the highway clearly does not: *County of Wentworth* v. *Hamilton Radial Electric R.W. Co.*, 33 D.L.R. 439, 54 Can. S.C.R. 178. (The remarks of Mr. Justice Duff on p. 189 of this case are, I think, misunderstood by counsel for the city; but in any case they do not affect the present case.)

ONT.

S. C.

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO. AND COUNTY OF YORK.

Riddell, J.

There being nothing to divest the rights of the county, the Board should not have dismissed the claim without giving the county an opportunity of calling witnesses, unless it appears that in no view could a claim for money damages be sustained.

As to paragraph 1, I do not think this claim could possibly be substantiated; 2, 3, and 4 may be difficult if *Village of Brighton* v. *Auston* (1892), 19 A.R. 305, be considered to apply; but there may be facts shewing that the county will sustain a pecuniary loss by being deprived of the rights there given, and it is reasonably certain that the principle of *Village of Brighton* v. *Auston* will not be extended—in any event nominal damages may be recoverable: *Village of Brighton* v. *Auston*, *ut supra*; Leake on Contracts, 6th ed. (Can. Notes), p. 773.

It is unnecessary to determine, in advance of evidence, whether 5 and 6 may be substantiated, while 7 is certainly such as may be of great value. The contingent right of the county to take the real and personal property of the railway does not depend on the ownership of the fee or of any less interest in the land. The statute of 1897 gives the statutory right to the county, and any difficulty which might arise under the general law from the fact that this property (or some of it) is in another municipality is avoided by this special statutory provision.

The city takes part of the real and personal property of the railway, which on a certain contingency the county is to have; this may be a serious loss to the county, and should be compensated for. The fact that this loss is contingent does not render the damages nominal; *Chaplin* v. *Hicks*, [1911] 2 K.B. 786 (C.A.), has placed the law in that regard in a safe and, if I may say so, a satisfactory condition.

I would allow the appeal with costs of the motion for leave and argument on the merits, payable forthwith by the city.

I annex to this judgment the claim of the county and the reasons for judgment given by the Board.

KELLY, J.:—I agree in the result.

Kelly, J.

Leave to appeal granted and appeal allowed.

ALTA.

S. C.

LEONARD v. WHITTLESEA.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 2, 1918.

COSTS (§ I—19)—PARTY TO ACTION ENTITLED TO—DEPRIVED OF BY TRIAL JUDGE—MUST SHOW JUST GROUND—PRINCIPLE MUST BE SHEWN.

A party to an action is entitled to expect that, when a trial judge deprives him of his *primâ facie* right to costs, the materials for a just ground of principle shall be made to appear in some form or other either upon the evidence or some recorded observation of the judge.

Statement. APPEAL by defendant from the trial judge's disposition of costs in an action on a contract and a counter claim for damages.

I. C. Rand, for appellant; *G. M. Blackstock*, for respondent.

The judgment of the court was delivered by

Beck, J.. BECK, J.:—The defendant appeals, by leave, solely as to the trial judge's disposition of the costs. Both the action and the counterclaim were dismissed without costs.

The defendant's counsel contends that if the judge proceeded upon a wrong principle, this court can and ought to review his decision. We agree that this is so.

He contends, of course, that this is what the judge has done in the present case.

The facts briefly are as follows: The plaintiff claims $270 for breaking land for the defendant. The defendant, by way of defence and counterclaim, says that the defendant agreed to break a much larger quantity of land and to do some seeding; that he failed to complete his contract to the great damage of the defendant, and he claims by way of counter claim $470. The trial judge finds that there was a contract by the plaintiff to break and seed the larger quantity of land; that he failed to do this, and holds that he is not entitled to succeed even on a *quantum meruit*.

As to the defendant's counterclaim, he says:—

> In view of my judgment as to the plaintiff's claim, I think the defendant ought not in conscience to succeed on her counterclaim, for undoubtedly the benefits which accrued to her by the work of the plaintiff should off-set any damage she might be entitled to recover. (Then as to costs he says). I think the action and counterclaim should be dismissed without costs to either party.

R. 720 leaves the costs of all proceedings to the discretion of the judge and provides that in case no order is made the costs shall follow the events. It gives, however, power to the judge to award a gross sum in lieu of or in addition to any taxed costs and to allow costs to be taxed to one or more parties on one scale

and to another or other parties in the same action on another scale and to allow a set-off of the costs.

If no order had been made the result would have been that, inasmuch as the plaintiff's claim was for $270, the costs on a dismissal of his action would have been taxed under column one, and inasmuch as the defendant counterclaimed for $470 the costs on a dismissal of her counterclaim would have been taxed under column 2, a somewhat higher scale. On the taxation there perhaps would have had to be some adjustment of witnesses' expenses and counsel fees. It was urged by plaintiff's counsel that the result would have been that the one set of costs would have approximately equalled the other and that had the trial judge directed a set-off the final effect would have been the same as that of the judge's actual direction. This, however, is more or less a surmise in any case, and it does not appear that the trial judge disposed of the costs upon any such calculation, the data for which were so vague.

I think that a party is entitled to expect that when a trial judge deprives him of his *primâ facie* right to costs, the materials for a just ground of principle shall be made to appear in some form or other, either upon the evidence or some recorded observation of the judge. See Annual Practice, 1918, p. 1183.

Going through the evidence I can find no reason for depriving the defendant of the costs on a dismissal of the action, and I would give them to her.

The question of the costs on the dismissal of the counterclaim, notwithstanding there is no cross-appeal or notice of intention to raise this question, is open for the consideration of the court, r. 331.

The matters put in issue by the counterclaim arose solely out of and formed part of the same transaction as that set up in the statement of claim.

A counterclaim, although it is declared (r. 65) that it shall have the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action both on the original and on the counterclaim, ought, it seems to me, to be examined, when dealing with the question of costs, to ascertain whether in substance it raises independent issues or calls for the giving of evidence upon points which are not or would not be put in issue by a total or partial denial of the plaintiff's claim.

ALTA.

S. C.

LEONARD v. WHITTLESEA.

Beck, J.

It is, I think, "issues" in this wide sense that are intended by r. 742, which reads as follows, and is, I fear, often overlooked:

> In any case where two or more issues of law or fact are raised upon the pleadings and success upon such issues is divided between the parties the court or judge may direct the costs only of the more successful of the parties to be taxed, and a proportionate part of the whole amount so taxed or of the whole amount taxable, whichever is the lower, to be allowed to such party or parties, and any such direction may either include or exclude the witness fees taxable by all or only some of the parties to whom costs are allowed.

Where a trial judge has, without the question having been argued, made a disposition of the costs with which either party is dissatisfied, I suggest that the proper course is, before the order is taken out, to ask the judge for an appointment to argue the question of costs. In this way he would be in a position to give consideration to any aspects of the question which he might have overlooked, and appeals in respect of costs might in some cases be avoided.

In the present case, although the counterclaim claimed a larger sum than the statement of claim, substantially no issues were raised by it which were not raised by the defence, and little, if any, additional evidence was called for.

Under these circumstances it seems to me that, although the counterclaim was dismissed, the costs ought not to be expressly given to the plaintiff, but the defendant ought to be left in the same position as if he had merely successfully defended the plaintiff's action.

I think, therefore, in the result that the plaintiff should be ordered to pay the defendant's costs of a defended action and that there should be no extra allowance of costs because of the counterclaim.

As I have already suggested, there is a fair probability that this question might have been fairly adjusted by the trial judge on a special application to him before the entry of judgment and thus an appeal might have been avoided.

Under these circumstances, I would allow the appellant only actual disbursements as his costs of appeal.

Judgment accordingly.

AUGER v. BEAUDRY AND HYDE.*

QUE.
K. B.

Quebec King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. February 28, 1918.

WILLS (§ IV—200)—WORDING CLEAR—INTERPRETATION BY COURT—PROBABLE INTENTION.

Where the wording of a will is clear the court must interpret it as expressed, effect cannot be given to a probable intention.

APPEAL from a judgment of the Superior Court, Monet, J. Varied. Statement.

Lafleur, Macdougall, Macfarlane & Barclay, for appellants; *P. B. Mignault*, K.C., for respondent, Dame Beaudry.

CROSS, J. (after having recited the facts):—The respondent, Mde. Roy, took the present action and in her declaration she set forth the facts and prayed that she be declared owner of the entirety of the share of Mde. Gardiner—including the latter's share of Guillaume-Napoléon's share of the real estate specifically bequeathed to Guillaume Napoléon and Mde. Gardiner, as being the sole survivor of the 4 children named in clause 6. She asked for an accounting by the executors who were made defendants in the action. Cross, J.

The appellants, *mis en cause*, have pleaded, in substance, that one half of Mde. Gardiner's share devolved to them (instead of the whole of it having devolved to the respondent) inasmuch as they, though grandchildren of the testator, are nevertheless also survivors of the 4 children within the meaning of clause 6, and as such took jointly with the respondent. Otherwise expressed, their contention is that for the case of death of a usufructuary legatee without issue the will created a fiduciary substitution wherein the surviving life-usufructuaries are institutes and the children of the life-usufructuaries the substitutes; that, by operation of that substitution, one-half of Mde. Gardiner's share passed to the respondent in life-usufruct and the other half—which would have gone in usufruct to Mde. Auger, mother of the appellants, had she survived—went directly to the appellants, the fiduciary substitution operating, as to that half, as a vulgar substitution.

The judge who decided the action in the Superior Court has taken the view that the respondent was the only survivor of the testator's 4 above-named children and, as such, took the whole

*Appeal to be taken to Privy Council.

QUE.

K. B.

AUGER v. BEAUDRY AND HYDE.

Cross, J.

of Mde. Gardiner's share. He accordingly gave judgment for the respondent.

Taken by itself, and in its literal sense, clause 6 would be decisive of the issue in respondent's favour as held by the judgment. But the appellants say, in substance, that it is possible to read the clause as meaning that grandchildren, whose parent had previously died, are intended to represent their parent and to take *per stirpes*, notwithstanding that their parent had not entered into enjoyment, the disposition in such a case operating as a vulgar substitution so that the provision for life-enjoyment *à titre précaire* would not take effect and the bequest would go directly to the grandchildren *per stirpes*. Fiduciary substitution, it is pointed out, includes the vulgar substitution, and it was argued that clause 6 enables children of a deceased usufructuary to share with a surviving usufructuary. In support of that view, counsel for the appellants rely upon the scheme of devolution made by the will as indicating that, though the rule in substitutions is that representation does not take place, in this case, the testator has provided otherwise and has manifested his intention to pass on the bequest in the order of legitimate succession to the grandchildren. To support that conclusion, it has been pointed out that the specific legacies to the 4 children, in each case with gift over to grandchildren *per stirpes* made in articles 4, 5, 6 and 7, are followed in arts. 12, 13 and 14 by like specific legacies to three sons born out of wedlock, in each case also with gift over to grandchildren *per stirpes*.

It has also been pointed out that the usufructuary legatees are forbidden to sell or hypothecate their usufruct and the rents and issues are declared to be alimentary.

It is specially pointed out that, by clause 8 of art. 18, there is a gift over to the 4 legitimate children (those first named in the will) of the legacies given to the 3 sons born out of wedlock, if the latter all die without issue, but this gift over is

au même titre d'usufruitiers que ci-dessus spécifié dans mon présent testament et la propriété d'iceux appartiendra à leurs enfants nés et à naître en légitime mariage, par souches, et aux mêmes conditions que les autres biens légués par mon présent testament.

In clause 9 power is given to the usufructuary legatees to dispose by will of the properties given to them, but only in favour of their children and grandchildren. This would, in effect, mean power

to vary the shares of grandchildren and to make substitutions in favour of great-grandchildren.

Particular stress has also been laid upon clause 10 of art. 18. That clause provided that, in the last year of their term of office, the executors should have a valuation made of the real estate given to the 3 residuary legatees, Corinne, Guillaume-Napoléon and Léocadie-Clorinthe, that the shares of these 3 legatees were to be made equal by *soultes*. That the soulte-money was to be invested in certain securities,

pour, par ceux de mes trois enfants ci-dessus en dernier lieu nommés qui auront droit auxdits retours du soultes, en jouir, à titre de constitut et précaire, leur vie durant, et pour, après leur décès, appartenir la propriété d'iceux, à leurs enfants nés et à naître en légitime mariage et par souches.

In view of all this carefully ordered devolution of his benevolence to his grandchildren, family by family, it is argued that the testator's intention is defeated, if by application of clause 6 it is made to result that the appellants (children of Mde. Auger, one of the 3 residuary legates), are excluded from taking any part of the share of Mde. Gardiner. It is said that such a result is bizarre and clearly not intended by the testator. I consider that the appellants have failed to establish the proposition or conclusion for which they contend. The most that can be said is that they have shewn it to be highly probable that, if the testator had contemplated the possibility of such an event as has happened, he would have provided against it. A court cannot give effect to a probable intention. It can give effect to the testator's intention if disclosed by the words which the testator has used. The will makes it clear that the appellants will receive whatever was given to Mde. Auger, but it does not have the effect of assuring them that the share of any of the other 3 usufructuary legatees who may die will devolve to them either in whole or in part, at least, so long as any of the 4 children survives. The shares of Guillaume-Napoléon and Mde. Gardiner have gone where the testator's language has carried them. The court cannot amend that disposal.

It is true that the shares of 3 of the usufructuaries in the bequests of real estate were to be equalised by valuation, the effect being that each of the 3 would enjoy and transmit to his or her family, real estate of equal value, inequality in value being made up for by *soulte*, but that was a thing which was to be done

QUE.

K. B.

AUGER v. BEAUDRY AND HYDE.

Cross, J.

and accomplished once for all, and its accomplishment did not stand in the way of one usufructuary legatee getting an addition by virtue of survivorship which would not have to be shared with children of a predeceased legatee so as to bring about equality.

On the whole, I consider that the appellants are attempting the impossible task of making the will provide for a case which, in fact, has not been provided for. They fail to shew from the will an intention on the part of the testator to have grandchildren take concurrently with children, the share of a son or daughter who would have died without issue.

On the contrary, the effect is to shew an intention to postpone enjoyment by the grandchildren until expiry of enjoyment by the last surviving son or daughter.

It is true that there are cases in which the word "survivors" has been given the meaning of "others." Can the appellants say that the expression *survivants de mes quatre enfants légitimes ci-dessus en dernier lieu nommés* is to be read (having regard to the will as a whole), as if it were *autres desdits quatre enfants* and then that the word *enfants* is to be taken as including *petits enfants* as warranted by art. 980 C.C.

Counsel for the appellants are no doubt right in saying that we should look to the descendants whom the testator wished to exclude as well as to those whom he wished to gratify. On the one hand, he clearly wished to exclude the children born out of wedlock, for whom he made other provision. He also wished to exclude Mde. Starnes. To make that exclusion, it was necessary or at least obviously convenient to name the 4 children. On the other hand, he desired to gratify 4 of his 5 legitimate children and after them the children of these four. So far as probable intention was concerned, there was no reason to prefer the respondent and exclude the appellants. How then was he to express himself in clause 6? Can the late Mde. Auger's children say: "We are amongst the 'survivants.' He did not exclude us?" It appears to me to be necessary to the appellants' case that they should shew from the will something which repels the idea that the testator preferred that the half share in question should be enjoyed by a child rather than by grandchildren.

Against that there is not only the wording of the clause as a whole, but there is the employment of the word "retourne" which

implies an added gratification, that is to say, a benefit to legatees already benefited rather than a gift to a new set of beneficiaries such as the appellants would be. It is to be remembered that the will was drawn up by a man trained in the law. It was easy to have had the notary add apt words to make children of any son or daughter, who had previously died, share with the surviving uncles and aunts in the share of any of the latter who might die without issue, if the testator had so wished. The testator was free to exercise his preferences and may have thought it wise not to make the grandchildren too rich or make them rich too soon.

Treating of the considerations to which regard should be had in construing testamentary dispositions of which the purport is not clear, it is said in Dalloz, Rep. verbis, Dispositions entrevifs et Testamentaires, No. 3483.

Il est évident, d'après cela, que l'interprétation d'un testament est une œuvre de sagacité plutôt qu'une application de règles déterminées *a priori*. Aussi le législateur, n'en a-t-il à cet égard établi aucunes. Plus tard, cependant, lorsqu'il est arrivé aux conventions, il a été plus explicite: il a posé quelques règles générales d'interprétation (art. 1156 et suiv.). Pourquoi cette différence? M. Corn-Delisle (*Donation et Testament* sur l'art. 1002, no. 2) en donne une explication judicieuse. La volonté testamentaire, dit-il, est plus capricieuse que la volonté conventionnelle. Celle-ci trouve un contrôle dans l'opposition d'intérêt des parties contractantes, et la combinaison de l'intention des parties forme une intention commune. La volonté testamentaire est despotique; elle s'exerce sans contrôle, et devient par là même plus difficile à pénétrer.

Respecting the meaning of survivors reference may be made to *Re Bilham*; *Buchanan* v. *Hill*, [1901] 2 Ch. 169; *Garland* v. *Smith*, [1904] 1 Ir. R. 35; *Inderwick* v. *Tatchell*, [1903] A.C. 120; *Re Rubbins*, *Gill* v. *Worrall*, [1898] 79 L.T.R. 313.

Since these notes were first written, the Chief Justice has called our attention to the decision of this court and of the Superior Court in *Ste. Marie* v. *Bourassa*, 18 Rev. Leg. O.S. 135, 454, 33 J. 327. That case presents striking resemblances to the one now before us. What one may call the scheme of the will is the same in each case. The testator in each case sets out by making specific bequests to each child in two groups; in the *Ste. Marie* case giving capital sums to daughters and landed properties to sons, and with gift over to grandchildren. There was even (as here) a provision for equalising values of the landed properties. Then came provision that in case of death of a son or sons without the issue

QUE.
K. B.
AUGER
v.
BEAUDRY
AND
HYDE.
Cross, J.

sa part ou leurs parts retournera ou retourneront à mes autres garçons survivants, à l'exclusion de leurs sœurs.

The action was taken by the children of a son who had died, to recover a share of the part of another son who had died at a later date. The argument for the plaintiff tutrix of the children is so like that made before us that, had the *Ste. Marie* v. *Bourassa* case been cited to us there would have been an inclination to think the latter argument a copy of the former. The conclusion in that case is in accord with that now arrived at. The appellants, therefore, fail on the main ground of their appeal.

It, however, appears to be necessary to consider whether the respondent has the same right to what passed to Mde. Gardiner from Guillaume-Napoléon Beaudry on his death as she has to the share which Mde. Gardiner received directly from the testator. Clause 6 carried the share of Guillaume-Napoléon to the 3 daughters who survived him, in life enjoyment. When Mde. Gardiner afterwards died without issue, did clause 6 (or the will as a whole) carry to the respondent as sole survivor of the 4, Mde. Gardiner's one-third of what had been enjoyed by Guillaume-Napoléon?

Neither in clause 6 or elsewhere in the will does the testator provide that the share which once passes to a survivor is to go to the survivors of that survivor in case of death of the latter without issue. On the contrary, the disposition is to the children of that survivor. There is no provision for continuing accretion to the survivors of the 4 children, but only provision for a first step in accretion. It is the particular share given (as part) which is passed on to the survivors and it is not said that it is to go to the last survivor. The law favours early vesting. It is to be remembered that the legacy to each of the 4 children was a legacy of individual objects or assets in so far as respects the properties in question in the present action. The substitution of Mde. Gardiner's third share of the Guillaume-Napoléon specific legacy lapsed by reason of failure of substitutes on the death of Mde. Gardiner. It follows that no part of the immovables bequeathed to Guillaume-Napoléon were carried by the channel of Mde. Gardiner to the respondent by virtue of the will of Jean Louis Beaudry.

It likewise follows that though Mde. Gardiner enjoyed only as life usufructuary or institute what she took of Guillaume-

Napoléon's share of the properties in question, what she so took fell at her death into her own individual estate and passed to her own heirs and out of operation of the will of Jean Louis Beaudry.

For these reasons the respondent's action fails in so far as respects the assets mentioned in par. No. 9 of her declaration, namely, subdivisions Nos. 8 and 9 of lot official No. 1506 St. Antoine ward, Montreal, saving such share thereof (if any) as she may have inherited as an heir or legatee of Mde. Gardiner.

Having dealt with that part of the action, there remains for consideration the appellants' objection that, even if they should fail on their main ground, the judgment, nevertheless, has gone too far in that it has declared the respondent to be owner of the assets in question out and out instead of having merely declared her entitled thereto as life usufructuary or institute.

Though probably of little real significance—seeing that an institute in law holds as an owner—the objection has foundation, as the unqualified terms of the judgment may be a menace to the appellants upon the ultimate possible opening of the substitution in their favour.

In the result, the appeal is maintained in part; the respondent is declared owner in life enjoyment of the entirety of the properties described in par. 5 of the plaintiff's declaration and the prayer of the action is granted as to them; but it is declared that the properties described in par. 9 of the declaration were not transmitted by the will of the late Jean Louis Beaudry to the respondent on the death of Mde. Gardiner and the action as regards the latter is dismissed saving any interest of the respondent therein as a possible heir of Mde. Gardiner.

The judgment is accordingly modified and the appeal maintained to the extent aforesaid.

As the modification turns upon a question not raised, each side will be left to bear its own costs of the appeal. The appellants must pay the costs of the action in the Superior Court.

Pelletier, J.

PELLETIER, J.:—This is a case for interpreting sub-clause 6 of clause 18 in the will of the late Hon. J. L. Beaudry, December 29, 1881.

This clause as it reads is very clear, so clear that it is not susceptible of two interpretations. However, in comparing it with the rest of the will it is certain that it does not conform to the

QUE.

K. B.

AUGER v. BEAUDRY AND HYDE.

Pelletier, J.

general idea which prevailed when the will was drawn and to the disposition of the property as the testator wished it.

Peculiar consequences follow from this and a disposal of a part of the property which is contrary to the tenor of the whole will. I am satisfied that the testator if he had forseen the case now before us would perhaps have arranged this otherwise, but that was a matter for him; if he has not done so can we adopt an interpretation different from that imposed upon us by the letter of the will in order to reform in this respect the part of the will which engages our attention? I do not believe it.

The testator was a legislative councillor; he had been several times mayor of Montreal; he knew what he wished to say and he formally declared, with no possible ambiguity, that if any of his children, whose names he mentions, should die without issue, their share in the property would go to the survivors of his other children, so that the survivors in question should have the usufruct and that the title should be in the children *per stirpes*.

It could not have been expressed more clearly, but now we are asked to apportion a part of this property to those who are not survivors and who are, therefore, clearly excluded. That would be acting in contradiction to the very clear terms of the clause.

I believe that the court is without power to come to the aid of the appellants who, no doubt, have the equity with them, but the clause in question does not present any doubt or ambiguity which in certain cases would permit us to give to a deed or a clause of that deed one interpretation rather than another.

If the intention of the testator was doubtful, we could interpret it; if it was susceptible of two meanings, we should ascertain which would most accord with the other provisions of the will, but I am satisfied that it cannot be said that a testator who clearly gives property to *primus* has wished to give it to *secundus*. Although I would have preferred to come to a different conclusion, I consider it impossible to do so, and I am, therefore, of opinion that the judgment should be affirmed.

Lavergne, J.

LAVERGNE, J., dissented. *Judgment varied.*

TWAITES v. MORRISON.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 18, 1918.

1. SALE (§ II B—30)—AGREEMENT TO BUY "GELDING"—SALE OF "RIGGOT"—IMPLIED CONDITION—GELDING OF HORSE-DEALING COMMERCE—INSPECTION—RIGHTS OF PARTIES.

An agreement for sale being for a "gelding," there is an implied condition that the subject of the sale shall be the "gelding" of horse-dealing commerce; this condition is not complied with by the delivery of a riggot although both parties honestly believed at the time of sale that it was a gelding and in a proper action the purchaser is entitled to damages.

2. PLEADINGS (§ I N—110)—CARELESSNESS IN PREPARING—ACTION DISMISSED—AMENDMENT OF BY APPELLATE COURT.

A plaintiff who in his pleadings carelessly alleges falsehood and fraud on which ground the action is dismissed, there being no evidence of fraud, is not entitled to have such pleadings amended so as to give him the relief he might have been entitled to had the pleadings been properly drawn.

Statement.

APPEAL by plaintiff from a judgment of a District Court Judge in an action for damages for fraudulent misrepresentations. Affirmed.

G. H. Ross, K.C., for appellant; *G. M. Blackstock*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—I prefer to express no opinion as to whether the sale in question should be considered one by description within the Sales of Goods Ordinance or whether the defect is one of substance or merely incidental.

The action is one for damages and is based on a charge of fraudulent misrepresentation. The charge failed absolutely and the court should not attempt to frame a new case for the plaintiff unless justice requires it. I do not think it does, for I feel considerable doubt whether the evidence establishes any real damage whatever. The only evidence of damage given by the plaintiff is that a horse, such as this, has bad qualities that a gelding would not have. As to details, he contents himself with evidence of value 4 months after the purchase without anything from which one can say that that difference was due to the defective quality in the horse. As against this, evidence is given by the defendant to shew that for 2 years preceding the sale the horse was deemed to be a gelding and to have all the qualities of a gelding and to give the satisfactory results to be derived from a gelding. The trial judge, in effect, accepts this evidence of the defence and, in the face of it, I find difficulty in concluding that the plaintiff suffered any substantial damage.

I would, therefore, dismiss the appeal with costs.

ALTA.

S. C.

TWAITES v. MORRISON.

Stuart, J.

STUART, J.:—The defendant sold to the plaintiff a horse identified and seen by the parties just before and at the time of the bargain for the sum of $80, which was paid in cash at the time, and the horse was concurrently delivered. The plaintiff had asked the defendant, before seeing the horse, if it was a mare or a gelding, and the defendant said it was a gelding. Defendant gave plaintiff a receipt for the purchase money, in which the horse was described as "a bay gelding." Plaintiff kept the horse for 2 months and then discovered that the animal was neither a mare nor a gelding, but what is known as a "riggot" or "ridgeling," that is a male horse which has not been castrated but has only one testicle and that so abnormally concealed as to give the horse the appearance of a gelding. Plaintiff did not go and see the defendant but went to his solicitor, who wrote the defendant demanding back the purchase money, but only inferentially and not expressly offering to return the horse. The defendant did not reply. After a period of 2 weeks, plaintiff's solicitor again wrote warning defendant that if the money was not returned in a week plaintiff would advertise and sell the horse and sue the defendant for the difference between the proceeds realised and the original purchase-price and the cost of the keep of the horse. Defendant still did not reply. The plaintiff advertised the horse and sold it for $30. He then brought this action against the defendant alleging (as unfortunately is so often lightly and carelessly done in these days) a false and fraudulent warranty by the defendant and claiming damages. There were other warranties asserted in addition to that respecting the animal being a gelding.

The trial judge dismissed the action and the plaintiff has appealed.

On the grounds chiefly dealt with in his judgment by the trial judge, I think he was right. The point mainly relied upon in the appeal, viz., that respecting the sexual nature of the animal the trial judge said nothing more than this: "As to the sex of the animal I think the defendant acted upon a fair and reasonably well-grounded belief that the horse was a gelding."

There is admittedly no reason, disclosed by the evidence, for not believing that the defendant honestly believed that the animal was, in fact, a gelding. This removes all element of fraud.

ALTA.

S. C.

TWAITES v. MORRISON.

Stuart, J.

In my view, the initial question is one of fact, not of law. Did the plaintiff get the real thing which he intended to buy? Is the difference between a gelding and a riggot so substantial as to justify the court in saying that he did not?

It will be said, in this case, the plaintiff wanted to buy a horse and he got a horse, and he saw it was a horse when he got it. Just there comes the question of fact. Of course he wanted a horse, but the fact that he asked beforehand: "Is it a mare or a gelding?" shews that it was not only a specimen of the mere *genus* horse that he wanted to buy but a certain clearly specified and understood species of the genus horse, namely, a gelding. And he did not get a gelding but a riggot. It is, in my opinion, a question of fact in each case just where the line between incidental quality and essential substance is to be drawn. All I can say is that I think this case falls clearly within the field of essential substance or subject-matter.

I, therefore, think that if the purchaser had offered the horse back, had held him for the vendor and had sued for the purchase-money, as for money had and received, he would, undoubtedly, have been entitled to succeed, at least, when the animal was in as good a condition as when he bought it, and there is nothing to shew that it was not. Also, if he had framed his action upon a contract to sell a gelding and simply alleged that this contract was broken, he could have recovered damages.

But the plaintiff made great difficulties for himself by the course he took. He proceeded to sell the horse and give title to it by extra-judicial procedure and then brought an action for damages for false and fraudulent warranties, failed absolutely to establish any fraud at all, and never asked to amend.

If the action had been properly framed, I think, upon the facts disclosed in the evidence, the plaintiff could have succeeded so far as liability is concerned.

In *Josling* v. *Kingsford*, 13 C.B.N.S. 447, 143 E.R. 177, there had been a sale of a specified bulk of oxalic acid which was identified and also actually inspected by the purchaser. After deliveries of certain quantities, amounting to nearly all of the acid, the sub-purchasers complained of the quality. It was discovered that the acid had been seriously adulterated. The purchaser sued: (1) On a contract to sell oxalic acid; (2) on a warranty that it was oxalic acid.

ALTA.

S. C.

TWAITES v. MORRISON.

Stuart, J.

It was held by the trial judge that there was no evidence of a warranty, but he told the jury that the vendors had contracted to sell oxalic acid and were bound to do so, and that it was a question of fact for them to say whether the purchaser had got what would be known in commerce under the denomination of oxalic acid, and if he had not he was entitled to damages. The jury gave a verdict for the plaintiff. On appeal the direction was sustained. Williams, J., who delivered the judgment of the court saying:—

> It is not possible to construe the contract in any other way than that it was a part of the agreement that the subject of the sale should be the oxalic acid of commerce, p. 457.

So here, I think, it is clear that it was part of the agreement that the subject of the sale should be the "gelding" of horse-dealing commerce which it was not.

This is, perhaps, the same thing in substance as saying that it was an implied condition of the contract that the horse was a gelding, and that the purchaser, having kept the horse, could treat the condition as sinking to a warranty and sue for damages.

There were, therefore, three perfectly good courses open to the plaintiff: first, to refuse absolutely to keep the horse, place him at the defendant's disposal, subject possibly to a lien in his own favour, and sue for money had and received; secondly, having kept the horse, to frame his action upon a statement of the facts to allege an implied condition which, exercising his rightful option, he had chosen to treat as an implied warranty and ask for damages; thirdly, as was done in the first count, in *Josling* v. *Kingsford, supra*, to allege a simple breach of a contract to sell him a gelding, this third perhaps being in substance the same as the second.

But, instead of adopting any of these courses, he rushed into an allegation of falsehood and fraud. His pleading, I think, cannot be treated as being anything else than an allegation of an express warranty, with the added character of deceitfulness and fraud. If he had not used the words "falsely and fraudulently," but had simply said that the defendant "warranted" that the horse was a gelding, the court could no doubt have treated this as meaning not an express warranty but an implied one. But when he added the reference to falsehood and fraud, he must be

ALTA.

S. C.

TWAITES v. MORRISON.

Stuart, J.

held, I think, to have been asserting that something had been expressly represented (a term of equity) or warranted (a term of common law).

The defendant went to trial to meet this undoubted allegation of intended fraud. The trial judge found, and upon the evidence, rightly, that there was no fraud at all.

The question now is, should this court of its own motion, now reform the pleadings and give the plaintiff relief? I am not disposed in such a case as this to do so at this stage where fraud has been alleged.

Even if we were to amend, it could only be on condition of payment of costs. At most, the plaintiff could only recover $40 or $50, and the evidence as to the damage is not at all conclusive. There was rather weighty evidence on behalf of the defendant that the horse had given good satisfaction as a work horse for a year and a half. The costs are now far in excess of any damage suffered.

I would dismiss the appeal with costs.

Beck, J.

BECK, J.:—This is an appeal by the plaintiff from the judgment of His Honour Judge Crawford.

The statement of claim, abbreviated, was as follows:—

(1) The defendant, falsely and fraudulently warranting a horse to be a gelding, 7 years old, safe and gentle and broken to drive single and double, sold the horse to the plaintiff for $80, then paid. (2) To the knowledge of the plaintiff, the horse was not a gelding, was not 7 years old, and was not safe and gentle. (3) The plaintiff relied upon the representations of the defendant as to the class and qualities of the horse and has suffered damage. (4) The horse, by reason of the premises, was of no use to the plaintiff, and he was obliged to, and did, get rid of and sell the same for a less price, etc.

The defence consists of denials of all the material allegations together with an allegation that the defendant sold the horse without warranty of any kind, and that the plaintiff examined it and agreed to accept it and to pay the price.

What is the ground of the plaintiff's action? If it was intended to be a warranty, *i.e.*, a contract of warranty, the proper form of the statement of claim would have been merely to allege the contract and its breach, with a claim for damages, *i.e.*, the warranty and the points on which it was not fulfilled. Bullen & Leake,

ALTA.

S. C.

TWAITES v. MORRISON.

Beck, J.

Precedents of Pleading, 7th ed., tit. "Warranty," gives a form: (1) the defendant by warranting a horse to be then, etc., sold the horse to the plaintiff for $, which the plaintiff then paid to the defendant; (2) the horse was not then, etc.; (3) particulars, (*a*) the warranty was in writing dated, etc.; (*b*) the horse was unsound in the following respects; (4) by reason of the breach of the warranty the horse was of no use to the plaintiff (or was worth $ less than if it had been as warranted); (5) damages. The same book, tit. Frauds, also gives a form following the lines of a form given in the English Rules App. Court, s. 6, No. 14: (1) the plaintiff has suffered damage by the defendant inducing the plaintiff to buy a horse and pay him $, the price thereof, by fraudulently representing to the plaintiff that the horse was sound, whereas, in fact, it was unsound, to the defendant's knowledge; (2) particulars; (3) damages.

The plaintiff's statement of claim seems to confuse two distinct grounds of action (to put on it the construction most favourable to the pleader)—one based on contract, the other on tort—by interweaving them, instead of stating them separately as alternative forms of action. But, it is worse than that. If the intention was to rely, alternatively, on a contract of warranty (1) it must have been an express warranty, for the Sale of Goods Ord., s. 16 (Eng., s. 14) says there is no implied warranty or condition as to (*a*) quality or (*b*) fitness for any particular purpose and (2) being express, it should have been stated whether it was in writing or oral (*Turquand* v. *Fearon*, 48 L.J.Q.B. 703). If the intention was to rely upon a fraudulent misrepresentation, a representation should have been alleged; while what is alleged is a false and fraudulent warranty. It really seems as if by the word "warranty," he meant representation, and intended the action to be one solely grounded on fraud.

On this ill-drawn statement of claim answered by denials, and an affirmative allegation of inspection followed by acceptance for the purpose, I suppose, of meeting the charge that the sale was induced by fraud, if proved, the parties went to trial.

I give, what seems to me, the facts proved so far as they are material: the plaintiff and the defendant met. The defendant said: Do you want to buy a horse, Mr. Twaites? Plaintiff said: Yes, what is it, a mare or a gelding? Defendant said: A gelding.

Plaintiff said: What is it like? and the defendant described it. Both then went to a near-by barn and looked at the horse, and the bargain was then closed; the plaintiff took possession of the horse, paying the whole price in cash and receiving a receipt in these words: Received from Charles W. Twaites payment in full for bay gelding seven years old.

The sale took place on May 12, 1917.

The horse eventually turned out not to be a gelding but to be a stallion uncastrated or only half castrated. Both parties really supposed the animal to be a gelding. It was from the ways of the animal especially, when among other animals of the plaintiff, that he concluded that the animal was not a gelding and, ultimately it was examined and one testicle was found. Witnesses described the animal as a "rigot" (other forms of which are "riggot" and "ridgeling") or an "original." The evidence leads to the conclusion that the animal had not been even partially castrated but was defective congenitally.

Evidence was given, though I think it is so much a matter of general knowledge that the evidence was not necessary, that an animal of that kind has characteristics and habits very different from a gelding, and is a very undesirable one to have among other horses and mares. The evidence, also, was directed to this particular animal and shewed that this animal was no exception to the general rule.

The receipt, which I have quoted, describes the animal as a gelding and mentions the age of the animal, but does not mention or assert in any form that the animal is safe or gentle or broken to drive in single or double harness. No question about the age of the animal was raised at the trial. The trial judge, I gather, found there was no warranty or representation that the animal had been broken to single harness, and found that the plaintiff had failed to prove that the animal was not quiet in double harness. An attempt was made to prove fraud, but the evidence for the plaintiff, if it be evidence, consisted only, as far as I can find, of this:—

Q. Do you think Mr. Morrison knew that the horse was a rigg ot? A. Yes, I think he did. Q. Do you think he was trying to put one over you? A. I don't know. Q. Do you think that Mr. Morrison was trying to put one over you? A. I think he must have been.

The defendant swore that he believed the animal to be a gelding.

ALTA.

S. C.

TWAITES v. MORRISON.

Beck, J.

As to this the trial judge said: "As to the sex of the animal I think the defendant acted upon a fair and reasonably well-grounded belief that the horse was a gelding."

Reverting to the plaintiff's statement of claim, the case based on fraud failed; so did the case based on an express contract of warranty, if such a case was ever intended, and the statute excludes an implied warranty.

"Warranty" is defined in the Sale of Goods Ord., s. 2 (*o*) (Eng., s. 62) as

> an agreement with reference to goods which are the subject of a contract of sale but *collateral* to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

In my opinion, the assertion that the animal was a gelding was not a warranty. It was something different; it was a part of the *description* of the horse, the thing forming the subject-matter of the contract of sale. It went to the essence of the contract, and not to something collateral to the main purpose of the contract. It brings the case under s. 15 of the Ordinance (Eng. s. 13):—

> Where there is a contract for the sale of goods by description, there is an *implied condition* that the goods shall correspond with the description.

A buyer may waive a *condition* and elect to treat its breach as a breach of warranty, and not as a ground for treating the contract as repudiated, or circumstances compel him to adopt this course (ss. 13 and 51, Eng. 11 and 53).

If the plaintiff intended to give this aspect to the case, I think his statement of claim ought to have been so drawn, alternatively if so desired, as to indicate that his claim was founded on an implied condition of correspondence to description which he had elected to treat as an implied warranty to that effect. It is true that the rules of pleading require only the material facts to be stated and the appropriate relief to be asked, leaving the party entitled to succeed upon any conclusions of law that can be legitimately drawn from the facts. Nevertheless, pleadings must be drawn with some degree of particularity. In doing so in this case, a pointed reference to the description and the fact that the animal did not correspond with it could hardly have been avoided. I think, too, that an allegation of the plaintiff's election to treat the implied condition as a warranty would be one of the material allegations which it would be necessary to make. Especially

would these observations be appropriate if, as in this case, other aspects of the case were distinctly indicated.

On the statement of claim as drawn in the present case, I think that it cannot be said that, on a minute examination of the statement of claim and the elimination of allegations unnecessary to support the action on the basis of an implied condition sunk to the grade of a warranty, such a cause of action is sufficiently alleged, especially, in view of the prominence given apparently to two other possible aspects of the case. In some circumstances, and at some stages of the case, a judge might perhaps have been inclined to hold that such a cause of action was not too greatly concealed to be discovered.

I take occasion to say what I have very often said that practitioners seem to have an idea that the frame of the pleadings is of very little consequence. This case will, I hope, tend to eradicate this false idea. The form of the pleadings is, in my opinion, so important that in practically every case they should be reviewed by counsel before the case is entered for trial in the light of the fuller information derived from examinations for discovery, production of documents or otherwise. This is not the first case in which a party has failed owing to his defective pleadings.

The question then comes, is this a proper case in which, no amendment having been asked, the court ought to "mould the pleadings" to conform to the evidence? After much discussion and consideration I have, I confess, with some hesitation, decided that this ought not to be done; for the reason that it may be that if the correct aspect of the case had been set up by the plaintiff it is not clear that no other evidence would have been given either by calling other witnesses or by further examining or cross-examining those actually called. I, therefore, agree to dismiss the plaintiff's action with costs.

The case, though involving a trifling amount, *except for the costs incurred*, has led to so much discussion amongst the members of the court and to some divergence of opinion that I set down the reasons why I think that, on the facts as they appear, the case is one not of fraudulent misrepresentation, not of express warranty, but of implied condition of correspondence with description.

ALTA.

S. C.

TWAITES v. MORRISON.

Beck, J.

I think the situation is that supposed and illustrated in the following extract from Pothier on Obligations, Part 1, c. 1, s. 1, art. 3, par. 1, clauses Nos. 17 and 18:—

17. Error is the greatest defect that can occur in a contract, for agreements can only be formed by the consent of the parties and there can be no consent when the parties are in an error reflecting the object of their agreement. . .

18. Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject *which the parties had principally in view and which constitutes the substance of the thing.* Therefore, if, intending to buy a pair of silver candlesticks, I buy a pair which you offer me, and which I take to be silver, while they are only plated copper; although indeed you had no design of deceiving me, being yourself in the same error, the agreement will be null, *because the error in which I have been destroys my consent.* For the thing which I wished to buy is a pair of silver candlesticks; that which you offered me, being a pair of copper candlesticks, cannot be said to be the thing which I intended to buy. . . . *Si aes pro auro veneat, non valet* (the continuation of this quotation, which is from Ulpian, is) *aliter atque si aurum quidem fuerit, deterius autem quam emptor existimarit; tunc enim emptio valet.*

It is otherwise when the error falls only on some *accidental* quality of the thing. . . .

In the case of *Kennedy* v. *The Panama, &c., Co.*, L.R. 2 Q.B. 580, Blackburn, J., giving the judgment of the court, uses these words after referring to the Roman Civil law:—

And, as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration., p. 588.

In the same case the same judge says:—

There is, however, a very important difference between cases where a contract may be rescinded on account of *fraud*, and those in which it may be rescinded on the ground that there is a *difference in substance between the thing bargained for and that obtained.* It is enough to shew that there was a *fraudulent* representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an *innocent* misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a *fraudulent* representation as to the horse's soundness the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error yet the purchaser must pay the whole price, unless there was a warranty, p. 587.

I make several observations upon the foregoing judgment:

(1) The court distinguishes most clearly (in cases where fraud is absent) between an error as to the substance of the thing, the subject-matter of the sale, and an error merely as to some quality though a material one supposed to belong to it; (2) when it is said that, in the case of an innocent misrepresentation or misapprehension, there is no right of rescission, and the whole price must be paid, unless there is a warranty. This is clearly stated as relating to a case of error not of substance, but merely of quality; (3) in Benjamin on Sales, 5th ed., p. 439, on a note to the words "unless there was a warranty" in the foregoing quotation it is said:—

> It is submitted that this statement of the law, and the decision of the case itself, is not, *having regard to the decisions since the Judicature Acts*, in accordance with law at the present day. The right to rescind a contract will now be governed by the equitable principles stated *infra*. The enquiry is an interesting one. Suppose the case of a sale of a horse upon a representation made honestly, which turns out to be untrue in fact . . . would the buyer be entitled to return the horse and demand back his money? It is conceived that he would (and then it is said) the equitable principles with regard to misrepresentation are now, by virtue of the Judicature Acts, the rule in all courts, and seem to be preserved by the Code (*i.e.*, the Sale of Goods Act) p. 441.

The nearest reported case I have been able to find is an Irish case, *Gill* v. *McDowell*, [1903] 2 Ir. R. 463. That was a case of a sale of an animal as a heifer which turned out to be a hermaphrodite. Three of the four judges held that there was evidence of misrepresentation sufficient to maintain the action on the ground of fraud, but all the judges agreed that, independently of fraud, there was no binding contract because the parties had bargained about a thing substantially different from what the seller knew the purchaser intended to bargain for, following the principles laid down by Blackburn, and Hannen JJ., in *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597. In that case, as in this, the animal was a specific thing, in view of both parties at the time of the bargain, yet the description was relied upon.

Randall v. *Newson* (1877), 2 Q.B.D. 102, held that on the sale of an article for a specific purpose there is an *implied* undertaking by the seller that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects; and that the limitation as to latent defects introduced by *Readhead* v. *Midland R. Co.*, L.R. 4 Q.B. 379, does not apply to the sale of a chattel.

ALTA.

S. C.

TWAITES v. MORRISON.

Beck, J.

In the course of the reasons for the judgment of the court given by Brett, L.J., it is said, p. 109:—

> In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the *article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others*; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what in or according to the contract, is the *real mercantile or business description* of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject matter be merely the commercial article or commodity, the undertaking is, that *the thing offered or delivered shall answer that description*, that is to say, shall be that article or commodity, *salable* or *merchantable*. If the subject-matter be an article or commodity to be used for a particular purpose, *the thing offered or delivered must answer that description*, that is to say, it must be that article or commodity and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, *there is no place in it for the suggested limitation.*

The limitation was suggested in this way. *Readhead* v. *Midland R. Co.*, L.R. 4 Q.B. 379, was supposed to lay down the principle that a seller of a chattel for a special purpose was not liable on an implied warranty of fitness for that purpose, in respect of a latent defect, which no care or skill could discover. *Randall* v. *Newson, supra*, was the case of a pole to be used as part of the plaintiff's carriage. The pole was fitted to the carriage. The pole broke when the carriage was being driven and the horses were injured. The plaintiff sued for damages. The jury found that the pole was not reasonably fit for use in the carriage and that there was no negligence on the part of the defendant in making the pole or in the selection of the material for it. The trial judge, Archibald, J., entered a verdict for the plaintiff. The Divisional Court (Blackburn and Lush, JJ.), ordered judgment to be entered for the defendant on the ground that the answers of the jury amounted to a finding of a latent defect in the wood of the pole, which no care or skill could discover, and that the principle of the decision in *Readhead* v. *Midland R. Co.* extended to the sale of an article for a specific purpose. The Court of Appeal held that the implied undertaking of the seller was not restricted by the limitation applied in the *Readhead* case to a contract of carriage;

that, in other words, no such limitation applied to the implied undertaking in the sale of a specific chattel for a specific purpose.

The quotation from the judgment in *Randall* v. *Newson*, which I interrupted for the foregoing explanation, proceeds as follows:—

If the article or commodity offered or delivered does *not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent or latent or discoverable.* And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale.

See also a decision of our own court, *Wright* v. *Nelson* (1917), 35 D.L.R. 603.

Putting the case as one of a substantial difference in the thing in question, the implied condition of correspondence with the description became effective. It gave a right to repudiate. The plaintiff did this by two letters, the effect of which is that he held the animal subject to the defendant's order and demanded his money back. The defendant refused. The plaintiff certainly was not bound to take the animal to the defendant, hand it over to him and "whistle" for his money. He was entitled to a return of his money in return for the animal. On refusal he was surely entitled to a lien on the animal. The plaintiff was then at liberty to treat the implied condition as a warranty and sue for damages. The fact of his selling the animal was perfectly justified and was a convenient way to ascertain his damages.

HYNDMAN, J.:—This is an appeal from the judgment of His Honour Judge Greene, who dismissed the plaintiff's claim with costs. Hyndman, J.

The action is founded entirely on alleged false and fraudulent representation of the defendant, in consequence of which the plaintiff alleges damage.

The plaintiff is a dealer in live stock, especially cattle and horses, and has been employed in that occupation for upwards of 25 years. The defendant is a farmer on a comparatively small scale, and it can fairly be assumed that the plaintiff was experienced equally, at least, with the defendant as a judge of ordinary farm animals. On May 12, 1917, the defendant approached the plaintiff with respect to buying a horse, the facts being contained in the following questions and answers, p. 6 of the appeal book, in the evidence of the plaintiff:—

Q. Will you tell us when you purchased this horse from Morrison and what negotiations were leading up to the purchase? A. I forget the exact

ALTA.

S. C.

TWAITES v. MORRISON.

Hyndman, J.

dates, but I have no doubt I met Mr. Morrison on the market, and he said, do you want to buy a horse, Mr. Twaites? Q. Defendant? A. Yes. I said what is it, a mare or gelding. He said, a gelding. I said, what is it like, and he described it to me. We went across to have a look at the horse to the blacksmith's barn by the Salvation Army, and eventually I bought it. Well, I said, if you come along with me I will pay you for it, and I paid him for it in cash. He gave me a receipt. I wrote the receipt out and he signed it.

The receipt is in the following words:—

May 12, 1917, received from Charles W. Twaites payment in full for bay gelding, seven year old, two white feet and branded on left shoulder, signed George Morrison, Medicine Hat.

At p. 7 of the appeal book are the following questions and answers:—

Q. Will you tell us again what the defendant said as to the horse being a gelding? A. In the first instance there? Q. During the whole conversation? A. He just simply said it was a gelding when I bought it. I asked him what the horse was, a mare or gelding, and he said a gelding, and that was the only talk we had about him as to his sex.

It is not at all clear, therefore, that the plaintiff would not have entertained the idea of purchasing at all if the reply had been other than it was, namely, a gelding. I am of opinion that it was at that stage mere curiosity on the plaintiff's part, for a dealer in horses buys all kinds.

After using the horse for about a month and experiencing a good deal of dissatisfaction on account of its actions when with other horses, the plaintiff discovered that the horse was not a gelding in the ordinary acceptation of the term, but that it was what he calls a "riggot" or "ridgeling," meaning a horse which has not been properly castrated or whose genital organs were never properly developed. He then requested the plaintiff to return him the moneys paid and to take back the animal. This the defendant refused to do, and in about a month's time the plaintiff sold the horse at auction for the sum of $30, and sued the defendant for the difference between the purchase-price and $30 together with the costs of its keep for the period which he had it, namely, $26.

The action being founded on a false and fraudulent representation the trial proceeded wholly on that basis and resulted in the trial judge finding as a fact that the defendant acted upon a fair and reasonably well-grounded belief that the horse was a gelding, and dismissed the action with costs.

I think the trial judge took the correct view of the law, which appears to me to be well settled in cases similar to this. The

case is not one of sale of goods by description, but the sale of a specific chattel where the buyer inspects the goods before completion of the bargain. If the buyer had purchased this specific article by description, relying on the vendor's representation that it was a gelding and it turned out not to be a gelding, doubtless, there would have been a right to rescission and return of the moneys paid, but here the facts are quite different from that. After the intimation was given that the defendant had a horse described as a gelding both sides examined the animal, and, as a result, both being of the same belief or opinion as to its "sex," the bargain was struck and the animal delivered.

In *Ormrod* v. *Huth*, 14 M. & W. 651, 153 E.R. 636, Tindal, C.J., at p. 664, uses the following language:—

> The rule which is to be derived from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller unless he can shew that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but, if the representation was honestly made, and believed at the time to be true, by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule *caveat emptor* applies, and the representation itself does not furnish a ground of action. And although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of title in a seller., it will be found, on examination, that in each of those cases there was either an assertion of title embodied in the contract or a representation of title which was false to the knowledge of the seller.

It seems to me that the case at bar fits squarely into the rule above laid down, and although the latter was decided as far back as 1845 it has not since been modified or overruled. It is, however, suggested that, even though the defendant is entirely innocent of any fraud in the matter or even knowledge that the horse was not strictly as represented, that there was a mutual mistake entitling the plaintiff to rescission and return of the price, though there is no suggestion on the record of any such claim. As pointed out above, the whole action is based on fraud. It would, therefore, in my opinion, be unfair and unjust to the defendant, at this stage, to decide against him on what must be considered an entirely new claim or form of action which might demand a quite different form of defence both as to pleading and at the trial. If it were a mere technicality, perhaps, it might be not

ALTA.

S. C.

TWAITES v. MORRISON.

Hyndman, J.

unjust for a court of appeal to do as is suggested, but, to my mind, there is, in the point, much more than a mere technicality. The question to be decided would be one of fact, that is, whether or not the parties were mistaken as to the thing or subject-matter of the bargain, or, the subject-matter being agreed to, then only as to some quality or attribute thereof. My own opinion is that, in this case, it is a mere quality or attribute of the thing bargained for, but this fact ought to be decided only on the evidence of expert witnesses. Now, it is clear that this phase of the case was not consciously dealt with by counsel or the trial judge. The very least which defendant ought to be entitled to is a new trial, in any event. But, surely, some responsibility ought to rest upon the plaintiff in respect to the manner in which his pleadings are framed and the trial conducted. He chose to charge false and fraudulent representation, and failed to substantiate it. To my mind, he should be compelled to stand or fall on his claim as launched and maintained throughout, no amendment at any time having been asked for.

But, apart from all this, I have grave doubts as to whether or not, even though he had succeeded in establishing that there was a false and fraudulent representation, or even if he were entitled to rescind on the ground of mutual mistake, that he has shewn any actual damages. There is evidence both ways, and with this point the trial judge has not dealt. The defendant's own testimony is to the effect that the horse was well worth the $80 paid for it, and the only ground for asking the court to conclude that the horse was worth $30 was because that was what it fetched at the auction sale. However, that may not be at all a true test of its value, because a great deal would depend on the manner in which the sale was conducted, the number of persons present, the season of the year and the demand for horses of that description in the locality where the auction sale took place.

I have, therefore, come to the conclusion that the appeal ought to be dismissed with costs. *Appeal dismissed.*

OSHAWA BOARD OF WATER COMMISSIONERS v. ROBSON LEATHER CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Sir William R. Meredith, C.J.O. and Maclaren, Magee and Hodgins, JJ.A., and Middleton, J. April 23, 1918.

REFERENCE (§ I—1)—TORT WAIVED—ACTION CONSISTING OF MATTERS OF ACCOUNT—TO OFFICIAL REFEREE—JUDICATURE ACT, R.S.O. 1914, c. 56.

Where the tort has been waived by the plaintiff in an action for water wrongfully and fraudulently taken, the wrongdoer being called upon to pay the value of the water taken, the whole question in dispute consisting of matters of account, an order referring the whole action to the official referee for trial is properly made under s. 65 (c) of the Judicature Act, R.S.O. 1914, c. 56.

Statement.

AN appeal by the plaintiff board from an order of FALCONBRIDGE, C.J.K.B., under sec. 65 (*c*)* of the Judicature Act, R.S.O. 1914, ch. 56, referring the whole action to an Official Referee for trial by him.

R. T. Harding, for appellant.

M. H. Ludwig, K.C., for respondent.

The judgment of the Court was read by

Middleton, J.

MIDDLETON, J.:—This is an appeal by the plaintiff from an order of the Chief Justice of the King's Bench referring this action for trial to His Honour Judge McGillivray, as an Official Referee, under sec. 65 (*c*) of the Judicature Act.

The plaintiff complains that the defendant company unlawfully and fraudulently connected pipes to the plaintiff's water system, at stand-pipes for fire protection, in the defendant company's tannery, and took large quantities of water therefrom.

The plaintiff, in the words of the late Mr. Adolphus, "Assumpsit brings and God-like waives the tort," and claims for the water, at 11 cents for each hundred cubic feet, the sum of $37,725.42.

The defendant company says, in effect, that, on several occasions when it found its own water-supply unsuitable for its purposes, and when its own waterworks were out of repair, it "used water for its tannery from the plaintiff's said service pipe," but not to the extent claimed, and submits to pay what shall be found due, raising several contentions as to the basis upon which payment should be made. After thus euphemistically describing the conduct of the defendant company, the pleader, with some sense

* 65. In an action, . . . (*c*) where the question in dispute consists wholly or partly of matters of account, a Judge of the High Court Division may at any time refer the whole action or any question or issue of fact arising therein or question of account either to an Official Referee or to a special referee agreed upon by the parties.

ONT.

S. C.

OSHAWA BOARD OF WATER COMMISSIONERS v. ROBSON LEATHER CO. LIMITED.

Middleton, J.

of humour, claims for it "that the statute commonly known as the Statute of Frauds is a bar" to the claim.

The order of reference was made at the instance of the defendant company and against the protest of the plaintiff.

All the cases shew that a wide meaning should be given to the words "matters of account" in sec. 65; and we think they are wide enough to warrant a reference in this case, as the sole matter in issue is the amount of water taken and the price that should be paid.

The course adopted seems convenient, as there will probably be much evidence of detail before the amount of water actually taken can be ascertained. The value of the water taken can easily be ascertained by the Referee, upon well-understood principles applicable where the tort is waived and the wrongdoer is called upon to pay the value of the thing taken, upon the implied contract.

The statute as it now stands differs from the corresponding provision in the Common Law Procedure Act, and authorises a reference of the whole action when the question in dispute consists wholly or partly of matters of account. The earlier Act permitted only the question of account to be referred.

The appeal should be dismissed; costs to the defendant company in the cause. *Appeal dismissed.*

BELANGER v. L'UNION MUTUELLE DES VOYAGEURS DE COMMERCE.

QUE.

C. R.

Quebec Court of Review, Archer, Greenshields and Lamothe, JJ.
May 22, 1918.

INSURANCE (§ III—42)—BENEFIT SOCIETY—BY-LAWS NOT ENFORCED—LIABILITY UNDER INSURANCE POLICY—BY-LAW INVOKED TO ESCAPE.

A benefit society which has never enforced a rule requiring dues to be promptly paid, but has made it a custom to accept payments from members in arrears whenever they were willing to pay, cannot invoke such rule in order to escape liability under the conditions of an insurance policy.

Statement.

APPEAL from a judgment of the Superior Court. Reversed.

Dame E. Bélanger, widow of Thomas Bernier, claimed $1,100 from the society defendant, due under a life insurance policy issued by the defendant to said Bernier.

The society contested the claim, alleging that at the time of his death in May, 1914, Bernier was in arrears on his policy and, therefore, according to the rules of the association, the latter was

QUE.

C. R.

BÉLANGER v. L'UNION MUTUELLE DES VOYAGEURS DE COMMERCE.

Greenshields, J.

in no way liable towards his widow for $1,000 claimed on the policy, or for $100 towards funeral expenses.

The action was dismissed before the Superior Court.

GREENSHIELDS, J.:—Plaintiff's action in the Superior Court was dismissed solely on the ground that there had been a violation of the strict rules of the association regarding the punctuality of payment of the dues on the policy of insurance. The rules said a member would be suspended from benefit if he did not pay within a certain period following the date the monthly payments became due. The only violation of the rules and regulations sought to be established against the plaintiff's late husband was his failure to pay regularly his monthly dues.

We say there was no violation. The record shews that nearly every one of the members were at one time or another in arrears, and not one of them was ever suspended. There was no violation then because there was never any effort to enforce the rules. We say the association created a custom which became so generally prevalent and so well recognised that all the members believed and knew that even if they were in arrears their money would be taken any time they would pay, and gladly taken. Having created that custom, the association cannot now invoke a rule or regulation which, by that custom, is absolutely destroyed, and, in this way, escape liability under the conditions of its policy. During the whole time Bernier was a member of the association he paid his dues in arrears, which arrears were accepted by the association without objection. The agents of the association were instructed to collect arrears from the members, and one of the agents, a few days before the death of Bernier, collected arrears from him, which the association accepted and retained. The association is bound by the custom which it created and followed, and Bernier at the time of his death was a member in good standing. The association never suspended him or notified him that he was suspended. We, therefore, cancel and annul the judgment of the court below, which rejected plaintiff's demand ,and the court condemns the association to pay to the plaintiff the sum of $1,100 with interest from the date of service of the action and costs in both courts. *Appeal allowed.*

ONT.

S. C.

WHEELER v. HISEY.

Ontario Supreme Court, Appellate Division, Sir William R. Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. April 23, 1918.

PRINCIPAL AND AGENT (§ II D—26)—ACT DONE WITHOUT AUTHORITY OF PRINCIPAL—RATIFICATION—FULL KNOWLEDGE OF FACTS.

In order that a person may be deemed to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances under which the act was done, unless he intends to ratify the act and take the risk whatever the circumstances may have been.

Statement.

AN appeal by the defendant Abraham Hisey from the judgment of the Senior Judge of the County Court of the County of Simcoe, upon the findings of a jury, in favour of the plaintiffs, who were land agents, for the recovery of a sum of money as commission on the price ($9,000) at which the appellant sold his farm; and a cross-appeal by the plaintiffs from the same judgment in so far as it dismissed the action against the defendant Norman Hisey.

The defendants were father and son; the father (Abraham) owned the farm; but it was the son (Norman) who "listed" it for sale with the plaintiffs; by a writing which the son signed, the plaintiffs were given "the exclusive sale of my property" —describing the farm—"good for 90 days," "and in case of a sale being made I will pay to them a commission of 2 per cent. on the selling price."

The sale upon which the plaintiffs claimed commission was not made by them, but by the defendants or one of them.

The finding of the jury was as follows:—

"Norman Hisey, after consulting his father, became his agent; therefore Abraham Hisey becomes responsible for commission."

Upon this, judgment was entered for the plaintiffs against the defendant Abraham Hisey, and in favour of the defendant Norman Hisey, as above.

W. A. Boys, K.C., for appellant and for the respondent in the cross-appeal.

D. L. McCarthy, K.C., for the plaintiffs, the respondents and cross-appellants,

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant Abraham Hisey from the judgment of the County Court of the County of Simcoe, dated the 29th January, 1918, which was directed to be entered on the findings of the jury, after the trial

of the action before the Senior Judge of that Court on the 16th January, 1918.

The respondents are land agents, and sue for the recovery of a commission of 2 per cent. on the purchase-price of the appellant's farm, which he sold for $9,000.

The employment of the respondents as agents to sell was by the defendant Norman Hisey, the son of the appellant, and was evidenced by the following document:—

"Stayner, Oct. 20th, 1916.

"I hereby give to Messrs. Wheeler & Holbrook, Stayner, the exclusive sale of my property known as lot 11 concession 3 Township of Nottawasaga, and in case of a sale being made I will pay to them a commission of 2 per cent. on the selling price.

"Good for 90 days."

"Name, Norman Hisey.

"Address, Stayner, R.R. No. 2 (L.S.)"

The farm, which consisted of one half—not the whole—of lot 11, was owned by the appellant, and the son had no interest in it, but he owned the stock on the farm, and had made some improvements on it, and would probably have become the owner of it at his father's death.

The respondents testified that their understanding at the time this document was signed was, that the son had an interest in the farm.

There was a conflict of evidence as to what occurred at the time the document was signed. According to the testimony of the son, the understanding was that no commission should be payable if the farm were sold by him. This was denied by the respondents, who testified that Norman Hisey was told by them that they would be entitled to the commission even if a sale were made by him. It must be taken that the jury accepted the testimony of the respondents on this point.

It is clear upon the evidence that the son did not assume, in entering into the agreement, to act for his father. The only mention of the father that was made was in what was said by the son after the document was signed, and what he said was, that he would see his father and that if his father was not satisfied he would let the respondents know.

On returning home, the son informed his father that he had

ONT
S. C.
WHEELER
v.
HISEY.
Meredith,C.J.O.

"listed" the farm with the respondents, but he did not tell his father that he had given an exclusive authority to sell to the respondents. The father was satisfied with the listing having been made; but the proper conclusion upon the evidence is, that, if he had been told that an exclusive authority to sell had been given and that the commission would be payable if the farm were sold, as it afterwards was, without the intervention of the respondents and not in consequence of their introducing the purchaser, he would not have sanctioned it.

Some days after, in consequence of something that was said by a commercial traveller, who was asked by the appellant to try to find a purchaser for the farm, the son went to the office of the respondents in order to ascertain if the authority he had signed was an exclusive one. Here again there was a direct conflict between the son and the respondents. According to the testimony of the son, the respondent Holbrook told him that no commission would be payable to them if the farm were sold by his father. Holbrook was asked:—

"186. Q. If Norman Hisey says he did come in and asked what the word 'exclusive' meant, he having got information in the meantime, what do you say?"

And his answer was: "I say it is wrong. Only the discussion about the farm."

I understand this to be a denial that Norman Hisey had seen him (Holbrook) after the document was signed for the purpose of making such an inquiry, and indeed the testimony of the respondents is, that they did not see Norman Hisey after the document was signed until he came in in response to a letter from them requesting payment of the commission on the sale which had then been made.

The attention of the jury was not directed to this point in the case, and it has not been passed upon by them. The proper conclusion as to it is, I think, that the testimony of Norman Hisey should be accepted. The probabilities are all in favour of his having gone to make the inquiry that he said he made. The question as to the authority being an exclusive one arose before the sale of the farm, and there is the testimony of the father that his son was sent to make the inquiry.

Even if that conclusion is not warranted, there was, in my opinion, no ratification of his son's act by the appellant. He was not informed of the important provision of the agreement his son

ONT.

S. C.

WHEELER v. HISEY.

Meredith, C.J.O.

had made—that the respondents were to have for 90 days the exclusive right of selling the farm—and it is clear upon the evidence that, if he had known that, he would not have sanctioned what had been done. The most that he intended to ratify and did ratify was the listing of the farm with the respondents, which ordinarily means that the agent is to receive a commission in the event of a sale being effected through his instrumentality.

In order that a person may be deemed to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances under which the act was done, unless he intends to ratify the act and take the risk whatever the circumstances may have been: Bowstead on Agency, 5th ed., p. 507, and cases there cited; and of any such intention there is no evidence, nor can the inference properly be drawn that he so intended.

All that the jury found was that:—

"Norman Hisey, after consulting his father, became his agent; therefore Abraham Hisey becomes responsible for commission."

This is not a finding sufficient in the circumstances to warrant a verdict for the respondents against the appellant.

Upon the whole, I am of opinion that, for these reasons, the verdict should be set aside and judgment entered dismissing the action against the appellant.

As I have come to this conclusion, it is not necessary to consider the other grounds urged by the appellant's counsel in support of the appeal.

It was contended that, if the judgment against the appellant cannot stand, the respondents are entitled to judgment against Norman Hisey, but I am not of that opinion. No case on that footing is made on the pleadings, and the judgment dismissing the action as against him should stand, without prejudice to the respondents, if so advised, bringing another action against him, based upon a contract by him to pay the commission in the event of a sale being made within 90 days.

The result is, that the verdict against the appellant is set aside, and judgment is to be entered dismissing the action as against him, with costs here and below; and the cross-appeal is dismissed; but, under all the circumstances, the dismissal should be without costs.

Appeal allowed; cross-appeal dismissed.

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C. R.

DEL SOLO v. CITY OF MONTREAL.

Quebec Court of Review, Archibald, A.C.J., Greenshields and Tellier, JJ. March 27, 1918.

MALICIOUS PROSECUTION (§ II—5)—ARREST—CONSTABLE ACTING IN GOOD FAITH AND WITH PROBABLE CAUSE—DISMISSAL FOR WANT OF PROOF—DAMAGES.

An action for damages for malicious arrest and prosecution will not lie against a city where the constable making the arrest acted in good faith, and with probable cause, although the case when called was dismissed for want of proof.

Statement. APPEAL from a judgment of the Superior Court, Martineau, J. Affirmed.

Internoscia & Fortin, for plaintiff; *Laurendeau, Archambault, & Co.*, for defendant.

Greenshields, J. GREENSHIELDS, J.:—This is an inscription in Review from a judgment dismissing the plaintiff's action with costs.

The plaintiff alleges a malicious arrest and prosecution without reasonable and probable cause. The defendant by its plea justifies.

The facts can be briefly stated. The plaintiff is a market gardener, and for some years had sold his vegetables at the Bonsecours market; he rented a space, or three double spaces, at the south end of the wooden platform which is erected on Jacques Cartier Square, and this platform at its southern extremity reaches the northern line of Commissioners St., which is a street running east and west. The street itself is paved throughout its entire width, and is level, and no part is specially marked out as a sidewalk.

On October 4, 1912, one of the constables of the city defendant, acting under instructions, notified the plaintiff that he was obstructing Commissioners St., or the sidewalk on Commissioners St., and notified him to remove his vegetables which were placed between the end of the platform and the rear end of the plaintiff's vehicle, which projected southward into Commissioners St., and between the rear end and the wooden platform there was a space of some 6 or 7 feet, which was used for foot passengers, and which the city constable wished to keep unobstructed. The plaintiff refused to do anything, but insisted that he had a right to maintain the position in which he then was. The constable told him that unless he removed the obstruction he would have to place him under arrest. The plaintiff preferred arrest to removal. This took place about half-past four in the

QUE.

C. R.

DEL SOLO v. CITY OF MONTREAL.

Greenshields, J.

morning. The plaintiff went with the constable to the Recorders' Court across the street, gave security or made a deposit for his subsequent appearance at the opening of the court; he appeared at the opening of the court, pleaded not guilty, and the case was continued for another day. It was continued a second time, and finally, through some misunderstanding or error, the witnesses for the city failed to appear. The case was called and was dismissed for want of proof, and the present action for $399 followed.

The trial judge was of opinion that the charge made against the plaintiff before the Recorder's Court was well founded. I am not at the moment called upon to go that far. I express no opinion as to whether a recorder should have convicted the plaintiff or not, but this much I do know, that the city had previously experienced trouble with market gardeners in connection with the blocking or obstructing of Commissioners St. The city tolerated to some extent such obstruction, but the constable in question had been given definite instructions to prevent, so far as possible, the interference with foot passengers' free movement along the north side of Commissioners St., and that constable on the morning of October 4, acting in perfect good faith and under instructions, and with no malice whatever, was of opinion that the sidewalk or the street, or both, was being obstructed by the manner in which the plaintiff had put his vehicles and his vegetables.

That both sidewalk and the street were obstructed, there is not the slightest doubt. Whether that obstruction was greater than the plaintiff was entitled to, under his quasi lease from the city, is a question of law which the constable was not called upon to solve at the moment; but he saw a condition of affairs that he thought called for his intervention, and in perfect good faith he intervened.

I have no doubt whatever, if the plaintiff had been at all reasonable, the whole matter could have been adjusted in a few moments; but he positively refused to remedy what the constable thought was an evil.

It is urged by the counsel for the plaintiff that the charge made in the Recorder's Court was that the plaintiff obstructed the street with his vehicles, whereas now, or at the trial in the present case, the constable urged that the sidewalk was obstructed by vegetables. If the recorder had been called upon to pass judgment on the

QUE.
C. R.
DEL SOLO v. CITY OF MONTREAL.
Greenshields, J.

merits, he would have convicted, if the case were proven, the plaintiff of doing what the facts proved he did do.

I should follow the holding in the case of *St. Denis* v. *City of Montreal*, 20 D.L.R. 571, 45 Que. S.C. 435:—

> In an action for damages for false arrest by a constable . . . malice of the latter will not be inferred from technical errors in his charge against the plaintiff before the recorder, and no such action will lie when the constable appears to have acted in the *bonâ fide* discharge of his duty.

And I should adopt the statement of the acting Chief Justice in his remarks in that case:—

> 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.

Upon the whole I should confirm the judgment.

Appeal dismissed.

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S. C.

CRAWFORD v. BATHURST LAND and DEVELOPMENT Co. Ltd.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. March 1, 1918.

1. COMPANIES (§ IV G—123)—SECRET PROFITS OBTAINED BY TRUSTEES—PROFITS OF COMPANY MUST BE REFUNDED.
Secret profits obtained by those who are in reality trustees of a company, organized and incorporated under the Ontario Companies Act, for the purpose of acquiring and re-selling land, which had been purchased by a syndicate, the members of which became shareholders of the company, are profits of the company, and those who in effect paid it are liable to refund it or cause it to be refunded.

2. COMPANIES (§ V E—217)—RESOLUTION OF COMPANY RATIFYING PAYMENT OF COMMISSIONERS—SHAREHOLDER'S RIGHTS.
A resolution of a company passed at a meeting of shareholders purporting to ratify the payment of commissions illegally paid to directors of the company cannot be enforced against the will of any shareholder.

Statement.

APPEALS by the defendants and cross-appeal by the plaintiff from the judgment of MASTEN, J., 37 O.L.R. 611.

I. F. Hellmuth, K.C., for the defendant Fullerton, appellant; *D. Urquhart*, for the defendants Murray, Gibson, and Bryan, appellants; *H. J. Macdonald*, for the executors of the deceased defendant Doran, appellants; *J. E. Lawson*, for the defendant company; *A. C. McMaster* and *J. H. Fraser*, for the plaintiff, respondent and cross-appellant.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—At the trial of this action the plaintiff's claims were reduced to four items, involving three separate questions: here they were further reduced to three

items, involving two separate questions, the plaintiff abandoning the fourth item and third question, upon which he had failed at the trial.*

The items now in question are: $3,867.25 claimed from the defendant Fullerton; the like sum claimed from the estate of one Doran, deceased; and a further sum of $8,121.22 claimed from the same estate. The one question covers the first two items: the third item involves another and altogether different question.

The first question is: whether the plaintiff can compel payment, to the defendant company, of the first two items, the amounts of which were received by the defendant Fullerton and Doran, respectively, out of the price paid by the company for the land in question.

And the second is, whether the plaintiff can compel repayment to the company of the amount of the third item, which was paid by the company, or its officers, to Doran, in his lifetime, as a commission upon a sale of the company's lands.

The material facts upon which these questions have to be determined are simple and really little, if at all, in controversy.

One Wallace and the defendants Fullerton and Doran were intimately connected by family, business, and friendship's ties. Wallace seems to have first conceived the idea of buying the land in question, for a company to be created, for the purpose of selling it to such company again at a profit: it was possible for him to secure the right to purchase it at a fixed price, and he did so; but that was a futile thing unless the company could be created to take, and to pay for, it: and he was quite powerless to carry out that part of the scheme: but that part of it the defendants Fullerton and Doran were capable of accomplishing, and did accomplish. The company was formed; and the shareholders paid in enough money upon their prospective stock to enable Wallace, Fullerton, and Doran to carry out, fully, the scheme. The price at which Wallace had contracted to purchase the land was $725 an acre: the price at which the land was transferred over to the company was $800 an acre; the number of acres was 156.

The profit thus made out of the scheme was $11,601.75; but might have been any greater, or less, sum at which these three persons saw fit to put it. And this profit was divided, by Wallace,

*The plaintiff did not appeal or cross-appeal as to the item referred to, which was the payment of dividends out of capital.

ONT.

S. C.

CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Meredith, C.J.C.P.

equally among the three; and the first two items in the plaintiff's claim in this action are the amounts of the shares which Fullerton and Doran got. No claim is made against the estate of Wallace, who also is now dead.

Every payment which was made upon the land, with the exception of a "down-payment" of $2,500, one-third of which was paid by Doran, and all of which was repaid out of the company's moneys, was paid directly by, or out of the money of, the company, to the sellers of the land; and the profits made by the three men came directly out of the company's money; the money, for all purposes, could not have come, and it was never intended, from the conception of the scheme, that it should come, in any other way.

Throughout, Fullerton and Doran purported to represent and act for the company to be formed, and Wallace as the vendor to them for the company. In the formal writings, evidencing the formal transaction, Fullerton was expressly made a trustee of the land for a "syndicate" which was to become the company; and, when the company was, at once, created and organised, Fullerton became its secretary-treasurer, and Doran its vice-president and general manager. The transition from syndicate to company was, in form, brought about by a resolution, at the company's first meeting, moved by Doran and carried unanimously, "that the syndicate should form itself into the said company."

From the testimony of the defendant Fullerton, it seems that he had not deemed himself legally entitled to demand any part of the profit made out of the scheme, but there can be no doubt that he and Doran expected to get, and deemed themselves entitled, apart from any legal right, to a share of it, and, I have no doubt, to share and share alike in it, as in the end they did. Doran in his testimony admitted that he expected to get a share of the profit; and the defendant Fullerton in his testimony put his position, as to the amount which he should have, thus: "I said to him"—that is, to Wallace—"the amount is entirely for you, but I have got in at least half the subscriptions, and it is owing to my efforts this matter has gone through so well for you as it has . . ."

The trial Judge found, and the evidence well supports that finding, that the receipt of these profits, so obtained, was not dis-

closed to the company, or indeed to the syndicate; and, being secret profits obtained by those who were really trustees, and self-appointed trustees, for the company, which was not only then substantially in existence, but had, as I have said, provided all the money required to carry out the scheme of the three, including payment of the profits thus divided among them, and without which company, so supplying the money, there could not have been any profits to be divided, how was it possible for these persons to resist a claim upon them by the company to account for and pay over to them these profits? The company, and its supply of the money, was the essence of the scheme from its inception.

It was contended that the money paid to Wallace was his, and that he could do with it as he pleased. We are not in this action concerned with the first part of this contention. The second is plainly erroneous, meaning, as it did, that the company had no concern in the transaction. All profits out of the transaction were the profits of the company, not those of servants of the company; and, in the circumstances of this case, it can make no difference whether the parties to the scheme thought, or did not think, that those who were paid them had any legal claim upon him who paid such profits; or at what point of time the payments were made. The money received was a secret profit which the servant could not retain against the master's will.

Nor can I perceive any substantial difference, as to liability, between the case of Doran and that of Fullerton; as a matter of arrangement the latter was formally made the trustee through whose name the transaction should, in part, be carried out, and rights of all parties to some extent safeguarded. The mere fact that Fullerton was the one who thus acted does not at all alter the actual position of the others. Any of the others might just as well have been selected. Doran was a party to the whole scheme from its inception, and, as it seems to me, is in the same position as if he, instead of Fullerton, had been assigned to the position of formal trustee for the purposes I have mentioned.

It is, therefore, not needful for the plaintiff to rely upon the provisions of the prospectus clauses of the Ontario Companies Act (secs. 99 *et seq.*, R.S.O. 1914, ch. 178) to sustain the judgment appealed against, in this respect; but, if it were, I could find no good reason for excluding this company from their salutary require-

ONT.
S. C.
CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.
Meredith, C.J.C.P.

ments: the case seems to me to be one entirely within the mischief intended to be prevented by that remedial legislation. The company was not in any sense a close corporation. Shareholders, wherever they were thought to be procurable, were sought; and there was no restriction upon their rights to transfer their shares to any one anywhere. A liberal interpretation of the words "offers to the public" is imposed upon us by legislation, as well as by the character of the legislation in question. And, upon the other ground, surely these clauses are applicable. The shares of the company were shares which were to be dealt with in Ontario. The company dealt with them; and the defendant Fullerton dealt with them, as others also did: and so the company is doubly brought within this legislation. The words of sub-sec. 2 of sec. 99 of the Companies Act are very wide, and assuredly embrace this company.

The next question is: whether Fullerton and Doran were discharged from liability, to account for these profits, by the resolution of the company, passed at a meeting of its shareholders, in these words:—

"That the company renounces all claims against the said Doran and Fullerton in respect of the moneys so paid to them, and that the retention by the said Doran and Fullerton be and the same is hereby approved and confirmed, and that the whole transaction between Wallace, Doran, Fullerton, and the company, be and the same is hereby confirmed, approved, and ratified."

This action of the shareholders, if effectual, was substantially a gift by the company to Fullerton and Doran of these secret profits, a gift made at a meeting called in their interests, whilst the trial of this action was pending and for the purpose of defeating this action, and a meeting almost entirely composed of shareholders who were relatives and friends of these two then defendants, and who were summoned, and came, to the meeting for the purpose of relieving them from liability.

But there was no power to give such relief against the will of any shareholder, if otherwise it could be said to have been given fairly. In no sense could it have been deemed in the interests of the company to discharge such a liability, or make such a gift; it could be given only in the interests, and for the personal benefit, of these two individuals; and to be an encouragement to that which the law deems a breach of trust, whatever may be the views of

business men upon the subject in regard to some particular cases: so that, if the company were a going concern, the gift could hardly be upheld: see *Hampson* v. *Price's Patent Candle Co.* (1876), 24 W.R. 754; and *Taunton* v. *Royal Insurance Co.* (1864), 2 H. & M. 135; and the less so when it was substantially, and practically, though not by legal methods, being wound up, and was so far wound up that a part of the capital of the company had been returned to the shareholders: see *Hutton* v. *West Cork R.W. Co.* (1883), 23 Ch. D. 654; *Cyclists' Touring Club* v. *Hopkinson*, [1910] 1 Ch. 179; and *In re George Newman & Co.*, [1895] 1 Ch. 674. I do not put it upon want of power, but upon impropriety of the act—stated in legal phraseology, fraud.

The adjudication appealed against, regarding these two items, was, in my opinion, right: and this appeal as to them, in my opinion, should be dismissed.

The third item stands upon a different footing. The amount of it was paid to Doran, as a land agent's commission, upon the resale of the land in question, which was made by the company at a profit; a sale made while Doran was a director of the company and its general manager.

The trial Judge was unable to find that there was any agreement to pay Doran any commission, or that he was employed by the company to sell the land; and the evidence, as I find, fails to establish any such employment or any agreement to pay, expressed or implied.

Doran had recently become a land agent; and his story, at the trial, was: that in some informal way he had been employed to sell the land, and so employed on the understanding that he was to have a land agent's commission of five per cent., upon the sale-price, if he effected a sale; and that the sale, which the company eventually made, was effected by him. But there is no unprejudiced corroboration of the story of his employment, though such corroboration was easily obtainable from those who took part in his informal employment, if they could have proved it; and the writings are altogether against it. The minutes of the meetings at which it is said to have taken place, though they purport to set out all its proceedings, and although they relate to the land in other respects, contain nothing that supports the story in any way; and some of the records of meetings of the company shew that the remuneration

ONT.

S. C.

CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Meredith, C.J.C.P.

of directors was to be $10 for each meeting attended; nothing more than that is anywhere provided for.

It seems that an offer, somewhat lower than that eventually accepted, had been made for the land, and that some of the directors were in favour of accepting it, but that Doran opposed them, expressing the opinion that more could be had from the persons making the offer; and more was obtained eventually. But in all that was done there was no more than a director's duty performed. I find no evidence of anything done in the capacity of a land agent merely, anything done that might not fairly be expected of a director who might have had some skill, and some experience, though very little, as the man had been but a short time a land agent, in buying and selling land. No advertisement in his lists of lands for sale by him, nor any seeking of other purchasers, seems to have been proved; his dealings with a person who went to England in respect of another transaction are left in a very hazy state in evidence, so hazy a state as to be insufficient to support a legal claim for any amount, not to speak of over $8,000. The argument of Doran, in the witness-box, that he should be paid a commission of over $8,000 because, as he asserts, he procured an advance of less than $8,000 in the price of the lands, seems to one, as his whole claim also does, less even than a lame one.

It would be very dangerous to support, upon such flimsy evidence, a claim such as this, by a person holding a position in a company such as Doran held in this company, and whose duty it was, consequently, to do all that, by virtue of such position, he should, to effect a sale. And, by the way, I may add that the danger of relying on parol evidence to support a claim for a land agent's commission, in any case, has become so apparent that, somewhat recently, legislation has been passed requiring evidence in writing of it.

But as to this item, as well as in regard to the other two, an attempt was made to ratify, at a shareholders' meeting, the payment of it. It was the same meeting at which the attempt was made to discharge Doran and Fullerton from the claims against them upon the first two items. In regard to the calling to the meeting, what took place at it, and the ineffectual character of it,

this item and the others are, for the same reasons, in the same position: what was done was ineffectual as to this item, as it was as to the other two, and for the like reasons.

It is not necessary to consider what would have been the result if there had been an expressed or implied employment of this director, and general manager, of the company, to sell its land: the alleged right to the commission fails, as far as I am concerned, because in fact no employment was proved.

And those officers of the company who authorised the payment of the sum in question to Doran, and so those who in effect paid it, are liable to refund it or cause it to be refunded. It could not have been paid out but for such authorisation, and the finding of the trial Judge as to those who are so liable seems to me to be well supported by the evidence.

The result is that the appeal, which embraces these three items, should, in my opinion, be dismissed.

The plaintiff has a right to enforce his interests in these matters in the name of the company, though all other shareholders may, and though they should, release theirs.

Since this opinion was written, soon after the argument of this appeal, two of my learned brothers have become unable to agree to it in so far as it affects the defendants Gibson and Bryan, thinking that the evidence is not sufficient to connect them with the improper payment to Doran of the $8,121.22. If we were bound to look at the minutes of meetings only for evidence of what these directors did, I should yet find no great difficulty in agreeing with the trial Judge that it is proved that these defendants were parties to that improper payment. Minutes of meetings are not to be looked upon as if they were legal documents "settled" by learned counsel: rather the eye of the business man, or as much of it as remains in the Judge, is to be applied to it; and I have no sort of doubt that the man of business would smile at my suggestion that the minutes in question might not be those of a directors' meeting, and would say to me, "What else can they be?" And I am bound to confess that my inclination would be to say "Nothing." And then he would say, "Why do they not shew a direction by the directors to pay this sum?" But there is much evidence besides; these defendants do not deny it in their pleading; on the contrary, they adopt the Doran defence that it

ONT.

S. C.

CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Meredith, C.J.C.P.

was a proper and lawful payment; and they did not at the trial go into the box and say, "We took no part in that payment;" on the contrary, their counsel contended that it was a proper and lawful payment, and in their notice of this appeal the same thing is contended; and the probabilities are, if not the presumption is, that the payment was, with the other payments, duly authorised at this directors' meeting. Otherwise we must assume, contrary to the fact and with extreme unfairness to the defendants Murray and Fullerton, that they were guilty of the obvious and grave wrong of signing the cheque and making this large payment without any kind of authorisation. Besides all this, they joined with Doran and the others at the ratification meeting, held for the purpose of defeating this action, and have completely, by their conduct throughout, cut the grounds of this defence from under their feet, if there ever were any such grounds.

Lennox, J.

LENNOX, J., agreed with the Chief Justice.

Riddell, J.

RIDDELL, J.:—I agree that the appeal should be dismissed in respect of Fullerton and Doran and allowed in respect of the other directors.

The facts are not obscure and the law is not in doubt; and I can see no good end to be attained by adding remarks of my own, adopting, as I do, the judgment of my brother Rose.

Rose, J.

ROSE, J.:—I agree that Mr. Fullerton and the Doran estate, respectively, must account for the payments made to Mr. Fullerton and Mr. Doran by Wallace out of the profit made by him upon his sale to Mr. Fullerton as trustee.

Mr. Fullerton's statement, which appears to accord with the documents, including the contracts, the conveyances, and the minutes of the meetings, makes his position quite plain. Wallace informed him that he was buying land at $725 an acre or less, and asked him to act as trustee for a syndicate which Wallace desired to form to take over the land at $800 an acre and to go into the syndicate himself and help to bring others in. Mr. Fullerton at once consented to act as trustee, but declined to promise to join the syndicate or to ask others to join, until such time as he had examined the property and satisfied himself as to its value. Then

ONT.

S. C.

CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Rose, J.

Mr. Fullerton and Mr. Doran were taken to see the property, and, following the inspection, Mr. Fullerton spent some time in satisfying himself as to the prospective value of the land, and finally agreed to join the syndicate and to ask others to join. Next, an agreement was signed between Wallace as vendor and Fullerton as trustee, by which the vendor agreed to sell and the trustee agreed to purchase the land at the price of $800 an acre, in all $123,752, payable $2,500 down, $44,201.75 in ten days, and the balance by the assumption of mortgages, and it was "understood and agreed" that the purchaser was "a trustee for a certain syndicate formed to purchase the said property;" and the vendor agreed to accept the liabilities of the syndicate and the members thereof, in lieu of any liability of the purchaser, and to release the purchaser from any personal liability. Contemporaneously, there was prepared a syndicate agreement between Wallace of the first part, Fullerton "as trustee" of the second part, and the subscribers of the third part. By it the parties agreed that on entering into the contract of purchase Fullerton "shall be deemed to have been acting as trustee for and on behalf of the syndicate and the syndicate shall forthwith pay him the deposit and shall indemnify him against all liabilities under the said contract." It was further agreed that each subscriber should be entitled to shares in a company to be formed, proportionate to the number of shares held by him in the syndicate; and that the trustee should, on request, convey the land to the company.

Matters then proceeded as was intended. Mr. Fullerton busied himself in getting persons to join the syndicate; the money for making the cash payments to Wallace was provided by the syndicate; the land was conveyed to Wallace by the persons from whom he had bought it; and Wallace conveyed it to Fullerton. The cash paid to Wallace exceeded by $11,601.75 the cash which Wallace had had to pay to those from whom he bought. Immediately after the money had been paid to Wallace and the conveyance to Fullerton had been executed, Wallace came to Mr. Fullerton and said: "I have come in to see what you thought you ought to get out of this." Mr. Fullerton says that the statement "rather startled" him; and he explained to Wallace that there was no understanding that he should have anything: that he was not entitled to anything. Wallace then said, "How

ONT.
S. C.
CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.
Rose, J.

would $300 strike you?" And Fullerton said: "The amount is entirely for you, but I have got in at least half of the subscriptions, and it is owing to my efforts this matter has gone through for you as well as it has; if under these circumstances you feel disposed to give me a bonus or gratuity I will accept it, but the amount of that or whether you give it or not is entirely for you to say." The same afternoon or the next morning, Wallace handed Mr. Fullerton a cheque, and went away. Mr. Fullerton "looked at it and saw it was for one-third" of the $11,601.75.

Mr. Fullerton next obtained letters patent incorporating the company, and had these with him at a meeting of the syndicate held on the 7th April, 1913. No information was given to the meeting about the payment by Wallace to Fullerton, or about a similar payment to Doran. The letters patent were produced, and it was resolved "that the syndicate should form itself into the said company and that the members of the syndicate should take stock in the said company in proportion to the amount of their shares in the syndicate." Meetings of the provisional directors and of the shareholders were then held, the shareholders present or represented being the members of the syndicate present or represented at the meeting of the syndicate. Directors were elected, Messrs. Fullerton and Doran being of the number; and a meeting of directors was held, attended by those two and two others. At that meeting a by-law was passed "that the agreement made between Mr. Wallace and Mr. Fullerton be adopted as the agreement made on behalf of this company, and that the directors be instructed to accept and execute a deed from Mr. Fullerton to the company of the said property, containing a covenant by the company to indemnify Mr. Fullerton from any contracts or covenants which he may have entered into as trustee of the company." By a deed, dated before, but registered after, the last-mentioned meeting, Mr. Fullerton conveyed the land to the company.

Upon this statment of facts, I do not see how it is possible to hold that Mr. Fullerton has any right, as against the company, to retain the $3,867.25. He never had any beneficial interest in the land; and, granting that there is a difficulty in holding that at the time when he received the money he was trustee for the company, which was not then formed (see *In re Leeds and Hanley Theatres*

of Varieties Limited, [1902] 2 Ch. 809, at p. 822), he certainly was, at that time, trustee for the syndicate; and, upon the formation of the company, he became trustee for the company. The money that he paid to Wallace for the land was the money put up by the members of the syndicate, and was treated by the company as payment for the shares allotted to those members. The company, when it adopted as its own the contract between Wallace and Fullerton, and agreed to accept a conveyance from and to indemnify its trustee, was not aware that the trustee had got back some of the money which he had disbursed. How can the trustee say that the money that had thus come to him was not held by him upon exactly the same trust as the trust upon which he held the land, i.e., a trust to hand it over to the company?

Mr. Doran's position, formally anyway, was a little different from Mr. Fullerton's. The land was never in his name, and in that sense he was not a trustee; and to that extent the case against him is weaker than the case against Mr. Fullerton. But, as found by Mr. Justice Masten, he became interested in the matter even before Mr. Fullerton did; he advanced to Wallace a portion of the money which Wallace had to pay as a deposit upon his purchase, and from that time he was active in the formation of the syndicate and of the company; he was with Mr. Fullerton when Mr. Fullerton first went to see the property; he did as much as Fullerton did in procuring subscriptions to the syndicate agreement; he was, in short, a promoter, and subject to all the disabilities attaching to that position. There seems to be strong reason for assuming, as Mr. Justice Masten does, that when Doran put up one-third of Wallace's deposit, he expected to receive some part of Wallace's profits: certainly, he admits that he expected Wallace would pay him for his work; but, even if the payment to him by Wallace can be looked upon as merely a gratuity, it seems to me that he must account for it. It is true that in most of the cases in which a promoter has been held liable to account for secret profits there had been something more than a voluntary payment to him by the vendor of property to the company; in some of the cases there had been an antecedent bargain between the vendor and the promoter, and in others the promoter had been party to a scheme by which the price to be paid by the company had been enhanced for the purpose of providing the fund out of which the promoter's

ONT.

S. C.

CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Rose, J.

profit was to come. But it does not appear to me that such antecedent agreement or enhancement of price, while it has been present and has been referred to in the judgments, is something that must be proved in order that the promoter may be liable. His fiduciary position is recognised even at a time when he is not strictly a trustee: it is "clearly settled that persons who get up and form a company have duties towards it before it comes into existence:" *Emma Silver Mining Co.* v. *Lewis* (1879), 4 C.P.D. 396, at p. 407. Grant that, at the time when Doran received the money, he had "duties towards" the company, and that Wallace expected him to see that the company, when it came into existence, should ratify the agreement between Wallace and Fullerton, and should become responsible for the later payments which Wallace had contracted to make, and it seems impossible to avoid the conclusion reached by Mr. Justice Masten that Doran was under obligation to account for the payment made to him by the vendor of the property: see *Bagnall* v. *Carlton* (1877), 6 Ch. D. 371, at p. 384. So that, even if Doran was a promoter only, and not a promoter and a trustee, as Mr. Fullerton was, I think his liability is established.

The claim in respect of the sum of $8,121.22 paid to Mr. Doran for effecting a sale of the company's lands remains to be considered. Mr. Doran swore, and Mr. Fullerton's evidence seems to support his statement, that it was understood amongst the directors that he should not be given a regular salary for acting as vice-president and general manager, but should have the opportunity of finding a purchaser for the land, and, if he succeeded, should be paid the usual land agent's commission, and should accept that as his "recompense" for performing the duties of his office.

At a meeting of the shareholders, he was instructed, informally, to endeavour to find a purchaser. He did make a sale, and he managed to induce the purchasers to add to the price first offered by them, which price some, at least, of the shareholders and directors were in favour of accepting, a sum practically equivalent to the amount of the commission. The company, therefore, ought to have been well content to pay the commission; and, apparently, all the members who knew about the matter were content. It was paid; and the question is, whether there was legal authority for paying it.

At a meeting, which was held on the 29th May, 1914, and which seems to have been a directors' meeting, although the minutes call it a meeting of the company, the secretary-treasurer is reported to have put in a statement of liabilities shewing the solicitors' charges in connection with the sale, a commission to Doran of $8,121.22, small sums for fees of the several directors, and a small salary to the secretary-treasurer. The statement ended with the following memorandum:—

"The amount at present in the bank is $45,014.48. The disbursements as above are $8,829.22, which will enable us to pay a dividend of 57 per cent. and leave the balance in the bank of $161.76 to the credit of the company."

Resolutions were passed that the directors be paid $10 per meeting for meetings attended by them; that the secretary be allowed the sum mentioned in the statement as owing to him; and that a dividend of 57 per cent. be declared and be paid to the shareholders forthwith. On the same day, cheques were issued for the commission and for the dividend.

There was no resolution of any kind referring to the commission or to the solicitors' charges; but the directors present at the meeting have been held liable in respect of the commission. Now, the company's general by-law number 6, passed by the directors and duly confirmed by the shareholders, enacts that: "The directors, themselves, shall have power to fix their remuneration either as directors or as officers of the company, and also the salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so;" and it is argued that the directors did order the payment of the commission and did so in the exercise of the power conferred upon them by the by-law; and that no further confirmation by the shareholders was necessary. If the directors had in fact ordered the payment, it would be necessary to consider whether the general by-law relates to payments such as the one in question; but I cannot find evidence supporting Mr. Justice Masten's assumption that they did order it. It seems to me that the only proper basis for a decision as to what the directors did or did not do is what is set out in the minutes; and that, there being no formal resolution for payment of the commission, the passing of such a resolution cannot be inferred from the mere fact that the directors

ONT.

S. C.

CRAWFORD v. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

ROSE, J.

ordered the distribution of the money that they were told would remain after the commission and the other outgoings were paid. Therefore, I reach the conclusion that there was no authority for the payment; that the Doran estate is liable; that Messrs. Fullerton and Murray, who signed the cheque, are also liable; but that the other directors are not liable.

So far I have discussed the case without reference to the by-laws passed by the shareholders, purporting to ratify all the payments for which the several defendants have been held liable, and to release all claims against those defendants. At to these by-laws, and as to the argument that the action is not maintainable except by the company as plaintiff, it is unnecessary to say more than that I agree with Mr. Justice Masten that the by-laws were invalid as being, in effect, an attempt, at a time when the company's capital was impared, to make presents to the directors of the debts due by them to the company, and that the authorities support the right of the plaintiff, under these circumstances, to maintain the action.

Except as to the liability of the directors, other than Messrs. Fullerton and Murray, I would dismiss the appeal.

Appeal dismissed; RIDDELL and ROSE, JJ. *dissenting on one point.*

IMP.

P. C.

CITY OF REGINA v. McCARTHY.

Judicial Committee of the Privy Council, Lord Finlay, L.C., Lords Buckmaster, Dunedin and Atkinson. July 31, 1918.

SCHOOLS (§ IV—74)—SEPARATE SCHOOLS—ASSESSMENT.

Where the minority ratepayers in a district have established a separate school under the School Act (Sask. Stats. 1915, c. 23, s. 39) all the ratepayers of the same religious denomination in the district are bound to contribute to the support of such school; a ratepayer of the same religion cannot elect to be a supporter of another school.

[*McCarthy* v. *City of Regina*, 32 D.L.R. 741, affirmed. See also Annotation 24 D.L.R. 492.]

Statement.

APPEAL by the City of Regina and others from the judgment of the Supreme Court of Saskatchewan directing that a Roman Catholic residing in a separate school district be entered as a separate school supporter.

P. O. Lawrence, K.C., and *D. L. McCarthy*, K.C., for appellants; *Hon. Frank Russell*, K.C., and *S. R. Curtin*, for respondent.

The judgment of their Lordships was delivered by

Lord Dunedin.

LORD DUNEDIN:—In the City of Regina there is a public school district and there is also a separate school district, the

IMP.

P. C.

CITY OF REGINA v. MCCARTHY.

Lord Dunedin.

territorial boundaries of the districts being coterminous. The separate school district is a Roman Catholic separate school district. One Bartz, who is a Catholic, and who, in 1915, was entered in the assessment roll as a separate school supporter, applied in 1916 to be entered as a public school supporter. The request was granted by the official making up the roll and he was so entered. An appeal against this entry was taken by McCarthy, another separate school supporter (title to that effect being given by a clause in the statutes), to the Court of Revision, who confirmed the entry. Appeal was taken from this decision to the Local Government Board, who allowed the appeal and directed his name to be entered as a separate school supporter. This judgment was affirmed by the Supreme Court unanimously, to whom appeal had been taken. From the Supreme Court this appeal has been taken to this Board.

The case accordingly raises the straightforward issue, can a person of the faith of the minority, who have established a separate school district, demand that he should be entered as a public school supporter? The question depends entirely on the statutory provisions which are contained in the three Acts, the School Act (c. 23 of 1915), the School Assessment Act (c. 25 of 1915), and the City Act (c. 16 of 1915).

The Local Government Board delivered a most careful and reasoned opinion, and the result at which they arrived was confirmed by equally careful and elaborate opinions delivered by the judges of the Supreme Court. These various opinions express with so much precision and accuracy the views which are entertained by their Lordships that they can really add nothing to what has been already said. It is only in respect of the general importance of the question that they desire to state succinctly and in general terms what they think the gist of the matter.

The scheme of the Acts seems to their Lordships to be this. There is a power given to the community after certain preliminary steps to erect a public school district. Whether there is to be such a district or not is decided by vote, and by the result of that vote the majority binds the minority. If the district is erected and nothing more is done then all persons holding property in the district are assessable for school rates. The religious complexion of

IMP.
P. C.
CITY OF REGINA v. MCCARTHY.
Lord Dunedin.

the school as between Protestant and Catholic is controlled by the majority who have voted for the creation of the district. But there is a conscience clause to protect parents having their children instructed in religious education which is not to their liking. There is, however, a power given to the minority, which means the members of the religious faith, be it Protestant or Catholic, who form the minority (for no other faiths have in this matter official recognition) to establish a separate school district with a separate school of their own religious complexion. In such a case the ratepayers establishing such a district are only liable for their self-imposed rate and not for public school rates. The legislation as to the formation and form of the assessment roll provides for a return by each assessable person, and prescribes a descriptive entry of P.S.S. (public school supporter) or S.S.S. (separate school supporter), as the case may be.

It seems to their Lordships that in this arrangement there are two guiding principles. The first is that after a vote the majority binds the minority. The majority settle as against the minority whether there shall be a district at all (there is a provision for the erection of a district on the motion of the Minister of Education, but this may be disregarded as extraneous to the present question). The second is that it is the criterion of religious faith which forms what may be called the subordinate constituency, and here again the majority compels the minority, either establishing or refusing to establish a separate school. If the school is established all must be rated.

It is true that the subordinate constituency form the minority of the whole constituency. As such they would have been assessed as public school supporters, were it not for the special exemption which is to be found in s. 39 of the School Act. But it is the very enfranchisement from the liability to pay public school rates that they get as a community, which subjects them to the rule, so to speak, of the majority of their own community. It is impossible, their Lordships think, to read the words in s. 39, "ratepayers establishing a separate school," as applicable only to the majority of the minority.

It is evident that there is a great practical advantage in working the scheme if the respondent's argument is sound. For the minority constituency to come to a common sense determination

IMP.

P. C.

CITY OF REGINA v. MCCARTHY.

Lord Dunedin.

as to whether they shall or shall not establish a separate school it is necessary that they shall calculate what assessments are available. If the religious test is taken, that is simple enough, but if the minority constituency is liable to be depleted by some of its members leaving its ranks and enrolling themselves as public school supporters it is evident that all calculations would be upset.

There are other arguments to the same effect, but as has been already said they are most adequately dealt with in the judgments below.

It should be added that the point as to whether the legislation in question was *ultra vires* was not pressed before the Board.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

HALLETT v. BANK OF MONTREAL.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 20, 1918.

1. EVIDENCE (§ XII A—923)—POSITIVE AND NEGATIVE—RELATIVE VALUE. In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.
2. TRIAL (§ V D—295)—JURY VERDICT—AGAINST WEIGHT OF EVIDENCE—UNREASONABLE—AMENDING. All possible weight should be given to the verdict of a jury, but when viewing the case from every standpoint it appears that the verdict is against the weight of evidence, and the verdict as rendered is such as could not reasonably have been found, such verdict may be set aside and judgment entered in accordance with the weight of evidence.

Statement.

APPEAL from judgment entered for plaintiff, at the York County Court, before Wilson, J., and a jury.

F. R. Taylor, K.C., and *J. J. F. Winslow*, support appeal; *P. J. Hughes, contra.*

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—Josiah Hallett, who carries on lumbering operations in the County of York, had certain moneys on deposit with the Bank of Montreal at its office in Fredericton, and on January 19, 1915, wrote Mr. Hawkins, manager of the bank, enclosing a cheque for $300, which he asked him to cash and express the amount to Millville and charge the same to his account. At the foot of the letter there was a memo stating that he wanted 50 one

N. B.

S. C.

HALLETT v. BANK OF MONTREAL.

Hazen, C.J.

dollar bills, 25 two dollar bills, and 40 five dollar bills, making in all $300. Upon receipt of this letter at the bank it was handed to the teller, Cecil Kemp, with instructions to have the money forwarded by registered mail, although Mr. Hallett requested that it should be forwarded by express. The teller counted out the money, listed it on what is called a bordereau slip and put a memorandum on the foot of the letter shewing the numbers and denominations of the bills, which he initialled.

The teller, in the ordinary course of business, handed the money, the bordereau and the letter with an envelope addressed to the plaintiff at Millville to the accountant. The accountant says that he counted the money twice, checked it with the bordereau slip and the letter and found it to correspond. The envelope was then closed and sealed and either handed to or placed on the junior's desk, which is the ordinary course of procedure. There was some doubt as to whether the sealing with wax was done by the teller or the junior, but I think nothing turns on this. The junior, Frank Coburn, says he took the letter, put the stamps on it, entered it in the registration book at the bank, and took it to the post office, where he got the registration slip signed with the date stamped thereon. These witnesses, Kemp, Sheffield and Coburn, swore distinctly to this state of facts. On January 21, 1915, the letter arrived at the post office at Millville and was entered by the postmaster in the registration receipt book, and was kept with the registered letters, which are placed at night in a safe, and which, according to the evidence of the Millville postmaster, could not be interfered with in the office. The plaintiff, to whom the bank officials had sent a letter informing him of the fact that the money had gone forward by registered mail, called at the post office for it on January 25, when it was delivered to him by the postmaster and he signed a receipt for it. The seals were unbroken and the plaintiff opened the envelope and took out the money which he placed in his trousers pocket, but did not count it, and states that he did not remove the elastic bands which were around the package of money, nor use nor interfere with it in any way until he handed it, still uncounted, to a man named Claire 6 days afterwards, and that that was the first time he had had it out of his pocket since he put it in there. At the time he received the money from the postmaster, Hallett

had in another pocket of his trousers a package of money containing $1,000 that he had received by express from the Bank of Nova Scotia, and about $80 of loose money. He swears that this money was in one pocket and the money received by registered letter in another, and that he kept the Bank of Montreal money in that pocket separate from all other. On the same day he got the money he returned to the woods, and says that he did not remove his clothes during that period or take the money which he had taken from the registered letter from the pocket in which he had placed it. He also says that during that week he paid out in different sums about $800, every dollar of which was paid out of the Bank of Nova Scotia money which was in the other pocket. On January 30, six days after he had received the money at the post office, he was called upon to pay $340 to J. R. Claire, and then, for the first time, he took out of his pocket the package of money received from the Bank of Montreal and handed it to Claire, telling him it was $300 that he had received from the Bank of Montreal. Claire counted it and found only $105. He handed it to Hallett who counted it and found only the same amount. There was $50 in one dollar bills, and $50 in two dollar bills, but only one bill of the denomination of $5. It came out in evidence that, on a previous occasion, Hallett had received money from the Bank of Montreal with a shortage of $90, which was promptly admitted by the bank and rectified. As soon as the deficiency in the money became known, Hallett caused the manager of the Bank of Montreal to be telephoned to from his camp, and was told to come to Fredericton, which he did on the following Monday morning. He explained the situation to Mr. Hawkins, the manager, who promised to make inquiries, and having made inquiries and communicated with the head office he informed the plaintiff a few days later, and disclaimed any liability on the bank's part.

This, in substance, is the evidence for the plaintiff. Mr. Hawkins, manager of the bank, in his evidence, explained the customary system that is followed by the bank officials in sending out registered parcels containing money, and all the officials swore that the usual course was followed. In answer to questions submitted to the jury they found that the defendant on January 20, 1915, did not cause the sum of $300 in bank notes to be placed in a strong

N. B.

S. C.

HALLETT v. BANK OF MONTREAL.

Hazen, C.J.

wrapper and closed and sealed with sealing wax and addressed to the plaintiff at Millville. In other words, they found that the $300 was not sent through the mail to Hallett, and that, for some reason or other, the amount which he directed the defendant to place in the envelope was not so placed. They found, however, that the defendant caused the postage and registration thereon to be prepaid by putting stamps thereon, that it caused the parcel so closed, sealed and stamped to be delivered to the post office in the City of Fredericton, that the parcel was duly registered for conveyance by mail to the plaintiff at Millville, that the defendant also caused a separate letter to be sent to the plaintiff at Millville informing him that the sum of $300 had been forwarded to him by registered mail, that the parcel so delivered at the post office in Fredericton was received in due course of registered mail at the post office in Millville, that it was delivered to Mr. Hallett, and received by him intact, and with the seals unbroken, but that the parcel sent by the defendant to the plaintiff when delivered to Mr. Hallett at Millville did not contain $300.

There is no evidence, whatever, to shew that the parcel was tampered with between Fredericton and Millville or at the post office in either place, and, therefore, I think, it is reasonable to conclude that $300 was not enclosed in the package or else that that amount was received by the plaintiff. The evidence is of the most conflicting character. There is nothing to shew lack of *bona fides* on the part either of the plaintiff or the defendant, and a careful perusal of the evidence leads me to conclude that the witnesses on both sides believed they were swearing to what was true. If the money was not in the envelope when it was delivered at the Fredericton post office, I should think it was because of some error or mistake that was made, and if it was received by Hallett and was not all in his pocket when he handed it to Claire to be counted, then I should conclude that he had lost it. He stated that it was in exactly the same condition as when he opened the envelope and put it in his pocket, that the same bands were around it, that he took no money or anything else out of the pocket in which the envelope was, and that it could not have been stolen from him as he had never removed his clothes, but slept in them during all the time that he was in the lumber camp.

The evidence given by the witnesses for the defendant was of

the most positive description. It was given by men all of whom had had experience in a bank, and who were in the habit of handling money and of counting it, and, in this respect, their evidence is on a different plane from that of the plaintiff's witnesses. It is impossible to believe, in view of the way in which the money was counted and checked over, that the $300 was not placed in the envelope. See *Aitken* v. *McMeckan*, [1895] A.C. 310. In *Lefeunteum* v. *Beaudoin* (1897), 28 Can. S.C.R. 89, after stating that the Supreme Court of Canada would take questions of fact into consideration on appeal, and if it clearly appeared that there had been error in the admission or appreciation of evidence by the courts below, their decisions might be reversed or varied, it was laid down that, in the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative. In this case the defendant's witnesses swore positively to the sending of the money. The plaintiff's witnesses say that the money was not received. As there is nothing to impeach the *bona fides* of the witnesses on either side, I am disposed to think that those who testified on behalf of the defendant should receive credit in preference to the plaintiff. In saying this I am influenced by the consideration (among others), having regard to the method in which business is carried on in banks throughout the country, that, if the amount sent from the bank had been $195 less than the defendant claims, the fact would have been discovered in a short time and made perfectly clear by the officials of the bank themselves, when they came to balance their books at the close of business hours, as they would have on hand that much more than the cash would shew and the mistake or error would be made plain. On the other hand, according to the evidence of the plaintiff himself, when he took the registered parcel to his house from the post office, he "just took the money out and threw the package down." Is it not probable that when he threw the package down some of the money sent from the bank may have remained in it? The envelope which contained the money was not produced at the trial, and the plaintiff did not know what had become of it. The plaintiff, too, it seems to me was certainly negligent in not counting the money at an earlier date; and in paying out such a large sum as $800 in different small

N. B.

S. C.

HALLETT v. BANK OF MONTREAL.

Hazen, C.J.

amounts for wages to people in his employ, it seems to me entirely probable that he might have made a mistake and taken money from the pocket in which the Bank of Montreal money was placed instead of the other pocket, in which was placed the money which he had received from the Bank of Nova Scotia. I am disposed to give all possible weight to the finding of the jury, but viewing this case from every standpoint I cannot help coming to the conclusion that the weight of evidence is preponderatingly in favour of the defendant, and that the verdict which was rendered is not such a one as, viewing all the circumstances of the case, could reasonably have been found. See *Metropolitan R. Co.* v. *Wright* (1886) 11 App. Cas. 152.

It is very strongly urged that there was evidence to support the finding of the jury, and that therefore it should not be interfered with. In this case nearly all the defendant's witnesses were examined under commission, and neither the court nor the judge had the opportunity of hearing them. In the case of *Currey* v. *Currey* (1910), 40 N.B.R. 96, it was held by Barker, C.J., McLeod and White, JJ., that the rule that the findings of fact by a trial judge should not be set aside unless clearly wrong does not apply where the judge did not see and hear the witnesses during a large portion of their testimony. In that case, the trial was begun before one judge and continued before another judge, to whom a considerable portion of the evidence was read from the stenographer's notes. In giving judgment in that case, Barker, C.J., said, p. 141:—

> If the judge neither hears nor sees the witness give the evidence he is in no more favourable a position for dealing with it than anyone else. If the evidence is uncontradicted, if the testimony has been taken under a commission, or the facts are admitted, the judge before whom the hearing has taken place is in no better position to decide than any other judge.

The same reasoning would apply to the finding of a jury in the case of evidence taken under a commission. In my opinion, also, the Judge of the County Court was in error in charging the jury that a certain amount of responsibility rested upon the defendant bank for not having sent the money according to directions of the plaintiff, without stating the extent of the responsibility.

As already stated, the plaintiff gave instructions that the money should be sent by express, and the defendants, following their usual custom, sent it by registered letter. In my opinion, this

did not affect the merits of the case at all. If the money had been sent by express, and when the express parcel reached the plaintiff it did not contain the amount of money which he ordered, his position with regard to the bank would have been just the same as in the present case. He would have a right to recover back the deficiency if he was able to shew that the bank had not sent him the amount of money which he had ordered, and I am disposed to think that the Judge of the County Court should not have charged the jury as he did. The statement to the effect that a certain amount of responsibility rested upon the defendant bank, was, I think, calculated to prejudice it in the eyes of the jury, and may have been a determining factor in deciding their action.

Exception is also taken to the judge's charging the jury as follows:—

> Then you have the other facts, incidental facts which do not amount to much, so far as the testimony is concerned. There is nobody going to question the honesty and uprightness of Mr. Hallett, and there is no one going to throw any discredit upon the young man Claire about what he said, because it would leave the impression upon anyone that they were men who were actuated not to tell the truth.

This is only an isolated sentence, and the charge must be read as a whole. In other parts of it the high character of the witnesses for the defendant, as indicated by their employment in such an institution as the Bank of Montreal, and the fact that no one would think of charging either of them with a wrongful intention with regard to the transaction out of which the suit arose, and that it must have arisen in consequence of a mistake either in the bank before the money left it or in the handling of the money in the hands of the plaintiff after he took the money from the post office in Millville, was referred to. It is clear from the charge that the judge was of the opinion that both parties believed they were telling the truth, and that the trouble arose in consequence of a mistake. It is also clear, I think, that the jury did not give due consideration to the evidence of Geoffrey Sheffield, taken by commission, for in spite of his uncontradicted evidence they found that the defendant did not on January 20, 1915, cause the sum of $300 to be placed in a package, closed and sealed and addressed to the plaintiff at Millville.

I am of opinion that the verdict for the plaintiff should be set aside and judgment entered for the defendant with costs.

Judgment accordingly.

ONT.

S. C.

ARMSTRONG CARTAGE AND WAREHOUSE Co. v. GRAND TRUNK R. Co.

Ontario Supreme Court, Appellate Division, Sir William R. Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. April 23, 1918.

TRIAL (§ V C—280)—FINDING OF JURY—MEANING OF—EVIDENCE TO SUPPORT—SETTING ASIDE.

When the meaning to be given to the finding of the jury is that the leaving of one of the gates at a railway crossing open was an invitation to the driver of a truck that he might safely cross the tracks, and where there is evidence to support this finding and also a finding against contributory negligence, the findings will not be disturbed.

Statement.

AN appeal by the defendant company from the judgment of Falconbridge, C.J.K.B., on the findings of a jury, at the trial at Hamilton, in favour of the plaintiff company, in an action for damages for injury caused to a motor-truck of the plaintiff company, and the goods the truck was carrying, owing, as the plaintiff company alleged, to the negligence of the defendant company's gateman, at a highway crossing in the city of Hamilton, in allowing the plaintiff company's truck to pass the north gate and get upon the railway lines at a time when there was danger from an approaching train, by which the truck was then struck, which was the cause of the injury of which the plaintiff company complained.

The jury found negligence of the defendant company, "by not having the north gate lowered soon enough," and no contributory negligence on the part of the driver of the plaintiff company's truck.

S. F. Washington, K.C., for the appellant company.

George Lynch-Staunton, K.C., for the plaintiff company, respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 29th January, 1918, which was directed by the Chief Justice of the King's Bench to be entered on the findings of the jury, at the trial before him at Hamilton on that day.

The action is brought to recover damages for injuries caused to a motor-truck of the respondent, and the goods it was carrying, owing, it is alleged, to the negligence of the appellant.

The motor-truck was injured by being struck by an eastbound train of the appellant, while the truck was being driven across the tracks of its line on Lottridge street.

The appellant has, under the authority of the Board of Railway Commissioners of Canada, erected gates on the north and south sides of its line on Lottridge street, in the city of Hamilton, and it is not disputed that it was the duty of the appellant to keep these gates closed when there was danger to persons crossing the tracks from an approaching train; nor is it open to question that, when the gates are not down, the travelling public is told that the tracks may be safely crossed without danger from an approaching train.

The truck was being driven by a man named Henry Ince, and was proceeding, heavily laden, southward on Lottridge street.

What happened I shall afterwards mention in dealing with the answers of the jury to the questions submitted to them by the learned trial Judge.

The relevant questions and the answers to them are as follows:—

"1. Was the injury to the plaintiff's motor-truck caused by any negligence of the defendants? A. Yes.

"2. If so, wherein did such negligence consist? A. By not having the north gate lowered soon enough.

"3. Was the plaintiff's driver guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No."

In order to ascertain what the jury meant by their answer to the second question, it is necessary to consider the evidence as to the position of the gates, which was conflicting.

According to the testimony of Ince and of Oscar Smith, who was riding with him on the truck, both the gates were up when the truck reached the railway tracks.

Daniel Jones, the man in charge of the gates, testified that he saw the east-bound train approaching, when it was distant about half a mile; that he started to lower the south gate behind a young lady who was about to cross the tracks from the south, and that he then started to lower the north gate "as she was coming to go under;" and that, just as she was crossing the last track, i.e., the north one, "the truck came with a dash and took advantage of the gate being half-way up and went through at a fair rate of speed;" that he held the north gate half-way up to let the young lady pass; that the south gate was then down; that he had seen the truck coming when it was at the curve in the street near the creamery,

ONT.

S. C.

ARMSTRONG CARTAGE AND WAREHOUSE CO. v. GRAND TRUNK R.W. CO.

Meredith, C.J.O.

about a block away; that the truck went on; and that, thinking that the driver was going to make a rush right over, he went to move the south gate to give him a chance to get through.

Florence Solly, the young lady, testified that when she got to the south gate it was being lowered, and after she went through it came down behind her; that the north gate "was just lowering down;" and that the truck came along and came under, and the gateman had to pull the gate up again to let the truck under; that the north gate was not put down while she was crossing the tracks; that, when she crossed, the truck was about underneath the north gate; that the north gate was moving when she went under it; that the gateman started to put down the north gate before she passed it; that the truck was then right up to that gate; and that the gateman pulled it up again to let the truck through.

In view of this evidence, the meaning to be given to the jury's answer to the second question is, I think, that they were unable to find that the south gate was up, but that they found that the north gate was not lowered when the truck reached it, and that this was an intimation to the driver that he might safely cross the tracks.

It cannot, in my opinion, be said that there was not evidence to support this finding. The jury acquit the driver of contributory negligence, and must therefore have come to the conclusion that he was not negligent in not noticing the condition of the south gate.

It is impossible to say that as a matter of law the condition in which the south gate was, prevented the condition of the north gate from being taken to have been an intimation to the driver that he might safely cross the tracks, or that the driver was negligent in failing to observe that the south gate was down. These were matters for the consideration of the jury, and we cannot say that their findings as to them are such that a jury might not reasonably have made them.

Oddly enough, in the case of *North Eastern R. Co.* v. *Wanless* (1874), L.R. 7 H.L. 12, which was the case of a railway crossing protected by gates, there was, as in this case, contradictory evidence as to whether the gate on the opposite side of the track to that by which the injured person entered upon the line was or was not open.

That case is authority for the proposition that the leaving of

the north gate open was evidence of negligence to go to the jury, and that it was so even though with care and circumspection the driver of the truck might have been able to see at a distance the approach of the train which did the injury.

The statement of the gateman that when the truck was "going under"—that is, passing the north gate—he shouted to the driver, "Stay where you are," indicates, I think, that the gateman then recognised that the driver had been led, by the position in which the north gate was, to get where he was, and that he was endeavouring to avoid the effect of his—the gateman's—failure to lower the north gate in time.

It is not without significance on the question of contributory negligence that the driver of the engine of the train, who was on the look-out, did not see the truck until, it was just approaching the west-bound track; and that the train which was travelling at a rate of between 35 and 40 miles an hour, was then only between 300 and 400 feet from the truck. The engine-driver had a much better view of the track to the east than the driver of the truck had, for there is a large building abutting on the railway line and coming almost up to the west side of Lottridge street, which prevented the driver from looking along the tracks to the west until after he had passed the north gate.

The jury, in view of all the circumstances, as I have said, acquitted the driver of the truck of contributory negligence. That question was one eminently for the jury, and I see nothing that would warrant us in setting aside their finding as to it.

As was said in *Smith* v. *South Eastern R. Co.*, [1896] 1 Q.B. 178, it was a question for the jury whether the driver of the truck, finding that the north gate was up, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistling of a train.

In my judgment, it would require an extremely strong case to defeat an injured person's claim because, after entering upon the railway tracks, he had failed to look for an approaching train. The gate being open, he was in effect told, "You may cross the tracks in safety;" and it would be anomalous indeed that, having told him this, the railway company may say to him in effect, "You ought not to have believed what we told you, but have looked out

ONT.
S. C.
Meredith, C.J.O.

yourself to see if there was danger from an approaching train;" and I do not wonder that juries do not look with favour upon such a defence.

I would dismiss the appeal with costs.

Appeal dismissed

MAN.
C. A.

FREEDMAN v. CITY OF WINNIPEG.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, and Fullerton, JJ.A. October 21, 1918.

HIGHWAYS (§ IV A—146)—OBSTRUCTION—CONCURRING CAUSES OF INJURY—NEGLIGENCE.

The rule in regard to negligence where a person is injured by coming in contact with an obstruction on a highway is that two things must concur to support the action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Statement.

APPEAL from the judgment at the trial in an action for damages for injuries sustained by running into an obstruction on a highway. Reversed.

T. A. Hunt, K.C., and *J. Preudhomme*, for appellant; *F. M. Burbidge*, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—This action is brought by the widow and infant children of the late Max Freedman to recover damages occasioned to them by his death in an accident on June 14, 1916. On that day, the deceased had commenced working as a teamster for the Manitoba Cartage Co. While driving a dray loaded with boxes westward along Higgins Avenue in the City of Winnipeg, one of the boxes on the rear end of the load came in contact with a telegraph pole of the Canadian Pacific R. Co. erected on the north side of the street. This displaced some of the boxes and one or two fell off the dray. The deceased then stopped the horses, threw down the reins and climbed over the top of the load with the intention of preventing other boxes from falling. While engaged in so doing, he fell off the dray, struck his head upon the pavement, and received injuries which caused his death. The only witness to the accident who gave evidence was one Moody, who had hired the deceased for the Cartage Co. Moody and another man were following the dray at a distance of twenty or thirty feet at the time of the accident and the deceased was under Moody's orders.

According to Moody's account the load had been put on the dray at the Immigration Hall. The greater part of the boxes

were about 8 feet long, and they contained seeds and samples for the Dominion Government. The boxes were placed crosswise on the dray. They had rope handles at the ends. There were some smaller boxes in front, on one of which the deceased sat while driving. On the north side of Higgins St. there is a line of telegraph poles belonging to the Canadian Pacific R. Co. These poles have been there for many years. In 1903, Higgins St. was paved with asphalt, and the pavement was placed around the poles and extended to the north limit of the street, there being no sidewalk on that side. Immediately adjoining the street on the north side there are the tracks of a switch belonging to the same railway company. Outside the line of telegraph poles, and extending to a boulevard on the south side, there is a clear asphalt pavement 30 feet in width forming the portion of the street intended for vehicles. There is no street car tramway line on the street.

The accident happened about 10 o'clock in the morning. Moody says that there was plenty of room for the deceased to avoid the pole with which the box came in contact. The deceased had already passed at least 4 poles, so that he had full warning of their presence. The witness also stated that the poles were perfectly visible so that any one could see them. There was not a team ahead of the deceased nearer than a whole block away. There were no vehicles or persons near to interfere with him. When he stopped the horses, they stood still while he climbed over the top of the load. Moody shouted to him to sit still, to leave the boxes alone, but the deceased went on with his attempt and the accident took place.

No evidence was put in for the defence. At the close of the plaintiff's case, a motion was made for a nonsuit by counsel for the defendant. The trial judge, while strongly expressing the view that no case had been made by the plaintiff, allowed the case to go to the jury, and they brought in a verdict for $3,250.

The only witness who gave evidence as to the facts which led up to the accident was the plaintiff's witness Moody. His evidence clearly shews that the unfortunate event was caused by the negligence of the deceased. While fully aware of the existence of the line of telegraph poles, in broad daylight, with nothing interfering with him and the ample paved street before him, he drove so

MAN.

C. A.

FREEDMAN v. CITY OF WINNIPEG.

Perdue, C.J.M.

carelessly as to cause a part of the load to collide with one of the poles.

The rule in regard to negligence in a case where a person is injured by coming in contact with an obstruction on a highway was laid down by Lord Ellenborough in *Butterfield* v. *Forrester* (1809), 11 East 60, at 61, 103 E.R. 926, at 927, as follows:—

> One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

This statement of the law was expressly approved in *Bridge* v. *Grand Junction R. Co.*, (1838) 3 M. & W. 244, 150 E.R. 1134, and in *The "Bernina"* (1886), 12 P.D. 58, and expresses the basic principle of the law of contributory negligence. For a discussion of the authorities I would refer to Beven on Negligence, 3rd ed., 149-155.

As to the duty of the trial judge in a case like the present, I would cite Lord Hatherley's view, expressed in *Dublin, Wicklow & Wexford R. Co.* v. *Slattery*, 3 A.C. 1155, at 1168, as follows:—

> But I concur, also, in the opinion expressed by Palles, C.B. (Ir. R. 10 Com. Law, p. 270), that "When there is proved as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury."

In the present case the evidence of the plaintiff's own witness, the only witness who testified as to how the accident took place, shewed clearly that the deceased could have avoided the obstruction by the exercise of ordinary care, and that there was no excuse for coming in contact with it. The trial judge should have entered a nonsuit upon this ground alone.

After the load had come in contact with the pole the horses stood still and the deceased was quite safe where he sat at the front part of the load. The question was raised whether his act in climbing over the top of the load to prevent other boxes from falling, with the result that he fell himself and sustained the injury, was one known by common experience to be usually in sequence to the wrong complained of, so that the wrong and the damage were conjoined or concatenated as cause and effect. Was the injury to the deceased caused by the alleged obstruction as a natural, legal consequence of it, or was the injury the result

MAN.

C. A.

FREEDMAN v. CITY OF WINNIPEG.

of his own negligence in leaving a safe place and going into danger? Upon this question the plaintiffs' counsel relied upon *Prescott* v. *Connell* (1893), 22 Can. S.C.R. 147; *Thorn* v. *James* (1903), 14 Man. L.R. 373, and *Ferguson* v. *Southwold* (1895), 27 O.R. 66. I do not think that the principle set out in *Prescott* v. *Connell*, which the other cases follow, apply in the present case, but I would decide this appeal upon the first ground above discussed.

Perdue, C.J.M.

The appeal should be allowed, the judgment for plaintiffs set aside and a nonsuit entered. The plaintiff is liable to pay the costs in the Court of King's Bench and in this court.

CAMERON and FULLERTON, JJ.A., concurred with PERDUE, C.J.M.

Cameron, J.A. Fullerton, J.A.

HAGGART, J.A.:—At the trial of this action, when the evidence was all in, the defendants moved for a nonsuit. At that time, the trial judge was very much in doubt as to whether he should allow the case to go before the jury, and having expressed his doubts in this regard, he permitted the jury to give their opinion as to the amount of damages that should be assessed.

Haggart, J.A.

After a perusal of the evidence, I think justice would have been done by entering a nonsuit.

I have perused the reasons of the Chief Justice. I adopt his reasoning, and agree with the conclusion he has arrived at.

A careful perusal of the evidence of the plaintiffs' principal witness, Mr. Moody, shews that the deceased, by the exercise of ordinary care, could have avoided the telegraph post which caused the load of boxes to collapse. There was clearly contributory negligence upon the part of Max Freedman.

The appeal should be allowed, the verdict of the plaintiff set aside and a nonsuit entered. *Appeal allowed.*

THE KING v. LORETTE.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Fullerton, JJ.A. October 7, 1918.

MUNICIPAL CORPORATIONS (§ II C—50)—INDICTABLE OFFENCES—DEALT WITH BY CRIMINAL CODE—BY-LAW REGARDING—ULTRA VIRES.

A municipal by-law attempting to deal with and impose punishment for an indictable offence already dealt with by the Criminal Code is *ultra vires*.

STATED CASE by police magistrate under s. 761 of the Criminal Code for the opinion of the court as to the power of a

Statement.

MAN.

C. A.

THE KING v. LORETTE.

Perdue, C.J.M.

municipality to pass a by-law making it an offence to interfere with any person taking cattle to pound. By-law held to be *ultra vires*.

H. J. Symington, K.C., for appellant; *R. A. Bruce*, for respondent.

PERDUE, C.J.M.:—This is a case stated by R. M. Noble, police magistrate, under s. 761 of the Criminal Code for the opinion of this court. The charge was that the accused

Did in the municipality of West Kildonan, in Manitoba, on or about April 29, 1918, unlawfully interfere with a person impounding cattle, contrary to the by-law of the said municipality in such case made and provided.

The evidence taken on the charge, which was made part of the case, shews that the accused made an attempt to release certain cattle which were being taken to the pound. The police magistrate, after hearing the evidence, ruled that the municipality had no power to enact the by-law, or that part of it making it an offence to interfere with a person impounding cattle, and he, therefore, dismissed the charge and released the accused. The case was stated on the application of the prosecutor.

The questions submitted for the opinion of this court are as follows:—

(1) Has the municipality of West Kildonan the power to pass a by-law authorizing any person over the age of 14 years, not being a poundkeeper, to impound cattle?

(2) Has the municipality of West Kildonan the power to pass a by-law making it an offence to interfere with any such person taking cattle to pound as enacted by s. 21 of the by-law 106 of the said municipality filed as ex. 1 in this matter?

(3) If the municipality has the power to pass the by-law referred to in questions 1 and 2, has it the power to also provide for a penalty for the breach of such by-laws?

By-law 106 of the rural municipality of West Kildonan contains the following amongst other provisions:—

(1) Prohibiting from running at large within the municipality, bulls, stallions, boars, rams, cattle, horses, mules, goats, pigs, turkeys, geese or poultry, and imposing on the owner a money penalty for every animal found running at large.

(2) Every poundkeeper shall impound any animal "distrained from unlawfully running at large or from trespassing and doing damages . . . delivered to him for that purpose by any person who has distrained the same," such animal to be held until the owner pays any claim for damages, etc.

(3) Enabling any person of the age of 14 years or over to take to the pound any animal found running at large or any animal found trespassing and providing for the payment of specified fees to such person so distraining animals.

(19) That every fine and penalty imposed by the by-law shall be recovered with costs "by summary conviction before any police magistrate or justice of the peace having jurisdiction in the municipality and in default of payment and there being no distress out of which the fine can be levied"—committal to the common jail for a period not exceeding 14 days unless the fine and costs be sooner paid.

(21) Any person interfering with the poundkeeper or interfering with any person or persons taking animals to pound, or anybody forcibly taking animals or poultry aforesaid out of pound before paying fees will be subject to a fine of not less than $25 and not more than $50 in addition to all fees due the poundkeeper for the impounding of said animals or poultry.

S. 601 of the Municipal Act, R.S.M. 1913, c. 133, as amended by 4 Geo. V., c. 66, s. 14, empowers a municipality to pass by-laws for the following amongst other purposes:—

(b) For allowing, restraining, prohibiting and regulating the running at large or trespassing of any animals, geese or poultry, and providing for impounding them; for causing them to be sold if they are not claimed within a reasonable time, or if the damages, fines and expenses are not paid according to law; and for appraising the damages to be paid by the owners of animals, geese or poultry impounded for trespassing contrary to law.

I shall first deal with question no. 2, which, as it appears to me, is the all-important one in this case. The alleged offence laid in the information is based upon clause 21 of the by-law. It is clear that if this clause has attempted to deal with a matter which comes within the general scope of the criminal law, the clause is beyond the power of the municipality or of the legislature of the province to enact; criminal law in its widest sense being reserved for the exclusive legislative authority of the Parliament of Canada: *Att'y-Gen. for Ontario* v. *Hamilton Street R. Co.*, [1903] A.C. 524. This exclusive power of the Dominion Parliament does not, of course, exclude the right of the provincial legislature to enforce by fine, penalty or imprisonment any law made by the legislature in relation to any matter coming within the classes of subjects specially assigned to the provincial authority for legislation: see s. 92 (15) of the B.N.A. Act; and see also *Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502, 505.

The above case of *Att'y-Gen. of Ontario* v. *Hamilton Street R. Co.*, *supra*, held that the Ontario Lord's Day Act, treated as a whole, was *ultra vires* as legislation upon criminal law. The Act, in its original form, was in force at the time of Confederation, and it was declared by the Privy Council that an infraction of that Act was an offence against the criminal law. The legislature of the province had not therefore power to re-enact and amend the original

MAN.

C. A.

THE KING. v. LORETTE.

Perdue, C.J.M.

Act. The Imperial Act, 6 & 7 Vict., c. 30, deals with offences similar to those which are dealt with by clause 21 of the by-law in question, with the exception that turkeys, geese and poultry are not mentioned in the Act. It has been held by this court that the Act, 6 & 7 Vict. is in force in Manitoba, and that an offence against any of its provisions is of a criminal nature: *Rex* v. *Laughton*, 6 D.L.R. 47, 22 Man. L.R. 520. The reasons for so holding were not set forth in the report of the case, and I feel that it is necessary now to refer to them briefly.

At common law, pound-breach (the wrongful removal of cattle or goods from a pound) was an indictable offence. The underlying principle was that the things impounded were in the custody of the law. See Russ. Cr., 7th ed., vol. 1, pp. 551-552; *Rex* v. *Broadshaw* (1835), 7 C. & P. 233; *Reg.* v. *Butterfield* (1893), 17 Cox C.C. 598. There is authority, also, that the forcible rescue of animals from a person lawfully taking them to a pound was an indictable offence at common law. See Chitty's Cr. Law, 2nd ed., vol. 2, pp. 203-204. The recital to the Act, 6 & 7 Vict., c. 30 (Imp.), refers to the frequent happening of rescues of cattle from the pound or on the way to or from the pound, and to the expense of prosecuting such offenders, and states that it was expedient to provide for the trial of the offenders in a summary way. It is clear that that Act dealt with offences which, by the laws of England, were of a criminal nature, and that the Act was intended to provide a summary method of dealing with such offences, instead of proceeding by way of indictment against the offenders.

By 51 Vict. c. 33, s. 1 (D.) the laws of England relating to matters within the jurisdiction of the Parliament of Canada as the same existed on July 15, 1870, were declared to be in force in Manitoba from that date, in so far as they were applicable to the province, and in so far as they were not thereafter repealed, altered, varied, &c., by any Act of the Parliament of the United Kingdom, applicable to the province, or of the Parliament of Canada. The effect of this enactment was to introduce the criminal law of England, as of the above date, into Manitoba, save in so far as it might at any time be repealed, altered or varied by the Parliament of Canada. The above enactment is still in force and its effect in introducing the criminal law of England, as the same existed on the date aforesaid, into Manitoba, is set out in

s. 12 of the Criminal Code. The Imperial Act, 6 & 7 Vict. c. 30, therefore, if applicable to Manitoba, and not repealed is still in force in this province as a part of the criminal law of England so introduced. There can be no question as to its applicability and there has been no repeal of it. As it is an Act dealing, as I have shewn, with certain offences of a criminal nature, it can only be repealed, altered or varied by the Parliament of Canada.

I would also refer to *Reg.* v. *Shaw* (1891), 7 Man. L.R. 518, which was cited and much relied upon by counsel for the accused in *Rex* v. *Laughton, supra.*

Even if the Imperial Act, 6 & 7 Vict. c. 30, is not wide enough to apply to a case where animals found straying on unenclosed land have been lawfully impounded, and a rescue has taken place, still the offence in question is of a similar character to those referred to in the Act and should come under the same legislative authority. At all events, the by-law attempts to legislate in respect to matters which have already been made a subject of legislation and dealt with by the Act as part of the criminal law. An attempt by the council of the municipality, or of the provincial legislature itself, to pass a by-law or enactment varying, adding to, or interfering with the Act would be *ultra vires*, because it would be an attempt to deal with a subject that belongs to criminal law. See *Att'y-Gen'l of Ont.* v. *Hamilton Street R. Co.*, already cited.

The question may also be regarded from another standpoint. In cases of rescue of goods on their way to the pound the main consideration at common law was whether they were or were not at the time of the rescue in the custody of the law. If they were, the rescue was a criminal offence. If the goods were impounded by a person authorised by law to do so they would be in the custody of the law from the time of the impounding. But if the person impounding was not authorised by law to do so, the goods would not be in the custody of the law until they were placed in the pound. See *Rex* v. *Bradshaw*, above cited. In the case at bar, the by-law authorises any person of the age of 14 years or over to take animals running at large or trespassing to the nearest or any pound, and the poundkeeper is to receive and impound them (s. 3). The taking of the animals in the present case for the purpose of impounding them would, if the municipality had power to pass

MAN.

C. A.

THE KING v. LORETTE.

Perdue, C.J.M.

the by-law, be authorised, and from the time of taking they would be in the custody of the law. Rescue of them would, therefore, be a criminal offence at common law. It follows that the by-law would be bad in so far as it attempts to deal with a criminal matter and impose a punishment in respect of it. S. 169 of the Criminal Code, in sub-s. (*b*), seems, in fact, to deal with this offence. If that is so, the by-law is clearly *ultra vires*.

For the reasons I have stated, and following the decision of this court in *Rex* v. *Laughton*, I would answer the second question in the negative. This answer disposes of the case and upholds the decision of the police magistrate in dismissing the charge and releasing the accused. It is not, therefore, necessary to answer the first question submitted.

The answer to the second question disposes of the third question.

Cameron, J.A.

CAMERON, J.A.:—The accused was charged before a provincial police magistrate with unlawfully interfering with a person impounding cattle contrary to the by-law of the rural municipality of West Kildonan in such case made and provided. The magistrate dismissed the prosecution on the ground that the municipality had no power to pass such a by-law, but reserved the following questions for this court. (See judgment of Perdue, C.J.M.)

It is to be noted that the by-law does not authorise the persons named to impound, but to drive or take animals to the pound there to be impounded by the poundkeeper.

The first question submitted might possibly (with the modification suggested above) be answered in the affirmative. But it seems to me that consideration of the part of the by-law therein referred to does not arise on the facts of this case, that the question should, therefore, not have been submitted by the magistrate and that that court is not called upon to answer a question of law which has nothing to do with the facts involved in the matter.

As to the second question, I am satisfied that the decision in *Rex* v. *Laughton*, 6 D.L.R. 47, 22 Man. L.R. 520 (to which we were referred as necessitating a negative answer thereto), would not have been based on the Stat. 6 & 7 Vict. c. 30, had it not been practically conceded by counsel in that case that the statute and

the by-law there in question were substantially identical. It was certainly not drawn to the attention of the court that the English Act was confined in its application to the case of animals trespassing on inclosed land. Of course I am speaking now of the terms of the by-law in the *Laughton* case (which is not now accessible) as if they were similar to those of the by-law now before us, which applies to animals running at large and does not, in express terms, cover the case of animals trespassing on fenced or enclosed premises. Nevertheless, I am satisfied that the decision in *Rex* v. *Laughton*, was correct on grounds I shall subsequently state.

I have examined the question of the common law in force in England prior to and, consequently, in this province since, July 15, 1870. I would refer to the statements as to the law on Rescue and Pound Breach, in vol. 1, Hals. 385-6. See also the Corpus Juris III., 79, 80, 81, 111, 135, 137. The decision in *Rex.* v. *Bradshaw*, 7 C. & P. 233, is important. There it was decided that where an official such as a "hayward" has distrained animals on private land and is taking them to the pound they are in his custody as servant of the owner of the land and not *in custodia legis* and, therefore, taking them from the "hayward" is not an indictable offence.

The conclusion I reach is that under the common law interference with any person, other than officers of the law in the execution of their duties, in driving or taking animals to the pound, was not in England, and would not be here, a misdemeanour or indictable offence. But I need not elaborate this branch, as it seems to me the question as to the validity of the parts of the by-law raised by the second and third questions is decided by Dominion legislation, which is comprehensive on the subject and supersedes the English law.

By s. 168 of the Criminal Code:—

Every one is guilty of an indictable offence and liable to ten years imprisonment who resists or wilfully obstructs any public officer in the execution of his duty or any person acting in aid of such officer.

And by s. 169:—

Every one who resists or wilfully obstructs:

(a) Any peace officer in the execution of his duty or any person acting in aid of such officer;

(b) Any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure: is guilty of an offence punishable on indictment or on summary conviction and liable if convicted

MAN.

C. A.

THE KING v. LORETTE.

Cameron, J.A.

on indictment to two years imprisonment, and, on summary conviction before two justices, to six months imprisonment with hard labour or to a fine of one hundred dollars.

"Peace officer" is defined by s. 26, and "Public officer" by s. 29 of the Code. Under neither definition would the persons mentioned in the by-law come. They would certainly not be persons "employed for the preservation and maintenance of the public peace or for the execution of civil process." Would they be persons "in making any lawful distress or seizure?" "Person" is defined by s. 2 (12) of the Code and by s. 34 (20) of the Interpretation Act. Whether or not the poundkeeper is a public officer or peace officer is not material, as he is clearly a person.

The result is that I am unable to read sub-s. (6) of s. 169 in any other light than making in its terms clear provision for the very case covered by the part of the by-law before us in the second question submitted. There is no doubt that that part is aimed at any one resisting or wilfully obstructing persons in making a lawful distress or seizure of animals running at large. In the case of animals doing damage it would be distress to take them in control or possession. When they are at large otherwise, contrary to the by-law, and are taken control or possession of by any one authorised, that certainly constitutes seizure of the animals. The term "seizure" is a wide one as shewn by the various definitions given in Cyc. XXXV. 1372. Beyond question, to my mind, the taking of animals under control and driving them is amply sufficient to constitute a seizure. The evidence to convict under the by-law would be sufficient to convict under s. 169 of the Code. We have, therefore, a reduplication of the state of affairs in *Reg.* v. *Shaw*, 7 Man. L.R. 518, with a new offence and additional penalties prescribed by the municipality, under the presumed authority of provincial legislation, in addition to the offence and the penalties prescribed by the Code. This makes the by-law to this extent beyond the powers of the local legislature to enact, if it purported to do so. As the legislation does not expressly so authorise the municipality, we must take it that it was not intended to go beyond the powers of the legislature. We must conclude, therefore, that the by-law itself goes beyond those powers. Here, however, this distinction is not material as it is clear that the ground which the by-law attempts to cover is already fully covered by the provisions of the Code.

I am, therefore, of opinion that the second question must be answered in the negative. This disposes with the necessity of answering the third.

FULLERTON, J.A., concurred with Perdue, C.J.M.

By-law ultra vires.

MAN.
C. A.
THE KING
v.
LORETTE.

HAYS v. WEILAND.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., and Kelly, J. April 23, 1918.

DISCOVERY AND INSPECTION (§ IV—32)—LIBEL BASED ON PRINTED PAMPHLET —DISCLOSURE OF NAME OF AUTHOR—ALTHOUGH INCLUDING DISCLOSURE OF NAME OF WITNESS.

On an examination for discovery in an action for libel based on a printed pamphlet, the defendant can be compelled to disclose the name of the author of the pamphlet as being a relevant fact in the case, although it involves the disclosure of the name of a witness.

APPEAL from the order of MEREDITH, C.J.C.P. Reversed. Statement.

R. S. Robertson for appellant; *W. Lawr* for respondent.

The judgment of the Court was read by

HODGINS, J.A.:—Appeal by leave of Clute, J., from an order of the Chief Justice of the Common Pleas, dated the 8th January, 1918, refusing to compel the respondent to answer questions 53, 142, 147, 188, and 190 on his examination for discovery. Hodgins, J.A.

The action is for libel, based on a pamphlet printed by the respondent, who pleads only that the document is not capable of nor intended to have the meaning attributed to it in the statement of claim. The pamphlet refers by name to the appellant, a member of the legal profession, who went to the front; and the innuendo is that the pamphlet charges both cowardice and unprofessional conduct.

The position of the respondent, so far as these five questions are concerned, resolves itself into a refusal to give the name of the person to whom he gave the copies of the pamphlet after he had printed them. He says, however, that that person brought him the manuscript to print.

The reason of the refusal as to question 53 is, that to answer further would "have a tendency to disclose the name of the person whom we intend to call at the trial."

As to 142, the refusal is on the same ground, the question being as to whether certain named people were "acting with" him "in connection with this matter."

Question 147 inquires whether it was the respondent's inten-

ONT.
S. C.
HAYS
v.
WEILAND.
Hodgins, J.A.

tion that what he printed should come to the attention of the people already mentioned. The remaining two questions deal with specific people, and ask if they received printed copies of the pamphlet. To the first of these questions the same ground of objection is taken, and it obviously is intended to cover the remaining two.

The only question to which any plausible ground seems to be open is No. 53. The others deal with the respondent's good faith—a very important matter when, as here, his counsel argues that he was an innocent actor in the matter, merely printing what he did in the way of his trade. The respondent, who admits reading the manuscript and thinking it was "a pretty hot reply," kept it in his pocket, having been told it was secret, and destroyed it after printing it. The appellant seems to be entitled to test this phase of the matter; and the four last questions could have been answered without disclosing any names, as they had been stated by the questioner. The refusal is therefore really not on that ground, but rests upon a disinclination to afford any clue to the real offender, the writer of the manuscript.

In consequence, the true point involved in all the questions is, whether the fact or allegation that an answer might disclose the name of a witness is enough, in this libel case, to warrant the refusal.

It should be stated that the learned Chief Justice of the Common Pleas exacted an undertaking from the respondent that on the trial he would "admit publication by him of the printed paper containing the words complained of," and considered that with such an admission the appellant was not entitled to press for further answers.

In *Marriott* v. *Chamberlain* (1886), 17 Q.B.D. 154, Lord Justice Bowen, in the Court of Appeal, sitting with Lord Esher, M.R., and Fry, L.J., said (pp. 164, 165):—

Although one party cannot compel the other to disclose the names of his witnesses as such, yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist to information with regard to such fact is not displaced by the assertion that such information involves the disclosure of the name of a witness.

This view of the law follows *Storey* v. *Lord Lennox* (1836),

1 Keen 341, 48 E.R. 338, and is itself adopted in *Humphries & Co.* v. *Taylor Drug Co.* (1888), 39 Ch.D. 693, 695; *Wootton* v. *Sievier*, [1913] 3 K.B. 499; and *Macdonald* v. *Sheppard Publishing Co.* (1900), 19 P.R. (Ont.) 282.

To this rule there are two exceptions, and both are relied on by the respondent. One is that to answer as desired would be oppressive, and the other, that the question is put for a purpose outside the action, as, for instance, that of bringing an action against some other person.

The answers to the questions would not of course entail anything in the nature of oppression. As regards the other exception, it is really a rule applicable only to newspapers, and depends upon their peculiar character and privileges. This appears from such cases as *Gibson* v. *Evans* (1889), 23 Q.B.D. 384, *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445 (note), *Hope* v. *Brash*, [1897] 2 Q.B. 188, and *Plymouth &c. Society* v. *Traders Publishing Association*, [1906] 1 K.B. 403, in which the defences set up were all statutory under the Act relating to newspaper libel, and consequently the information sought possessed no relevancy.

The exception itself is founded upon considerations of policy—for, if a newspaper proprietor were compelled to give up the name of his informant, the collection of news would be difficult; and, in the second place, if fair comment and ample apology are a defence to a newspaper, it would be difficult to deny them to the real author of the words complained of.

These considerations do not apply here, and there is no reason for extending the protection afforded to newspapers to the printer of a fugitive libel, who, after reading it, asks to be assured that it will lead to no trouble, then prints it, and destroys the manuscript.

There remains, however, the inquiry whether the name of the person to whom the copies were delivered is a material fact. It may be observed that the delivery deposed to by the respondent is not in itself necessarily publication, because the recipient was the author of the manuscript. But it was part of the publication, and publication is or may be a complex operation; and the intent and knowledge of the respondent, when delivering these copies, is an element of considerable weight in determining whether he was an innocent printer or a participant in an attack, particularly mean and unpatriotic, if the allegations were not true or believed

ONT.
S. C.
HAYS
v.
WEILAND.
Hodgins, J.A.

to be so by him. The name of the person to whom the copies were given may be illuminating and indicate the purpose underlying the secrecy observed, and may even destroy the present defence and aggravate the damages. It might also tend to mitigate them if it turned out that the respondent was misled or inveigled into what he did by his friend.

The relevancy of the identity of the person to whom the copies were given may be put on several grounds. Innocency in circulating libellous matter may entirely absolve the person publishing if he shews that he was not negligent: *Vizetelly* v. *Mudie's Select Library Limited*, [1900] 2 Q.B. 170; *Smith* v. *Streatfeild*, [1913] 3 K.B. 764; *Haynes* v. *DeBeck* (1914), 31 Times L.R. 115.

In *Vines* v. *Serell* (1835), 7 C. & P. 163, Park, J., ruled that, although publication was admitted, the manner of it was competent evidence with a view to the amount of damages. This ruling was amplified in the judgment given by the Common Pleas in *Pearson* v. *Lemaitre* (1843), 5 M. & G. 700, 134 E.R. 742, after a very full argument. Tindal, C.J., there said (pp. 719, 720):—

"Either party may, with a view to the 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."

Inspection of documents was granted in *Pape* v. *Lister* (1871), L.R. 6 Q.B. 242, though having a bearing only on the quantum of damages.

In Ontario the case seems covered in principle by the judgments of Mabee, J., and a Divisional Court, in *Massey-Harris Co.* v. *DeLaval Separator Co.* (1906), 11 O.L.R. 227 and 591. In that case the name of the informant was ordered to be disclosed. On the other branch, viz., discovery of the names of the persons to whom the circular was published, Meredith, C.J. (now C.J.O.), said (p. 593): "The inquiry they desire to pursue is undoubtedly relevant to the issues in the action or some of them and on the quest on of damages."

One of the issues there was qualified privilege, which would raise not only the question of the mutual interest between the persons to whom communication was made and the publisher of

ONT.

S. C.

HAYS v. WEILAND

Hodgins, J.A.

the libel, but also that of malice as defeating privilege. In this case there is no defence of privilege, but innocent publication is asserted, into which the question of *bona fides*, honest belief, or malice enters, and the principle must be the same.

McKergow v. *Comstock* (1906), 11 O.L.R. 637, another case of privilege, contains the following statement of the law by Anglin, J. (p. 643):—

"Apart from any question of privilege *bonâ fides* is always material upon the question of damages. A plaintiff may offer evidence to prove lack of good faith—absence of honest belief on the part of a defendant—in order to aggravate his damages; a defendant may, in like manner, give evidence to shew that he acted in good faith to mitigate the damages: *Pearson* v. *Lemaitre*, 5 M. & G. 700, 719, 134 E.R. 742. The existence or absence of express malice is the issue to which such evidence is relevant and, as the lack of honest belief is cogent evidence of such malice, the existence of such belief goes far to negative it."

The appeal should be allowed with costs, including those of the order appealed from and the application for leave to appeal, to the appellant in any event; and an order for attendance at his own expense of the respondent, and requiring him to answer these questions, should issue. *Appeal allowed.*

NASHWAAK PULP & PAPER Co v. WADE.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 20, 1918.

WATERS (§ II D—95)—LUMBERMEN—RIGHT TO FLOAT LOGS DOWN STREAM —RIGHTS OF RIPARIAN OWNERS—OBSTRUCTIONS.

Lumbermen and riparian proprietors have concurrent rights in a floatable river. The lumbermen have an undoubted right for passage of their logs down the river, but this right must be exercised subject to the rights of the riparian proprietors, and all reasonable means must be used and care and skill taken to avoid injury to the riparian owners.

Statement.

APPEAL by defendant from the judgment of the King's Bench Division in an action to recover damages for injury to land by depositing logs thereon, damaging and destroying crops and wearing away the bank of the intervale. Affirmed.

A. J. Gregory, K.C., and *M. J. Teed*, K.C., for appellant; *P. J. Hughes*, *contra*.

Hazen, C.J.

HAZEN, C.J.:—The Nashwaak river, which is a floatable stream, is a tributary of the St. John, into which it enters on the easterly

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

side opposite the City of Fredericton. From the earliest settlement of the province it has been used for the floating and driving of logs. The plaintiffs own a farm situate in the county of York about 8 miles above the mouth of the Nashwaak and situated on its west bank, 40 or 50 acres of the farm consisting of intervale land, and this farm is about 2 miles above certain jam piers which were placed in the river by the predecessors in title of the defendant company. The defendant, a company duly incorporated under the N.B. Companies Act, is the owner of large areas of land at the head waters of the Nashwaak river, and also owns the mills at the town of Marysville, which were formerly owned and operated by the late Alexander Gibson.

It appears from the evidence that the dam which held back the water which supplied power to these mills went out in the year 1913, and that since that year no lumber has been manufactured at these mills, and that in the year 1917 the machinery had been removed, or was being removed, from them, and they were being dismantled and there was nothing left of the mill except the wooden structure in which the machinery had formerly been. It further appeared that the logs which were brought down the Nashwaak by the defendant company during the season of 1917 and preceding years back to 1913 were driven by Marysville to the mouth of the Nashwaak river opposite Fredericton, where they were rafted and freighted down the River St. John to its mouth. The defendant is the owner of the alveus of the stream, and of land on both sides of the river at the point where the jam piers were constructed, about two miles below the plaintiff's intervale, and is also the riparian proprietor of both sides up as far as the plaintiff's lower line. In the spring of 1917 there was a considerable quantity of old logs in the river that had not come down in the spring drive of 1916, about three million of which belonged to the defendants, and a quantity to the Frasers, who also operated upon the river. In the spring of 1917 the defendant had a large quantity of new logs, and the Frasers also had a considerable quantity. Many of the logs came down in April or May, 1917, and were stopped at the jam piers maintained by the defendant company near the Penniac bridge, this bridge being very close to the piers which, as I said before, were within about two miles of the lower line of the plaintiffs' intervale. These logs were being

sluiced out in the ordinary way, and it is stated about three million feet had passed through. The spring freshet had subsided, and about the 17th or 18th of June a freshet that appears to have been unusual for the time of year occurred, and the water rose to a considerable height. The plaintiffs claim that the logs being jammed in the river above the piers filled the river completely, being wedged in, as was said by one of the witnesses, like nails in a keg, from the surface of the river to the depth of 25 or 30 ft., extending up river for a mile or more, and so created a dam, raising the water on the plaintiffs' land to a much greater height and retaining it there for a much longer period than otherwise would have taken place, and that this would not have occurred but for the boom and piers which were maintained by the defendant in the river. This caused injury to the crops upon the plaintiffs' intervale, and when the freshet subsided logs of the defendant and of the Frasers grounded upon it, thereby causing damage. It is also claimed by the plaintiffs that the action of the logs coming down the stream caused damage by wearing and tearing away the intervale at the river bank, and that a ford by which they usually crossed the river was blocked by the logs, thereby causing further damage.

The jury, in answering the questions submitted to them, assessed the damage to crops at $544, injury to the river banks by the logs of the defendant company prior to the freshet of June 18, $50, and during that freshet at $50. For stoppage of the ford used by the plaintiffs at Gibson's Island, by the logs of the defendant company, $25, and for the stranding of the defendant's logs on the plaintiffs' intervale, $15, making a total of $684.

The lands of the plaintiffs, as stated, are situated about 2 miles above the jam piers. Opposite the plaintiffs' upper line there is a small island known as Gibson's Island, and to the east of the plaintiffs' intervale as it juts out into the river is a large island situated at the confluence of the Nashwaak and Penniac Rivers, known as Penniac Island. At this point the river divides into two channels, one known as the eastern or Penniac channel and the other known as the western channel, which skirts the southern side of the plaintiffs' intervale. The evidence was that if the river at the point of division was left unobstructed many, if not most of the logs, would go down the eastern or Penniac channel. During

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

the season of 1917, however, and for the 2 years preceding, the defendant had strung a boom from a point at or opposite the lower end of Gibson's island extending down to and along the northern end of Penniac Island, effectually closing the eastern or Penniac channel, and this had the effect of diverting all logs coming down the river into the western channel by and in front of the plaintiffs' lands. This fact has important bearing on the plaintiff's claim for damages caused by the wearing away of the bank by the logs of the defendant. The defendant denied that the logs filled the river to the extent alleged or that it created a damage or raised the water to any appreciable extent, and further alleged that the freshet waters would have overflowed the plaintiffs' intervale and damaged their crops if there had been no jam at all. He also denied the trespass complained of and denied the liability, and alleged that the river is a common and public highway for the driving and floating of logs, and the defendant was lawfully using the same for such purposes without negligence, and that the freshet in question was of such an unusual and extreme character as to amount to *vis major*, and logs were carried on the plaintiffs' lands without the defendant's negligence, and also that some of the damage complained of was done by the logs of the Frasers. The defendant also justified under Act of Assembly, N.B. (1865), c. 53. This statute authorised Alexander Gibson, the proprietor of the Nashwaak mills to erect and maintain a dam across the river Nashwaak at or near the lower bridge, for the purpose of stopping, collecting together and sorting timber, logs, masts, spars and other lumber which might float down the Nashwaak river and for the purpose of selecting and separating therefrom all of his logs, masts, spars and other lumber. He was also authorised to erect and maintain a boom extending from the boom just mentioned down the river Nashwaak near the centre thereof, and near to the said mills for the purpose of protecting and securing the timber, logs and lumber for the use of the said mills. It declared it to be his duty at all times while the boom mentioned in the first section of the Act was kept and maintained across the river and whenever any timber, logs or lumber coming down the river were stopped by said boom, to cause the same to be examined and sorted out each day except Sundays, and to select thereform without any unreasonable delay, all the timber, logs or lumber belonging to him.

and place the same within the boom mentioned in the second section of the Act, or otherwise to remove the same and to allow the remainder of such lumber to float down on the western side of the said river Nashwaak to and over the sluice of the mill dam of the said Alexander Gibson in the customary manner. S. 8 of of the Act provide that all the rights, powers and privileges given to and vested in the said Alexander Gibson and all the duties and liabilities by the Act imposed upon him should vest in and attach to his heirs and assigns, being the owners of the said Nashwaak mills, as fully in all respects as the same were given to and vested in and attached to him.

The trial judge withdrew this statute from the consideration of the jury as not applying to logs not manufactured or not intended for manufacture at the Nashwaak mills, giving to it the reasonable construction that the Act only applied to logs and lumber to be manufactured at those mills and not otherwise, a construction which, I think, can be clearly gathered from the language of the Act. Otherwise it is impossible in my mind to attach any meaning to the words "proprietor of the Nashwaak mills" in the first section, the words "near to the said mills for the purpose of protecting and securing the logs and lumber for the use of the said mills" in the second section, and the words "being the owners of the said Nashwaak mills" in the eighth section. I think it is perfectly clear that the legislature in giving the authorisation for the construction of these piers did so for the purpose of enabling the more effective operation and carrying on of the mills at Marysville, and as the dam which provided power which drove those mills had been carried out in 1913, and no lumber was sawn at those mills after that date, and as the mills had been dismantled and at the time of the trial the machinery either had been or was being removed, I think the judge was right and that in charging the jury that the provisions of c. 53 of the Act of 1865 were not applicable to the defendant company and that Act had no effect so far as the case was concerned, he was fully justified. The defendant, however, was the owner of the land on both sides of the stream where the boom was constructed, and it becomes necessary, therefore, to consider what his rights were as such riparian proprietor.

A question very similar to this was fully gone into by the late

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

Barker, C.J., in the case of *Roy* v. *Fraser* (1903), 36 N.B.R. 113, and a conclusion come to that the owner of the alveus of a navigable river and of the land on both sides of it upon which a dam stands has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property, but such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water and to the public right of passage. This public right is not a paramount right, but a right concurrent with that of the riparian proprietors, and if in the exercise of their public right the defendants in driving their logs down the stream injured the plaintiffs' dam, the onus is upon them to shew that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury. In that case the plaintiff had a water-power mill upon Green river in the County of Madawaska for the purpose of working his mill, with a certain dam across a certain stream where the same passed through his lands, and the action was brought against the defendants, for damaging said dam. The language in which Barker, C.J., at p. 132, refers to Green river is applicable to the Nashwaak:—

> It is, I think (he says), clear from the evidence that this Green river is a navigable river, or to use a practice which has been adopted in such cases, a floatable river, the same as the Hammond river which was under discussion in *Rowe* v. *Titus*, 1 All. 326, among other rivers and streams in this province and elsewhere. They are private rivers subject to the public right of passage. The dam in question is said to have been built some 50 or 60 years ago, and there is no question raised here either as to its having been built by the owner of the bed of the stream at that point or that the plaintiff who now owns it is also the owner of the land on both sides of the river at this point and the owner of the bed of the stream as well. The original owner in building this dam for the purpose of his mill, and the present owner in maintaining it for the same purpose both acted in the undoubted exercise of a right incident to the ownership of the soil.

In support of this proposition he mentioned the case of *Caldwell* v. *McLaren* (1884), 9 App. Cas. 392 at pp. 404, 405:—

In this case I, therefore, conclude that the defendant had the right to place a boom and piers, but that that right must be exercised subject to the rights of other riparian proprietors to the reasonable use of the water, and that if in consequence of the erection of this boom logs coming down the Nashwaak river were held back to such an extent as to dam back the water and cause the same to overflow the plaintiffs' land or to be retained on the

plaintiffs' land for a longer time than would otherwise have been the case or to do other injury thereto, the defendant is liable in damages to the plaintiffs therefor, and that it is incumbent upon the defendant to shew that he used all reasonable means and all reasonable care and skill in order to avoid injury to the riparian proprietors above and below him, but if by the construction of the boom he infringed on the rights of the proprietors above him as it was claimed occurred in this case, he is liable to damage to such proprietors. In 1853 the Court of Common Pleas of Upper Canada held in *The Queen* v. *Meyers*, 3 U.C.C.P. 305, that the erection of a dam on a river such as the one now in question by a riparian owner was illegal. The dam was a nuisance and as such an indictment would lie to have it abated. *In Farquharson* v. *Imperial Oil Co.*(1898), 29 O.R. 206, Armour, C.J.,, quoted the passage I have cited from *Caldwell* v. *McLaren*, *supra*, and held that the dams had not been wrongfully erected although they were erected not by any legislative authority but by virtue of a right of property in the bed of the stream. The more recent Canadian case, on the subject, however, is that of *Ward* v. *Township of Grenville* (1902), 32 Can. S.C.R. 510. In that case it appeared that the defendant, by legislative authority, had erected a bridge over a tributary of the Ottawa river. The appellant, Ward, was a log owner whose lumber was being driven down this river, which is a stream, I should judge, of the same character as the Nashwaak river, and the bridge was carried away by reason, it was alleged, of the negligence of those driving the logs. The township brought an action and recovered. The judgment was sustained.

In the leading case of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, the judgment of Blackburn, J., in the Court of Exchequer Chamber, is quoted with approval by the Lord Chancellor:—

> We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima 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, but as nothing of this sort exists here it is unnecessary to inquire what excuse would be sufficient.

The Lord Chancellor goes on to say that the general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose land is flooded with water from his neighbour's reservoir, or

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's gas works, is injured without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmlesst o others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbours', should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have occurred, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and undisputed consequence, and upon authority this is established to be law, whether the thing so brought be beasts or water or filth or stenches.

In the same case Lord Cranworth, in the course of his judgment, said at p. 340:—

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.

My conclusion from these authorities is that if the booms and piers maintained by the defendant near the Penniac bridge held back logs coming down the Nashwaak river to such an extent as to dam back the water and cause the same to overflow the plaintiff's land, or retained the water thereon for a longer period than would otherwise have been the case, the defendant is liable for such damages, if any thereby occasioned.

Taking this view of the legal rights of the parties, the question now arises with regard to the evidence and the finding of the jury, and in this connection and at this point I think it desirable to give the questions submitted to the jury with their answers thereto. They are as follows:—

The Court:—1. Was the flooding of plaintiffs' intervale due to the freshet of June 18? Yes. 1A. Was it due to the backing up of the water by the jam of logs at the piers and extending up river? The jam retained the water to quite an extent.

2. Was the freshet which occurred on or about the 18th day of June last of such violence and so unusual and extraordinary as to be properly called an act of God or *vis major*? No.

3. Was the defendant company guilty of any negligence or want of

reasonable and proper care and precaution in the construction and maintenance of the piers and booms at the Penniac bridge? No.

4. If so, in what did such negligence consist?

5. Did the defendant's logs cause damage to the plaintiffs' lands by injuring and carrying away portion of the bank on the river? Yes.

6. Did the defendant company take reasonable and proper care and precaution to prevent the logs driven down the river causing injury to the bank of the plaintiff's land? No.

7. Did the defendant company use proper and reasonable care and precaution to keep its logs free from going on the plaintiffs' lands? No.

8. Was the jam formed at the piers near the Penniac bridge due to any negligence or want of proper and reasonable care and precaution on the part of the defendant company? To a certain extent.

9. If so, in what did such negligence consist? In not making some provision for holding a portion of their logs at some point below the jam piers.

10. What damages did the plaintiff sustain by reason of the flooding of his intervale lands on or about the 18th day of June last? Total damage to crops, $544.90.

11. What damage did the plaintiff sustain by reason of injury to his river banks by the logs of the defendant company (*a*) prior to the June freshet of the 18th, (*b*) during the freshet of June 18? (*a*) $50; (*b*) $50.

12. What damages did the plaintiff sustain by reason of the stoppage if any, of the ford used by him at Gibson's island by the logs of the defendant company? $25.

13. What damages did the plaintiff sustain by reason of the stranding of the defendant's logs on his intervale lands? $15.

Questions submitted by plaintiffs:

1. Do the plaintiffs own and occupy the lands described in the statement of claim? Yes.

2. Did the defendant in the month of June, 1917, maintain in the Nashwaak river (*a*) The piers and boom referred to in the evidence as the jam piers and boom? Yes. (*b*) Logs in a jam above the jam piers? Yes.

3. Did the defendant negligently allow said jam to obstruct and hold back this water in the Nashwaak river? Yes.

4. Were plaintiff's crops injured as a result of the water being so obstructed or held back? Yes.

Questions by defendant:

1. Did the defendant exercise reasonable and usual ordinary care in conducting its spring drive and in the management of its logs in 1917? Not in the vicinity of Wade's intervale.

2. Was the freshet of June 17 and 18, 1917, extraordinary and unusual having regard to the time of year? The freshet of June 17 and 18, 1917, was unusual.

3. Could the defendant have reasonably anticipated such a high freshet in June? No.

4. Would the high freshet of June, 1917, have overflowed the plaintiff's land and injured their crops if the jam had not been there? We are unable to say.

5. Did the jam of logs in June, 1917, cause the water to be backed up so as to damage the plaintiffs' lands and crops more than they would have been if the jam had not been there? Yes.

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

6. Did the plaintiffs forbid or refuse to permit the defendant to remove the logs from the plaintiffs' land after the first June freshet? Yes.

7. Is the Nashwaak river a floatable river for the driving of logs? Yes.

From these answers it will be seen that the jury found that the overflowing of the plaintiffs' intervale was due to the freshet of June 18, and that the jam caused by the logs piling up against the boom and piers constructed by the defendant at the Penniac bridge retained the water to quite an extent; that the defendant's logs caused damage to the plaintiffs' lands by the injuring and carrying away of a portion of the bank on the river; that the defendant company did not take the reasonable and proper care and precaution in order to prevent the logs driven down the river causing injury to the bank of the plaintiffs' lands, and did not take proper and reasonable precaution to keep its logs from going on the plaintiffs' lands; that the jam formed on the piers near the Penniac bridge was to a certain extent due to negligence and want of proper and reasonable care and precaution on the part of the defendant company, and that such negligence consisted in the company not making some provision for holding a portion of their logs below the jam piers. In answer to a question by the plaintiffs the jury said that the defendant negligently allowed the said jam to obstruct and hold back the water in the Nashwaak river, and that the plaintiffs' crop was injured as a result of the water being so obstructed and held back.

In answer to the defendant's questions, it was stated that the defendant did not exercise reasonable and ordinary care in conducting its spring drive and in the management of its logs in 1917, in the vicinity of Wade's intervale; that they (the jury) were unable to say whether the freshet of 1917 would have overflowed the plaintiffs' land and injured their crops if the jam had not been there; that the jam of logs in June, 1917, caused the water to be backed up so as to damage the plaintiffs' lands and crops more than would have been the case if the jam had not been there.

A great deal of evidence was given on both sides with regard to the rise in water in the river, and it was contended on behalf of the defendant that as, according to certain witnesses, the rise below the jam was only 1.78 feet less than above, the backing up of the water and consequent damage to the intervale could only have been caused by the jam. The jury, however, had the opportunity of seeing the witnesses, hearing them under oath, and witnessing

their demeanour on the stand. They had the further advantage of inspecting the *locus in quo* and while they state they are unable to say if the high freshet in June, 1917, could have overflowed the plaintiffs' land and injured their crops if the jam had not been there, yet they say that the jam caused the water to be backed up and retained so as to damage the plaintiffs' lands more than they would have been damaged if the jam had not been there, and they further find that the plaintiffs' crop was injured as a result of the water being so obstructed and held back, and that the flooding of plaintiffs' intervale was due to the freshet of June 18, and that the jam retained the water to quite an extent.

In view of all these findings, and of the evidence upon which the same were based, I am of opinion that the trial judge was right in directing a verdict for the plaintiffs and that there was ample evidence to justify a jury of reasonable men in coming to the conclusion which they did. It has been contended that the answer to question 1A is not a finding that the overflowing of the plaintiffs' intervale was due to the backing up of the water by the jam. The answer of the jury to that question is that the jam retained the water to "quite an extent." I am disposed to think that the fair meaning to be derived from this is that after the water had risen the jam retained it and prevented it from running off as rapidly as it otherwise would, and therefore made the damage caused by it so much the greater.

In answer to the third question put by the plaintiffs, however, the jury distinctly say that the defendant negligently allowed the jam to obstruct and hold back the water in the Nashwaak river, and in answer to question 4 say that the plaintiffs' crop was injured as a result of the water being so obstructed or held back. To my mind it makes very little difference whether the injury was caused by the backing up of the water by the jam of logs at the piers or by the retention and holding back of the water by that jam and its being prevented from running out in the usual free and unobstructed manner. In either case the damage was caused by the action of the defendant in maintaining the boom and piers which occasioned the jam of logs and the backing up of the same.

The answers to the questions submitted will shew that the jury accepted the evidence of the plaintiffs' witnesses to the effect that a large jam of logs existed and remained above the jam piers after

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

June 17, and raised up the waters of the Nashwaak river above the jam and held the waters back longer than they would otherwise have remained had there been no obstruction in the river in the form of the jam of logs caused by the piers and booms, and that in consequence the crops on the plaintiffs' intervale were injured and to a great extent ruined.

I now come to the question raised by the defendant to the effect that the freshet in June was of such an unusual and extraordinary character as to amount to *vis major*, or the act of God, and that therefore it was not liable. The evidence shews that in the spring of the year, May and early June, the rainfall did not exceed that which was customary at that season of the year, and this state of affairs continued until about June 15, when heavy rains occurred which caused the water to rise in the river to what was an unusual height for that season of the year. This question was left to the jury by the trial judge in these words:—

The act of God does not necessarily mean exertion of natural force so tremendous in extent that no human force or scheme could possibly prevent its effect. It is enough that it should be such that human effort could not reasonably be expected to anticipate it. The question for you is this: was the flood due to the freshet so great that it could not reasonably have been anticipated, although if it had been anticipated the effect might have been prevented. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant cannot claim immunity, but the company should not be held liable because it could not reasonably anticipate—that is, however great the flood might have been on the 18th, if it was no greater than floods that happened before and would be expected to occur again, then the question of *vis major* or act of God would not arise, but as a matter of law I do not think the company should be held liable because it did not prevent a very extraordinary act of Nature which it could not reasonably anticipate. Now the question largely turns upon whether this freshet could have been reasonably anticipated and this is a matter for you, for when the law creates a duty and the party is disabled from performing it without any default of his own by the act of God, the law will excuse him.

The following question concerning the matter was left to the jury by the court:—

2. Was the freshet which occurred on or about June 18 last of such violence and so unusual and extraordinary as to be properly called an act of God or *vis major*? No.

Question by defendant:—

2. Was the freshet of June 17 and 18, 1917, extraordinary and unusual having regard to the time of year? The freshet of June 17 and 18, 1917, was unusual.

3. Could the defendant have reasonably anticipated such a high freshet in June? No.

I must say that on first consideration the answers to these questions seem more or less conflicting, but having regard to the answer to the question submitted by the court, that there was no *vis major*, the jury having been properly directed on the subject. I think the meaning of the answers to the questions submitted by defendant becomes reasonably clear. It was undoubtedly the opinion of the jury that there was no *vis major* and it so found. That is evident from their answer to question 2 submitted by the court. In answer to question 2, submitted by the defendant, they found that the freshet of June 17 and 18 was unusual. They were asked if it was extraordinary and unusual. They simply found it was unusual. The inference, therefore, clearly is that they did not regard it as extraordinary. They also found that the defendant could not reasonably have anticipated such a high freshet in June. To my mind it is clear that the jury meant that such a freshet was unusual in the month of June, but that it was not extraordinary, and while it was unusual in June and while the defendant could not reasonably have anticipated such a high freshet in that month, there was no reason why such a freshet might not have been anticipated earlier in the season, at the time when the spring freshet ordinarily occurs. The inability to anticipate, to my mind had reference to the time of year, and that being the case, I do not think the answers to questions 2 and 3 by the defendant in any way limited the answer of the jury to the question put by the court when it asked directly if the freshet was of such violence and so unusual and extraordinary as to be properly called an act of God, or *vis major*, and the jury found it was not.

Conflicting evidence was given with regard to the extent and character of the storm, but the question to my mind was one for the jury, they being properly directed, and there was evidence that justified them in coming to the conclusion and giving the answer which they did, and finding that the injury was not caused by the act of God.

The defendant relied upon the case of *Nichols* v. *Marsland*, (1875), L.R. 10 Ex. 255. This case decided that one who stores water on his own land and uses all reasonable care to keep it safely there is not liable for an action for the escape of the water which injures his neighbour, if the escape be caused by an agent beyond his control, such as a storm which amounts to *vis major* or an act of God, in the sense that it was practically, though not physically,

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

impossible to resist it. This case differs from the one under consideration, however, in several important particulars. In the first place, the jury found that there was a *vis major*. The question was submitted to them, and if the jury had found as in the present case, that there was no *vis major*, the decision of the court would probably have been different. In that case a storm which was in the nature of a cloudburst came and caused the damage. It was not contended, as I understand the evidence, that there was any cloudburst which caused the damage in the present case. It is a matter of common knowledge in this province that freshets occur and have occurred for very many years past at different periods, and if in consequence of one of these freshets, the jury having found that there was nothing extraordinary with regard to the present one, the river is raised to such a pitch as to cause logs that, but for an obstruction in the river, would have gone out in the natural way to jam and retain the water so that it is backed up and thus damages the land of a proprietor further up the stream, it cannot be successfully contended that the defendant can escape liability on the ground that the conditions which caused the rise of water constitute a *vis major*, in view of the fact that with all the facts and evidence before them the jury decided that it was not a *vis major*, and that the freshet of June, 1917, was not extraordinary, but unusual, having regard to the time of the year.

In the recent case of the *Greenock Corporation* v. *Caledonian Railway*, [1917] A.C. 556, which was not cited in the factums, or at the argument, it was held:—

> It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the natural channel are adequate to carry off the water brought down even by an extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of an act of God or *damnum fatale* (the equivalent used in Scottish cases to the expression an act of God), but is the direct result of the obstruction of a natural watercourse. There is no difference in this respect between the law of England and that of Scotland.

In this case the railway company contended that an overflow of water undermined and brought down the wall of the station, and that this would not have happened but for an interference with the natural course of the stream by the corporation.

The Lord Chancellor, in referring to the case of *Nichols* v. *Marsland*, *supra*, upon which reliance was placed by the appellants, said at p. 572:—

In that case it was decided that if the escape of water from a reservoir was due to the act of God, the person maintaining the reservoir is not liable. (He says the case has been tried by a jury and that two observations arise upon it). The first is that the case was dealt with in the argument and judgments with reference merely to the accumulation of water in the reservoir. There is no reference to the fact that the course of a natural stream had been interfered with. . . . This decision having reference merely to the storage of water, as in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, does not affect the question of liability or interference with the course of a natural stream, as laid down in the authorities which he cited. Secondly, the jury had found that the damage was occasioned by the act of God.

Lord Dunedin, in the same case, referring to *Nichols* v. *Marsland*, *supra*, states that

it was decided upon the footing of the verdict of the jury, which, as construed by the court, amounted to a direct finding, that the act in question was an act of God, which, is the exact equivalent to the expresssion used in the Scottish cases—*damnum fatale*.

Lord Shaw, concurring in the judgment of the Lord Chancellor, says:—

No doubt whatsoever is thrown upon these doctrines by *Nichols* v. *Marsland*. A perusal of the judgments and procedure therein shews that it was held by a jury's findings that the disaster did, as a matter of fact, occur by a *damnum fatale*. I cannot, I confess, view the case as wholly satisfactory, but its conclusion was reached undoubtedly and solely by the road of settled fact—an affirmance of *damnum fatale*.

His Lordship says, quoting the words of Lord Chelmsford in *Tennent* v. *Glasgow*, 2 M. (H.L.) 22:—

He was bound, therefore, under those circumstances—interfering with the stream and with another person's right over the stream—to provide against every contingency, and although it was an extraordinary flood in that case which occasioned the bursting of the dam, it was one which he ought to have provided against. It is accordingly quite unnecessary to go into the doctrine of *damnum fatale* in general.

I am not entirely satisfied that that expression, or the equivalent expression, "the act of God," will ever be capable of complete, exact and unassailable definition. . . . Further, I may be allowed to express the doubt whether expressions such as those used by Lord Cockburn in *Samuel* v. *Edinburgh & Glasgow Railway*, 13 Dunlop 312, p. 314, as to nature's "miracles" do anything to clarify, or indeed whether they do not confuse the issue, and I am quite clear that when, in *Potter* v. *Hamilton and Strathhaven* (1864) 3 M. 83, at 86, Lord Ardmillan supplemented his citation from Lord Westbury's judgment in *Tennent's* case, *supra*, by the observation: "A party who makes a new work is bound to protect those on a lower level from extraordinary as well as ordinary accumulations of water, provided they be not such as to amount to an unprecedented event, so improbable and unnatural as could not have been reasonably anticipated," such a gloss is not warranted by law. Its effect might be to whittle away and undermine an affirmation of the law which without it would be as it was meant to be and is, broad and firm.

Lord Wrenbury said:—

The case is not that of a man who has brought a wild beast upon his land and has effectually chained it, and the chain has been broken by the act of

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

Hazen, C.J.

God. That was *Nichols* v. *Marsland*, *supra*. It was a case in which the act of God, if there was one, brought the wild beast, and but for the act of man there was a safe exit for the wild beast, and it would have gone away and there would have been no injury. The act of man consisted in closing the exit, which, had it remained, would have rendered the advent of the wild beast harmless. To construct a reservoir on your own land is a lawful act. To close or divert the natural line of flow so as to render it less efficient is not. It has never been held that in such a case there is not liability.

With regard to the damage done to the banks of the plaintiffs' intervale by logs coming down the stream, the jury found that, prior to the June freshet, it amounted to $50, and, during the June freshet, the same amount. It was admitted that the river is a floatable and drivable river for the floating and driving of logs, and is a common and public highway for that purpose, and the jury so found in answer to question 7 put by the defendant.

The cases which I have quoted in the previous part of this judgment I think clearly establish the proposition that while the lumbermen and riparian proprietors have concurrent rights in the river, and the lumbermen have an undoubted right for passage of their logs down the same, that that right must be exercised subject to the rights of the riparian proprietors, and that the defendants must use all reasonable means and exercise all reasonable care and skill in driving their logs, in order to avoid injury to the riparian proprietors. See *Ward* v. *Township of Grenville*, 32 Can. S.C.R. 510, and *Roy* v. *Fraser*, 36 N.B.R. 113.

In the present case it does not appear that the defendant took any precautions in order to protect the plaintiffs' intervale from injury caused by the drive in the spring of 1917. On the contrary, I have already pointed out that at the point above the plaintiffs' intervale, where the river divides into two channels, one is known as the eastern or Penniac channel and the other as the western channel, if the river was left unobstructed most of the logs would go down the eastern or Penniac channel, and could not in any way injure the plaintiffs' intervale, but before the season of 1917 the defendant had strung a boom, and during that season maintained a boom, from a point at or opposite the lower end of Gibson's Island, thus effectually closing the eastern or Penniac channel and diverting all logs coming down the river.

White, J.

WHITE, J.:—I agree with the conclusion arrived at by the Chief Justice, that the verdict entered upon the findings of the jury in this case should not be disturbed, and wish to add only a few observations of my own.

N. B.

S. C.

NASHWAAK PULP & PAPER CO. v. WADE.

White, J.

Questions 1 and 2 by the court are as follows:—

Was the flooding of plaintiffs' intervale due to the freshet of June 18? A. Yes.

Was it due to the taking up of the water by the piers and extending up river? A. The jam retained the water to quite an extent.

Question 4 by the defendant is as follows:—

Would the high freshet of June, 1917, have overflowed the plaintiffs' land and injured the crops if the jam had not been there? A. We are unable to say.

Question 5 by the defendant is as follows:—

Did the jam of logs in June, 1917, cause the water to be backed up so as to damage plaintiffs' lands and crops more than if the jam had not been there? A. Yes.

Taking these questions and answers together, it is quite clear that the jury have found that, but for the jam of logs at the piers mentioned, the plaintiffs' lands possibly might not have been injured at all by the overflowing of the water, and certainly would not have been injured to the extent which they were injured had it not been for the existence of the jam referred to. By their answer to question 3 by the court the jury found that the defendants were not guilty of negligence or want of reasonable, good and proper care and precaution in the construction and maintenance of the piers and booms at Penniac bridge. This question and answer should be read in connection with questions 8 and 9, and the answers thereto, which are as follows:—

Q. Was the jam formed at the piers near the Penniac bridge due to any negligence or want of reasonable care and precaution? A. To a certain extent.

Q. If so, in what did such negligence consist? A. In not making some provision for holding a portion of their logs at some point below the jam piers.

Questions 3 and 4 by the plaintiffs, and the answers thereto, are as follows:—

Q. Did the defendant negligently allow said jam to obstruct and hold back the water in the Nashwaak river? A. Yes.

Q. Was plaintiffs' crop injured as a result of the water being so obstructed or held back? A. Yes.

From these answers it is quite clear that the jury have found that some part, if not all, of the damage occasioned to the plaintiffs' land by the overflowing of the freshet was due to the jam of logs, and that such a jam was caused by the negligence of the defendants in not making provision for holding part of their logs at some point below the jam piers. The evidence, I think, justified these findings. It seems to me immaterial, therefore, whether the freshet referred to could properly be deemed *vis major* or not, because the

N. B.
S. C.
NASHWAAK PULP & PAPER CO. v. WADE.
White, J.

damage was caused not by *vis major* alone, but to a considerable extent, at least, and possibly altogether, by and through the negligence of the defendants.

See *Rickards* v. *Lothian*, [1913] A.C. 263, at 277-279, and *Burt* v. *Victoria Graving Dock Co.*, (1882), 47 L.T. 378 at 381, and *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q.B.D. 418.

It is of the essence of the defence of *vis major* that the damage done shall be occasioned by some power as, for example, the act of God, or the King's enemies, which the defendant could not control or anticipate and provide against, and that the damage was not caused or contributed to by any breach of duty on the part of the defendant toward the plaintiff. I agree, however, with the Chief Justice in the conclusion arrived at by him, that the freshet of June 18, which the defendants claim was so extraordinary and unusual as to constitute *vis major*, did not amount in fact to *vis major*. Though unusual and extraordinary, it was an occurrence which the defendants were bound to provide against. Because I think it is a matter of common knowledge to residents of this province that such a freshet is liable, though little likely, to occur in the month of June.

Grimmer, J.

GRIMMER, J., agreed. *Application refused.*

N. B.
S. C.

MARITIME COAL, RAILWAY & POWER Co. v. CLARK.

(Annotated).

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 20, 1918.

SALE (§ I D—20)—ACCEPTANCE OF GOODS—NO COMPLAINT AS TO QUALITY—ACTION FOR PURCHASE PRICE—DEFENCE OF INFERIORITY.

A purchaser who makes no complaint to the vendor as to the quality of goods sold, until months after the goods have been accepted and paid for, although he has complained to an agent of the vendor, who has no authority except to receive orders, cannot set up such claim in an action for the purchase price of the goods.

2. SALE (§ II B—31)—SCREENED COAL—TRADE DESIGNATION—COAL SCREENED AT MINE.

A contract for the delivery of "screened coal" is carried out by the delivery of coal properly screened at the mine, although owing to the soft and friable nature of the coal more slack is produced in transit than would be produced from coal from other mines.

Statement.

APPEAL from a verdict entered for the plaintiff, at the Westmorland Circuit Court, before Chandler, J., without a jury. Affirmed.

W. B. Wallace, K.C., supported appeal.

M. G. Teed, K.C., *contra*.

The judgment of the court was delivered by

HAZEN, C.J.:—The respondent company, in this case, operates the Joggins Mine, so-called, in the Province of Nova Scotia, and carries on the business of mining and selling coal, and the appellant is a retail coal dealer in the City of St. John. The action was tried before Chandler, J., without a jury, at the City of Moncton on the 29th and 30th days of April last, and a verdict found for the respondent for $936.52, and judgment ordered to be entered for him for this amount, with the costs of the action. It was further ordered that a verdict of $20 be entered for the appellant under his counterclaim as damages without costs, this amount to be set-off against the amount found for the respondent.

The respondent's claim was for 5 cars of coal which he sold and delivered to the appellant, and the correctness of this claim was admitted, but the appellant set up, by way of counterclaim, that a large quantity of coal in addition to the 5 cars of coal mentioned in the respondent's claim, delivered by the respondent company to the appellant, was not properly screened and was not fit for the use of the appellant's customers, and he claimed the following sums in respect of the alleged excess of slack coal in the coal delivered:—To work and labor screening coal in various cars shipped: $26.45; loss of $3.75 per ton in 82 tons of slack coal, $307.50; paid for screening, $69.10; loss of $1.65 per ton on 103 tons sold to J. S. Gibbon & Co., $179.95 = $583.

In the month of October, 1916, R. M. McCarthy, of St. John, a coal broker, who had previously sold some Joggins coal to the appellant, suggested to the appellant that he purchase some more of the same coal, as he stated the price was likely to go up, and in consequence the appellant ordered through McCarthy 10 cars of Joggins coal at $4.25 per ton. These cars were delivered through the fall of 1916. Some dispute in regard to the price arose between the appellant and the respondent, and eventually the price of 10 cars was fixed at $4.25, and this amount of coal was paid for by the appellant. According to the evidence of McCarthy himself, who was called by and gave evidence on behalf of the appellant, he was simply a coal broker and had no authority to bind the respondent company or to make any financial arrangement between the company and the appellant, and it appears from the evidence he had no power to adjust or allow rebate; that he had no power to bind the

N. B.

S. C.

MARITIME COAL, RAILWAY & POWER CO. v. CLARK.

Hazen, C.J.

company, and that any order he took was subject to their acceptance; and he also states, in the course of his evidence, that he had no authority from the company to make any final settlement. It would appear from this, therefore, that no general agency existed between McCarthy and the respondent, that as stated he was simply a broker and that any orders he took were subject to approval by the company, and that there his authority in the matter ended. McCarthy's evidence as to what took place between himself and the appellant when the coal was ordered was to the effect that the appellant asked him for a price on screened coal, which he gave and from time to time sold him screened coal, while appellant's evidence is to the effect that McCarthy came to him and stated that he had the agency for the Joggins Mines and wanted him to take some of that coal. He told him he knew what he wanted, that he wanted good screened coal, that he (Clark) could deliver from the car to the customers, and said that was the coal he expected it would be. The agreement then entered into between Clark and McCarthy was for screened coal, with the words added—"that can be delivered from the car to the customers." The respondent sold three grades of coal—screened coal, run-of-mine and slack coal, and, in my opinion the contract was for screened coal, and the words, that could be delivered from the car to the customers, do not add anything to the contract. The coal was to be screened coal delivered at Minudie, from which point the freight was paid to St. John, by the appellant, and it appeared from the evidence that the coal that was sent to the appellant was properly screened in the usual manner. The evidence leaves no doubt whatever upon this point. The 10 cars of coal mentioned were delivered to and accepted by the appellant and paid for by him. The cars containing the coal mentioned in the particulars of the respondent's claim were as follows:— March 8, 1917, one car containing 36 tons; March 14, 1917, one car containing 36 tons; March 23, 1917, one car containing 38 tons; April 3, 1917, two cars containing 67 tons. The appellant claims in his set-off by way of counterclaim for an excess of slack in these cars as well as in the cars previously received.

The trial judge was of opinion that the question of excess of slack coal can only be raised by the appellant with reference to the 5 cars last mentioned, shipped between March 8, 1917, and

August 3, 1917, and he comes to this conclusion after a review of the evidence, including the letters that were put in by the respondent. I quote from the judgment of the judge as follows:—

On November 7, 1916, the defendant wrote to McCarthy claiming that he was being overcharged by the plaintiff company for a part of the ten-car order, and also complaining of the amount of slack coal in all of the cars so far received, saying that it was necessary to keep a man upon each car screening, from the time the car was opened until the last load had been taken out, and that he had taken about two tons of slack out of each car.

On November 10, 1916, the defendant wrote to the plaintiff company at Joggins Mines, with reference to the price of the coal shipped, claiming that he should have been charged $4.25 per ton instead of the amount charged by the plaintiff company. In this letter the defendant made no reference to the question of slack coal.

On November 14, 1916, the defendant wrote to McCarthy again, calling his attention to the excess of slack coal in the Joggins coal received by him, and in this letter he says, "We expect you to make up to us the difference in prices on this car. Kindly let us hear from you on the matter at your earliest convenience."

On November 18, 1916, the defendant again wrote to the plaintiff company with reference to the price charged for the coal, claiming that he should have been charged $4.25 per ton instead of the price charged by the plaintiff company. This letter contains no reference to the question of slack coal.

On January 4, 1917, the defendant wrote to McCarthy with reference to the quantity of excess slack coal, asking him to take the matter up with the mines and to arrange for an allowance to the defendant on the cars shipped.

On March 1, 1917, the defendant again wrote to McCarthy, concerning the amount of slack in the coal received, complaining about the excess of slack coal, and in this letter he says, "Kindly let us hear from you at once in regard to the settlement of this matter."

On May 27, 1917, the defendant wrote to the plaintiff company with reference to an unaccepted draft drawn by the company upon him, and says, "We notified Mr. McCarthy that we would not accept the draft until he had the correction made" (meaning the correction in price) "and also had some settlement made of the several claims we had made to him for slack in the coal that we had been getting, and which he had repeatedly agreed to do."

The judge points out in his judgment that it is somewhat remarkable that the appellant said nothing to the respondent company in the course of the correspondence between them as to this question of slack coal until May 27, 1917, several months after the last of the 10 cars ordered, and some time after the delivery of the last 5 cars included in the respondent's claim, and concludes that it is not now open to the appellant to raise any question as to the excess of slack coal in the 10-car lot ordered in October, 1916, as this coal was all delivered and paid for without any question being raised by the appellant as to an excess of slack coal so far as

N. B.

S. C.

MARITIME COAL, RAILWAY & POWER CO. v. CLARK.

Hazen, C.J.

the respondent company was concerned. The appellant did bring up this question as to slack coal in letters to McCarthy, but he said nothing to the respondent company about this and paid for the 10-car lot without directly calling the attention of the respondent company to this question of slack coal. He was of opinion that McCarthy had no power to deal with this question of slack coal or make any settlement with the appellant or allow any rebate, and while McCarthy seems to have communicated to the respondent company the claim of the appellant as to slack coal, the respondent paid no attention to the claim whatever, and the appellant never took up the question so far as the 10-car lot was concerned until May 27, 1917, months after the coal had been delivered and paid for. In his letter to the respondent company of July 20, 1917, the appellant expressly said that a number of the cars were received prior to those mentioned in these letters that contained a quantity of slack upon which he did not make any claim. Under the circumstances the judge was of the opinion that the appellant is not now entitled to make any claim upon the respondent company for excess of slack coal in the 10-car lot, and I think that in view of the evidence no exception can be taken to his finding in this respect. This leaves the question of the excess of slack coal to apply in his opinion only with reference to the 5 cars mentioned in the particulars of the respondent's claim, shipped between March 8, 1917, and April 3, 1917.

In view of the fact, as stated before, that the contract was for screened coal, and the evidence shews that the coal was properly screened at the mines, I think the judge might fairly have come to the conclusion that the contract had been carried out, when the screened coal was delivered at Minudie on the line of the Intercolonial Railway, and that, therefore, no claim could be maintained against the respondent with respect to it. It is true that it appears from the evidence that the cars when they arrived in St. John contained a larger percentage of slack than the coal from most other mines would shew, but this was explained by the fact that the coal from the Joggins Mine was softer and more friable than that from other mines, and that in its handling after it was put upon the cars and its transportation from Minudie to St. John, and its removal from the cars there more slack would be produced than from coal from other mines in Nova Scotia, but as the con-

tract of the respondent was for screened coal, in my opinion, as I have said before, the contract was fulfilled when screened coal was delivered at Minudie.

The trial judge, however, took a different view of the case, and discussed the question of excess of slack coal with respect to the 5 cars mentioned in the respondent's claim. Three of these cars were transferred by the appellant to J. S. Gibbon & Co., coal dealers of St. John, at 10 cents per ton over and above what appellant paid for them, without the appellant examining the coal in any of them and knowing nothing about its quality. No evidence was offered as to the quality of the coal in these cars, nor as to whether there was or was not an excess of slack in them. The judge, therefore, concludes that these 3 cars must be excluded from consideration in connection with the question. Two cars containing about 71 tons altogether are, therefore, left for consideration, one shipped March 14, 1917, and the other on March 23, of the same year. In this connection, the trial judge said:—

There is no doubt the defendant ordered from Mr. McCarthy screened coal, as he required this kind of coal for his trade. The plaintiff company sells three grades of coal, run-of-mine being the coal just as it comes from the mine, with the stone and other foreign substance removed; screened coal, being coal which has gone over a screening apparatus in use at the mine, which is supposed to remove the slack coal as the coal passes over the screens or shakers as they are called, and slack coal, the lowest and cheapest grade of coal sold. The plaintiff claims that the coal shipped by them to the defendant was screened coal and was properly screened, and they prove by the evidence of several witnesses that the coal shipped to the defendant by the company had gone over the screens and was what they sell as screened coal. The coal sold is of course soft coal and friable, and had to be shipped from the mine at Joggins to McCann Station on the Intercolonial Railway, a distance of 12 miles, and from there to the City of St. John, a distance of some 140 miles. The coal was all shipped in box cars.

The accountant of the respondent company, and general business manager, claimed that the company never recognized any claim for slack exceeding 10% of the amount of coal shipped.

In the judge's view of the case the question of the excess of slack coal must be confined to the two cars mentioned. He states that he found it difficult to say from the evidence just what was the quality of the coal contained in the 2 cars of March 14 and March 23, but it seemed to him that very probably there was some excess of slack coal in these 2 cars over and above the 10% which the respondent company said it would expect to find in the car sold by the respondent after its arrival in St. John, and being of

N. B.

S. C.

MARITIME COAL, RAILWAY & POWER CO. v. CLARK.

Hazen, C.J.

the opinion that the appellant is entitled to some allowance for that excess he thinks that $20 is a fair amount to give the appellant toward this excess.

As previously, I do not think, in view of the evidence with regard to the screening of the coal, that the appellant is entitled to have anything for this excess of slack, but as the respondent has not moved against the judge's finding on the counterclaim, stating that as it is so small such a step would not be justified, I do not think the judgment should be interfered with or varied in that respect.

The appellant complained that the trial judge refused to admit evidence of what McCarthy said in regard to the claim for slack coal. The respondent's counsel stated that he wanted to shew by this evidence that Clark, before he paid the drafts, called up McCarthy and told him he would not accept the draft as nothing had been done. It appears, however, that all the evidence of the rejection of which the respondent complains was admitted at one stage of the case or another. The appellant says that he told McCarthy he was not going to accept drafts and that he told him he would pay them under protest. He says he told McCarthy he would not accept and afterwards told him he would accept them under protest, and in his letter of May 27, to the respondent, he says:—

> We notified McCarthy that we would not accept draft until he had correction made, and also had some settlement made of the several claims we had made to him for slack in the coal that we had been getting and which he had repeatedly agreed to.

Other extracts from the evidence might also be quoted to the same effect, and I think it, therefore, clear that, altogether apart from the question as to whether or not the evidence is properly rejected or was relevant or material, or admissible in view of the fact that McCarthy had no authority to settle, or make any arrangement or payment for excess of slack, the appellant was not prejudiced in any way by its rejection, as he was able to shew exactly what he wanted to shew by this evidence, by other evidence given at other times during the progress of the case.

Appeal dismissed.

ANNOTATION.

Annotation.

ACCEPTANCE OR RETENTION OF GOODS SOLD.

Damages where title fails. A purchaser from one who has no title was held in Ontario to be entitled to recover as damages the value of the chattel, and not merely the amount paid therefor. In *Confederation Life Association* v. *Labatt* (1900), 27 A.R., (Ont.) p. 321, Osler, J.A., said:—

"As to the MacWillie company: they undoubtedly sold as owners, and cannot successfully deny their liability to indemnify their vendee, *Eichholz* v. *Bannister* (1864), 17 C.B.N.S. 708, 144 E.R. 284, but they contend that recovery as against them must be limited to the amount of the purchase money paid by Labatt. There is no case in the English courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject, the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration, *Eichholz* v. *Bannister*, *supra*, *Raphael* v. *Burt & Co.* (1884), Cab. & Ell. 325, *Peuchen* v. *Imperial Bank* (1890), 20 O.R. 325. In Benjamin on Sales (1899), 7th Am. ed., from the Eng. ed. of 1892, and in earlier editions published in the author's lifetime, it is said: "*Eichholz* v. *Bannister* was on the money counts and therefore, strictly speaking, only decides that the price may be recovered back from the buyer on the failure of title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of the contract, there seems no reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty." In the fourth edition of Judge Chalmers' work on the Bills of Sale Act, 1893, it is pointed out that this suggestion has been adopted in that Act. In the most recent edition of Mayne on Damages (1899), the subject is not noticed. In America there is much diversity of opinion, both in the text writers and decisions. In Sedgewick on Damages, 8th ed. (1891), vol. 2, p. 492, the general rule is said to be that "the measure of damages for breach of warranty of title to a chattel is the value of the chattel at the time of the purchase, with interest and the necessary costs of defending a suit brought against a vendee to test the title, with interest from the time of payment. But the vendee may disaffirm the contract and recover the consideration paid, though that is greater than the value of the property." It is remarkable that the editors do not discuss or even refer to *Eichholz* v. *Bannister*, one of the two leading English cases on the question of an implied warranty of title, and cite only *Morley* v. *Attenborough* (1849), 3 Ex. 500, 154 E.R. 943, for the English law on the subject. In Sutherland on Damages (1882), vol. 2, pp. 418, 419, it is said: "The value of the property at the time the vendee is dispossessed has been held to be the measure of damages. Generally, however, the measure has been stated to be the purchase money and interest: thus adopting the same rule that is applied generally in estimating the damages for breach of covenants for title to real estate. . . . Where the vendee is dispossessed by suit, and has, in good faith, incurred expenses in defending it, he is entitled to recover these also from the vendor as an additional item of damages." It appears to me that the law is accurately stated in the passage quoted from Mr. Benjamin's learned work, and that the vendee, going upon a breach of the implied warranty, is entitled to recover the value of the thing he has lost in consequence

Annotation

of the failure of the vendor's title. Can less be supposed to have been in the contemplation of the parties when the sale was made? Why should a loss by failure of title be less fully compensated than a loss by breach of warranty of quality? The case appears to fall fairly within the general rule of the common law, as stated by Parke, B., in *Robinson* v. *Harman* (1848), 1 Ex. 850, at 855, 154 E.R. 363, at 365, that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Conditional sale. Evidence may be given of non-compliance with warranty to reduce damages. In *Cull* v. *Roberts* (1897), 28 O.R. 591, an agreement was made for the sale of machinery, a note being taken for the price, or, rather, an agreement called a note, by which it was stipulated that if the note was not paid, or if the purchaser should dispose of his land or personal property, etc., the vendor might retake the property and sell the same, possession to be kept in the meantime by the purchaser. The defendant set up the defective character of the machinery as a breach of warranty, but was not allowed, at the trial by the County Court Judge, to give evidence of it. It was sought in the argument to distinguish between this case of a conditional sale and the case of *Abell* v. *Church* (1875), 26 U.C.C.P. 338, which was a straight sale. *Per* Boyd, C., *Tomlinson* v. *Morris* (1886), 12 O.R. 311, "is not opposed, but rather favourable to the view that in case of conditional sale of a machine, if the price is sued for, the defendant may shew that the machine was not as warranted, and so reduce the claim by the difference between the value of the machine as warranted and its actual value in fact."

Compare *Copeland* v. *Hamilton* (1893), 9 Man. L.R. 143.

Damages governed by market price. Where the defendant failed to deliver according to contract, the plaintiff's damages were held to be the difference between the contract price and the market price. Defendants sought to reduce this amount by saying that the plaintiff had contracted to sell the goods at a lower price, so that he had not in reality lost as much as he was claiming. "But, said Osler, J., in *Ballantyne* v. *Watson* (1880), 30 U.C.C.P. 529, at 541, "this is not the way to look at it. The defendant has nothing to do with the profit the plaintiff might have made. Assuming that the plaintiff sold this cheese, he was not able to deliver it, for he had not got it from the defendant. If the sub-sale went off for that reason, the plaintiff was not thereby disentitled from going into the market and purchasing the same quantity at the market price, which was ten cents per lb., or it is perhaps not assuming too much to infer that he filled the sub-contract by the delivery of other cheese which he would have had to purchase in the market at the increased price, or to supply from his own stock, which was then worth to him ten cents per pound. In either case he would sustain a loss of four cents per lb. There seems no reason, therefore, to reduce the damages."

Notice of purpose for which goods required. Damages in such case. In *Watrous* v. *Bates* (1854), 5 U.C.C.P. 366, defendants agreed to furnish plaintiff with railway ties to enable them to carry out a contract for the supply of ties to Sykes & Co. The trial judge directed the jury that the measure of plaintiff's damages was the difference between what he was to pay defendant for the ties and the price he was to receive from Sykes & Co. Although the profits to be made on the article contracted for are in general too remote to be considered as damages for a breach of contract, this principle is subject to be controlled by the circumstances of the particular case. The words of

Annotation.

Baron Alderson in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, were quoted: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract, under these special circumstances so known and communicated."

An attempt was made to apply this principle in *Feehan* v. *Hallinan*, (1856), 13 U.C. Q.B. 440, the purpose for which cordwood was bought being the burning of bricks, and the defendant having failed to supply wood according to his contract. Plaintiff claimed that he was entitled to recover damages occasioned by the fall in the price of bricks while he was waiting for the wood. It does not appear that the purpose for which the wood was bought was communicated, but the judgment does not seem to proceed upon this ground. It reads as if the damages would have been considered remote under any circumstances.

"The plaintiff's case shews nothing more than that he dealt with the bricks which he intended to make and burn, in the same manner that a merchant would do with goods which he was importing, viz., that he took his chance and incurred the risk of a rising or falling market. In such case the mere ordinary chances of the market cannot be supposed to have entered into the minds of the parties when the bargain was made for the delivery of the wood. If the fluctuations of the market are to form an ingredient in estimating damages in such a case as the present, then the contract must be special with reference to that. The contract here is not made for bricks, in which case the rise or fall might have had some bearing upon the question, but the contract is for wood to burn the bricks, and therefore the immediate damage is that which is connected with the price of wood at that time."

Contract price of goods fifty-two dollars, damages three hundred and ninety-seven dollars. Held not excessive for failing to supply them. The contract in *Lalor* v. *Burrows* (1868), 18 U.C.C.P. 321, was to furnish 180 sets of locks of malleablized iron. Damages were claimed in a lump sum of between $700 and $800, and the jury awarded $397.50, without specifying the items allowed. The court held that there might be damages amounting to this sum and discussed the law as to the various items that might be claimed for, saying, among other things: "If the plaintiff be entitled to procure other goods by reason of the defendant's failure of contract, it makes no difference to him how little he paid, or was to pay the defendant for them, and how much he had to pay to procure or replace them. The damages the defendant may be liable to pay may be enormously beyond any profit or price he was ever to receive for his work, as in *Wilson* v. *The Newport Dock Co.* (1866), L.R. 1 Ex. 177, and as often happens when a lawyer, who was to get a few dollars for searching a title, has to pay the whole value of the property by reason of some defect which he should have guarded against; or, when a surgeon who has got a few dollars for his services, is called upon to pay for the loss of a limb, or some other misfortune which his patient has suffered from his alleged neglect, far beyond the trifling sum which was to have been his compensation."

Damages for goods not delivered according to contract. In *Colton* v. *Good* (1854), 11 U.C. Q.B. 153, 155, the plaintiff claimed as damages for the delivery of mill stones not according to the contract, the cost of endeavouring to repair the stones and expenses of dressing them and the damage done to his mill

Annotation.

machinery by the broken stones. It was held that he could recover the cost of dressing the useless stones on the same principle as expenses incurred with espect to articles bought in the confidence that they would prove such as the vendor was bound to furnish. The cost of repairing the damage to the machinery was also allowed, the jury being satisfied that the breaking of the stones was not such an accident as could not be fairly charged against the manufacturer, but was occasioned by their not being secured by a sound and strong iron band as usual. The expense of attempting to repair the broken stones was not allowed. The plaintiff had done this on his own responsibility; he could have rejected the stones and recovered back what he had paid for them. He could not be allowed to recover back the amount paid for the stones and also the cost of attempting to repair them.

Note the difference between recovering the cost of dressing the stones under the assumption that they were such as the plaintiff was bound to accept, and the cost of attempting to repair them after it was clear that the plaintiff would be justified in refusing acceptance.

Recovery of deposit where vendor wrongfully sold goods. The plaintiff purchased cattle to be kept by the defendant until fit for the English market and paid a deposit of two hundred dollars. Defendant considered that he was not bound to keep them beyond August 20th, and insisted upon plaintiff taking them off his hands, notifying him that if he did not do so they would be re-sold. Plaintiff refusing to take them until the proper time, the defendant did sell them and claimed to retain the deposit. It was held that the plaintiff could waive the breach of the contract and sue simply for the recovery of the money paid. *Murray* v. *Hutchinson* (1887), 14 A.R. (Ont.) 489.

Purchaser must accept delivery in reasonable time. Damages for refusal. Where a specified quantity of hay was sold to be delivered at a specified place, at such times and in such quantities as the purchaser might order, it was held that the purchaser must accept the hay tendered within a reasonable time, and that the measure of damages was the difference between the contract price and the market price or value on the day fixed for delivery, or in the present case, the day when the hay was tendered to the defendant and he should have taken delivery, that being the time when the contract was broken. The plaintiff was not bound to re-sell the hay, though he might, if he thought proper, have done so and charged the vendee with the difference between the contract price and the price realized at the sale. But it would be requisite, in such a case, to show that the hay was sold for a fair price and within a reasonable time after the breach of the contract. The plaintiff was also allowed for extra expenses which he had incurred owing to the refusal of the defendant to fulfil his contract, such as labour, cartage, storage, weighing and selling the hay. *Chapman* v. *Larin* (1879), 4 Can. S.C.R. 349.

Damages for refusal to accept where the contract was to deliver wood in instalments and after one instalment had been delivered. The plaintiff in *Moore* v. *Logan* (1856), 5 U.C.C.P. 294, received as damages the difference between the contract price and the selling price "at the time the contract was broken or to be performed." These periods are not necessarily the same, but the case does not discriminate and is of no value on the question which is discussed, which is the proper time at which to take the selling price, whether it is the time when the instalments were to be delivered, or the time when the defendant refused to accept further instalments and thus broke the contract. On the whole, it is not a very valuable case.

Annotation.

In *Brunskill* v. *Mair* (1857), 15 U.C.Q.B. 213, the defendant failed to accept a quantity of flour delivered at Oswego, in consequence of which the plaintiff was obliged to resell. He was held entitled to recover the difference between the contract price and the price at which he had been obliged to resell at Oswego. The defendant was contending that the price at Toronto should govern, but this contention was overruled, as the plaintiff was at liberty to deliver it at Oswego.

Damages for refusing to accept deed of transfer. The plaintiff sued in an action, among other things, for the refusal to accept the deed of a vessel sold by plaintiff to defendant and of which the defendant had received possession. The jury gave as damages the whole value of the vessel and the court declined to disturb the verdict. The defendant was objecting that no title to the vessel had passed to him for want of the transfer under the provisions of 8 Vict., c. 5, but the court held that it was not competent for him to set up such a defence, as he had refused to accept the transfer. *Phillips* v. *Merritt* (1853), 2 U.C.C.P. 513.

A few additional cases where the subject of acceptance and rejection of goods sold has been considered may be noted.

Jacobsen v. *Peltier*, 3 D.L.R. 132, held that a rehibitory action (or action in cancellation of sale for latent defects) must be brought with reasonable diligence according to the nature of the defect and the usage of the place where the sale is made; and where there is no usage, the old French law prescription of six months from the date of the sale will be applied; also that use of the thing sold as the buyer's property, the making of extensive repairs, alterations and improvements thereto, are acts of acquiescence to the sale and will bar a resolutory action, more especially when the defendant was never notified thereof.

Ironsides v. *Vancouver Machinery Depot*, 20 D.L.R. 195, 20 B.C.R. 427, was an action for the price of railway construction dump cars and equipment, the defence being shortage and unfitness. The defendants did not advance the contention put forward at the trial for a year or more after they took delivery, the British Columbia Court of Appeal affirming the judgment of Gregory, J., held that the lapse of time before making the complaint of alleged shortage of or unfitness were 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.

Alabastine Company, Paris v. *Canada Producer and Gas Engine Co., Ltd.*, 17 D.L.R. 813, was an appeal from the judgment of Clute, J., in favour of the plaintiff in an action to recover $5,500 paid by the plaintiff on account of purchase-money for an engine (to be built according to specifications) bought from the defendant and alleged to be useless for the purpose intended, and for damages and for rescission. The engine was being "tried out" from September, when it was set up in respondent's factory, until the time of the breakdown in the following March. The Ontario Supreme Court (Appellate Division), affirming the judgment of Clute, J., held that when a sale of personalty not yet in existence or ascertained is made with a condition that it shall, when existing or ascertained, possess certain qualities, the "trying out" of the thing sold after delivery covering a protracted period does not constitute an acceptance against the buyer, where such "trying out" was, as

Annotation.

understood by both parties, to be for the purpose of discovering whether or not it answered the conditions of the contract.

In *Duncan & Buchanan* v. *Pryce Jones Ltd.*, 22 D.L.R. 45, McCarthy, J., of the Alberta Supreme Court, held that the buyer of goods is liable, because of his acceptance of same, if he retained them after actual receipt of same for such a time as to lead to the presumption that he intended to take possession thereof as owner.

Haug Bros. v. *Murdock*, 25 D.L.R. 666: Elwood, J., of Saskatchewan, held that where, in the sale of a traction engine, a purchaser accepts the engine and continues to use it after discovery of the defects, he is thereby precluded from later returning the engine. This case was reversed in 26 D.L.R. 200, but on the ground that as the engine was not constructed in accordance with the Steam Boilers Act (R.S.S. 1911, c. 22, sec. 19), the regulations not having been complied with, the sale of the engine was wholly illegal.

In *Hart-Parr Co.* v. *Jones* (Sask.), [1917] 2 W.W.R. 888, the facts were: The receipt of an engine, the property therein not having passed, and user of it for threshing purposes for about 30 days and the signing of an acknowledgment that an expert had spent a certain number of days in repairing it and had made it satisfactory.—Lamont, J., the trial judge, held, under the circumstances, that there had been no acceptance. From August till spring could not be regarded as an unreasonable time for the rejection of an engine, the vendor by painting it having made inspection on the part of the purchaser at the time of delivery ineffective.

The following Quebec cases may also be of interest:

Macey Sign Co. v. *Routtenberg*, 48 Que. S.C. 346. A defect in the "flasher" of an electric sign consisting in the fact that it produces only a red light in place of producing simultaneously a red and white light is an apparent defect. The irregular placing of the interior wires of the sign is a latent defect, but the purchaser cannot complain of it eight months after its installation.

Martin v. *Galibert*, 47 Que. S.C. 181. When a purchaser has examined merchandise before buying, and has not objected to the price on account of its inferior quality, he cannot afterwards refuse to accept and pay for it on account of such inferiority.

Mackay v. *Temple Baptist Church*, 25 Que. K.B. 417. The buyer of a debt who, after having accepted a first transfer, received from the same seller another one containing in addition to the first, other claims against new debtors, and who instead of notifying the seller of his refusal to accept the second transfer, keeps it in his possession for several years, and meanwhile proceeds to collect the debts from the two debtors, has thereby tacitly accepted the last transfer.

Where a transfer of claims contains the debts of several debtors, and the buyer, without positively accepting, collects the debt of any one of the debtors, he accepts tacitly the whole transfer.

Southern Can Co. v. *Whittal*, 50 Que. S.C. 371. A delay of four months after the delivery of a machine is too long to refuse to accept it on account of defects. If considerable changes are made by a buyer to a machine sold and delivered, it amounts to an acceptance.

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. November 9, 1918.

NEGLIGENCE (§ I B—5)—SCHOOL BOARD LENDING DANGEROUSE QUIPMENT FOR EXAMINATION PURPOSES—INJURY TO CANDIDATE—DAMAGES.

A School Board which conducts a technical school for instruction in the manual arts, and permits the Department of Education to use its equipment on an examination, the examination being entirely under the direction of the Department of Education, is not liable in damages for injuries to a student taking the examination, if the equipment supplied was reasonably safe and suitable for the work for which it was being used.

Statement.

APPEAL by defendant from the judgment of Walsh, J., 41 D.L.R. 400, in an action for damages for injuries received by a student at an examination. Reversed.

H. H. Parlee, K.C., for appellant; *J. F. Lymburn*, for respondent.

Harvey, C.J.

HARVEY, C. J.:—I would allow this appeal with costs and dismiss the action with costs.

The trial judge finds, as seems clear from the evidence, that the defendants were exercising no control or authority over the operations out of which the accident happened.

I cannot see how they can be charged with negligence in permitting the use of the machinery which is clearly as suitable for the purposes for which it was being used as it was reasonably possible to obtain.

Such machinery is, by its nature, dangerous and must be used with great care.

If boys of 16 cannot exercise such care it may be that they should not use such machinery, but the defendants were not responsible for the plaintiff's using the machinery.

If he neglected the opportunities presented by the defendants to familiarize himself with its practical operation, I am at a loss to see why the defendants should be held liable because they did not prevent him from taking the examination, which they had no legal right to do, or because their instructors did not inform the examiners of the fact of which they probably, at the time, were unaware.

Moreover, if they had given such information, I fear that it would have made no difference.

Stuart, J.

STUART, J. (dissenting):—My inclination in this case is to dismiss the appeal. With much deference I think too much

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Stuart, J.

has been made of the authority of the High School and University Matriculation Examinations Board. Even if that body were a strictly subordinate branch of the Department of Education, subject entirely to the control of the Minister, which, in fact, it appears not to be, inasmuch as it is appointed, according to the evidence, jointly by the Department of Education and the University of Alberta, it does not seem to me that its authority was anything more than a purely *examining* authority. Treating it, however, as entirely subordinate to the Department of Education, it appears to me that its functions were confined to the appointment of examiners which would include three classes: (1) those setting the questions; (2) those reading the answers; (3) those presiding while the pupils of the various schools were engaged in answering the questions asked. To make examinations uniform throughout the province was no doubt one purpose of having a general board. But in effect the examiners simply entered the schools on certain days and asked the pupils certain questions. No doubt, under the School Ordinance, the Department had authority to send out its examiners to do this. But, in my opinion, this did by no means abrogate, even temporarily, the authority and duties of the various Boards of Trustees as these are set forth in ss. 95 and 95(*a*) of the School Ordinance. A perusal of those sections will plainly shew that it was the duty of the Boards of Trustees to look after the personal health and safety of the pupils attending the schools. I do not think that duty was even for a moment ever transferred to any other authority.

What was the situation? It was, as I apprehend the matter, just this: Under s. 95 (a) the Board of Trustees in a town district is given power "at its discretion" (it is not imposed as a statutory duty) "to provide, *equip*, and maintain such room or rooms as may be required and to provide *suitable* teachers for giving instruction in manual training, domestic science, physical training, music, and art." This power the defendant board chose, in its discretion, to exercise. It "provided, equipped and maintained" the technical school in question. It employed "at its discretion" teachers, whom, no doubt, it thought to be "suitable." To put the matter on the lowest ground, it invited the plaintiff to attend this school and to make use of this equipment. I cannot see that the question, much canvassed at the trial, as to

whether the plaintiff, as a pupil in grade IX., was or was not bound to take this work or rather to be examined upon it, is very material. As a matter of fact he did attend the classes. He was only 16 years old—not a man, but a boy. Then, one day, the examining authority appeared, and, to put the matter in a plain, simple form, proposed to ask this boy to do a certain thing by the use of the circular saw in question. This examining authority was not a guiding or instructing authority. Its object and purpose was to find out if the pupil had been properly guided and instructed by the authority which had undertaken that function "at its discretion." Its object and purpose was to test and examine. It seems to me to be a contradiction in terms to say that such an authority, acting solely for such a purpose, owed a duty to the person whom it proposed to test to discover first if he had been made fit for the test. That was just what the examining authority was endeavouring to find out. Much less also was it the duty of the examining authority to guide, instruct, and warn. The boy was still a pupil at the school. He was still on the day of examination under the charge of the Board of Trustees and its agents, the teachers. But it is not necessary, in my opinion, as a matter of principle, to go even so far as to say that. At least up to the time when he submitted to the examination, he was under the guidance and instruction of the teachers. They knew he was about to be examined. They knew or ought to have known to what extent it was safe for him to venture to use the circular saw, if it should turn out on examination day that he was asked to do so. Upon the evidence, I am satisfied that they ought to have known that it would be unsafe for him to attempt to use it. That the boy had perhaps played truant, or was absent on the one single day shortly before the examination when the boys in the class were put to use the saw, seems to me just as immaterial as would be the fact, if it should happen to be the fact, that he had not understood the instruction given during some of the so-called "demonstrations" which had taken place during the term. This is not the case of a grown man in the employ of a master for pay in a commercial manufactory. Even then, it is the duty of the master to give full and careful instruction and warning to a novice who is put, for the first time, at working a dangerous machine. But here, I think, the duty was a more rigid and exact-

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Stuart, J.

ing one. The plaintiff was a boy at school. He went there, he was sent there, by his parents, to get instruction in the manual arts. The defendant Board had, at its discretion, offered him and his parents to give him this instruction. They proposed to instruct him in the use of what is shewn in the evidence to be one of the most dangerous machines in use in any factory. And, having him in their charge and care, they allowed him to be put to a test by an intervening examining authority upon the use of that machinery, without even having ever seen him use it, without his having, in fact, ever used it at all, and this to their knowledge.

There is, in my opinion, a fallacy in the suggestion, which, if not directly made in argument, at any rate underlies some of the propositions addressed to us, that the examining authority had asked the plaintiff (I mean asked in the sense of "ordered") to use the saw. The plaintiff was not bound to use the saw. His doing so was simply an answer to a question on the examination. In substance it was this "can you use that circular saw properly in cutting out a piece of wood to the required length and breadth; show us whether you can or not by actually doing it in our presence." As in the case of any question on an examination paper the pupil could omit such a question if he liked, taking the consequence in a loss of marks. But the fact that he was asked to do so, that other pupils in his class were doing so, that the examiners—to him strange and authoritative no doubt—were there expecting him to try, would no doubt urge on a boy of that age to do something or to try to do something which, if he had been alone, he might not have ventured upon. Now, in my opinion, in the circumstances of this case, and the facts as to his meagre instruction being what they were, there was a duty resting upon his teachers, before he entered upon the practical examination at all, to tell him that he must not attempt to use the circular saw, if the examiners should happen to ask him to do so. They should have told him that not having had full and sufficient instructions he should not venture to do so, and that he must, in the circumstances, simply submit to the loss of marks.

The matter of the liability of educational authorities for accidents to school children has come up in a number of English cases. *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 840, and *Ching* v. *Surrey County Council*, [1910] 1 K.B. 736, were cases,

the first of a defective door, and the second of a defective playground. They afford little help, perhaps, in this case, although they do shew, in a general way, the duty of the educational authority not to supply defective "plant." In *Smith* v. *Martin and the Corporation of Kingston-upon-Hull*, [1911] 2 K.B. 775, the corporation was held liable for the negligent act of the teacher employed by it in sending a girl of fourteen to poke a fire, in consequence of which she was burned. It was held that the teacher had authority to send the child on the errand, and was acting within the scope of her employment, and that there was evidence to justify the jury's finding that she had done this negligently. *Shrimpton* v. *Hertfordshire County Council*, (1911) 104 L.T. 145, is perhaps more in point. There, the House of Lords upheld the verdict of a jury, in holding the educational authority liable where it had, at its discretion, provided a conveyance for children, and had permitted the plaintiff, a child of 12 years, to ride therein, though, strictly she did not come within the class entitled to do so, but had omitted to provide a safe conveyance owing to the absence of any conductor or guard.

The head-note on the case shews that it has some bearing here on the other ground of negligence which I have not yet touched upon, viz:—that the saw was not made reasonably safe by means of a guard. It says;—

> A person who provides anything for the use of another is bound to provide a thing reasonably safe for the purpose for which it is intended, even though the person using it uses it only by the permission or consent of the person providing it-and has no legal claim to the use of it.

This is the principle, which, I think, is applicable to the present case. I do not think that the saw was, in any sense, under the control of the examining authority. The school conducted by the defendant Board was going on. Its pupils were using the machinery supplied by the defendant. Would it be contented that, if, on a written examination, a child was injured through a defective seat collapsing, the examining authority would be liable because it had taken possession of the school for the day for the special purpose and that the Board of Trustees were not liable for that reason? I think not. All the examining authority did was to come in and say: "We propose to see if you know how to use one of these machines which you have, as we suppose, been instructed about. Let us see if you can use it." In attempting

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Stuart, J.

to use it the plaintiff was, in my opinion, still using a machine provided for him by the defendant. So, while I lay the greater stress on negligence consisting in the absence of proper warning and instruction, and in the act of permitting the pupil to attempt at all to use the machine, if asked to do so by the examiners, I think that, upon the other ground also, the defendant is liable. Upon the evidence, I think they could have made the machine much safer than it was by means of some protection. The practice of manufactories is only relevant in a limited sense, because there, the question of expense through delay in what needs to be rapid work comes in. Here, such a consideration did not need to come up at all.

Returning to the other ground, the evidence shews that in some schools and factories, an apprentice is made to act as an assistant for a long time to a person actually operating such a machine before being permitted to touch it. What was done here is as wide as the poles away from such carefulness as that.

The case of *Smerkinich* v. *Newport Corp.*, (1912) 76 J.P. 454, is really nearest to the facts of this case but, nevertheless, it is distinguishable. The plaintiff was 19 years of age. He was a pupil in a technical institute, and was injured in using a circular saw which had no guard. But the two Judges of the King's Bench Division thought he appreciated the danger. He asked for leave to use the machine of his own accord, after having actually used it frequently for two sessions. They, in effect, applied the maxim *volenti non fit injuria*.

I do not think that the casual, hurried warning given just before the plaintiff began to use the saw to "mind your hand" was sufficient to relieve the defendant from liability.

For these reasons, I am in favour of dismissing the appeal.

Beck, J.

BECK, J.:—My view is that it was the Department of Education and not the School Board who was conducting the examination; that the Department had, under the School Ordinance, the right to use the school and the apparatus for the purpose of holding the examination therein (School Ordinance, ss. 4, 6, etc.); that, during the examinations at which the plaintiff was a candidate, the apparatus in the school was, in fact, wholly under the control and actual direction of the officials of the Department and not the School Board.

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Beck, J.

The application for the examination made by the plaintiff was, as required by the regulations of the Department, made to the Department and not to the Board. I can see no ground for asserting an obligation on the Board, assuming they had knowledge that the plaintiff was a candidate, to inform the Department of the qualifications or want of qualifications or previous course of instruction of the plaintiff. In any event, the importance of the plaintiff's grade of knowledge would depend upon the nature of the examination to which the officials of the Department might see fit to subject him. There was no obligation, in my opinion, for the Board to foresee or suspect negligence in this respect on the part of the officials of the Department.

Consequently, in my opinion, the Board is not liable, even if negligence is made out, upon which I express no opinion.

I would therefore allow the appeal with costs.

Hyndman, J.

HYNDMAN, J.:—This is an appeal from the judgment of Walsh, J., in favour of the plaintiff.

The plaintiff is an infant, and, at the time of the happenings complained of, was 16 years of age.

The defendant School Board was duly constituted under the provisions of the School Ordinance and the regulations made in pursuance thereof. In the year 1917 the said defendant, as part of its educational system, organised a technical or manual training school which they owned and equipped.

The plaintiff was a student in grade IX. of the Strathcona High School, also owned and controlled by the defendant Board. Part of the course of study for said grade IX. was that of manual arts which was taught in the said technical school and which was obligatory. The plaintiff, in consequence, attended the classes, once a week, for a period of about 30 weeks extending from about January to June, 1917. The regulations of the Department of Education prescribed that a student, desirous of taking the departmental examinations for matriculation, must, on or before April 15, make application in writing on a form furnished by the Department. The plaintiff, accordingly, made such an application and paid the prescribed fee of $2.

The examinations were held in the month of June, 1917, and included manual arts.

The only technical school in which examinations in this sub-

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Hyndman, J.

ject could be held in Edmonton was the one in question, and the Department notified the defendant Board that they "would require this building for the June examinations." Although there may or may not have been any legal obligation on the part of the defendants to grant the use of this school, as a matter of courtesy, they did give the use of the premises without charge, the Department paying for all materials required for the occasion, and on June 27, candidates, amongst whom was the plaintiff, attended, and the examinations were held. The evidence is, and the trial judge so found, that, on this occasion, the school was under the exclusive control of the Provincial Departmental examiners, although two of the permanent instructors, employees of the defendant school, were present at the time.

A part of the equipment of the school was a combination circular crosscut and rip saw, both saws set in the same table and operated by the same power, only one of them, however, being capable of use at a time. Attached to the machine is an adjustable guard or hood of wire mesh fastened to a steel rim which can be utilised if desired as a supposed protection to the person operating the saws. During the examination, the plaintiff, in order to comply with one of the tests put to the candidates, was required to saw a piece of wood 3 ft. long by 3 inches wide. The plaintiff was given a piece of wood with which to do this, and to use the words of the trial judge:

> He put the end of it which was nearest his body in his right hand and with his left hand guided the other end of it against the rip saw, which was in motion, and ran the saw through the wood, keeping his left hand on the left-hand edge of the block at a distance, I should say, of a little more than 1 inch from the saw until the saw had run itself through the block. Then for some purpose and in some manner which he cannot explain, he brought his left hand back towards his body and in doing so it came in contact with the saw which was unguarded. The result is that he has lost from that hand his little finger from the first joint, his third finger from the knuckle, and the end of his thumb, whilst his first and second fingers are to a certain extent stiff. His claim is against the Board for the damages thus occasioned him.

The grounds of the plaintiff's claim are that the defendant (1) provided for the use of pupils in attendance at the said technical school a circular saw which was defective and unsafe; (2) failed to provide for the use of the said pupils a circular saw affording the maximum of protection or reasonable safety; (3) failed to see that the guard of the said circular saw was in position on the

occasion in question; (4) failed to instruct the plaintiff in the use of the said circular saw; (5) submitted the plaintiff to the test of the examiners in the operation of the said circular saw with such inadequate instruction in its use as to expose him to serious risk of injury.

It seems to me that grounds 1, 2, and 3 are substantially one and the same thing and mean that the defendant did not provide machinery which was not defective and not unsafe.

The general rule of law is that a master or employer must provide machinery fit and proper for the work and take care to have it superintended by himself or his workmen in a fit and proper manner. The test of fitness is not that others use like tools and machinery but to consider whether they are reasonably safe and suitable for the work to be done, and such as a reasonably careful man would use under like circumstances. "Reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. See Beven on Negligence, 3rd Can. ed., pp. 613, 614, and cases there cited.

There is no dispute but that a circular saw whether a crosscut or rip saw is a dangerous instrument if not carefully handled, and that characteristic is inseparable from its nature.

The question is then, did the defendant Board, in providing this machinery, fail to fulfil their duty as required by the rule of law above stated? In my opinion, they did not. A technical school would be practically useless without the installation of such saws, and it was absolutely necessary for the proper carrying on of the work of manual training. The evidence is, in my opinion, decidedly in favour of the fact that this particular machine was up to the standard of the day and is of the latest and best type. John W. Allen, one of the plaintiff's own witnesses, in cross-examination, admitted that the machine is one of the best on the market and that he did not know of any better equipment in a combination saw. The chief complaint seems to be that there was no "guard" used, though a guard, to which I have already referred, was attached to the table and might have been

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Hyndman, J.

put in use, and the greater part of the evidence is directed to that fact. The plaintiff's witnesses state that, in their opinion, there is greater danger in using the rip saw than the crosscut saw, because, in using the former, the wood is apt to shoot forward (back?) in the direction of the worker and cause injury, and that the guard will, in some way, prevent this. But no such thing happened on the occasion in question, so even if the hood had been there, this important object would not have been served. On the contrary, however, other witnesses, men of long experience and whose opinions are entitled to weight, say that the machine would be more dangerous with than without this appliance, taking all the possibilities into consideration. The witness Allen also stated, in his cross-examination, that possibly "there may be some times when you would say if the hood had been on this accident would not have occurred, but if the hood had been on other accidents would have occurred." There is evidence, too, that in other well-appointed factories, similar machines with hood attachment are used, but the hood is generally discarded for the reasons given. With great deference to the opinion of the trial judge I am unable to agree that there was any evidence upon which it can be said that the School Board did not use every reasonable care and precaution to provide machinery reasonably safe and suitable for the work contemplated.

However, even if I should be in error in this conclusion, there is the further, and I think, fatal objection to the plaintiff's claim that, on the occasion complained of, the premises were not under the management or control of the defendant but were being used by the Provincial Board of Examiners, a distinct and separate body, independent in every way of the defendant Board, and no obligation attached except to see that no trap or hidden danger existed. In granting the use of the building to the Provincial Board, if permission was at all necessary, there was no contractual relationship between them; they cannot be said to be invitees, for the premises were practically, though not perhaps legally, commandeered by them. They notified the defendant Board that they would require the building, which notification was complied with. They were, then, I think, mere licensees.

A licensee is a person who is neither a passenger, servant nor trespasser, and not standing in any contractual relation with the

owner of the premises, and is permitted to come upon the premises for his own interest, convenience, or gratification. (29 Cyc. 451.)

The rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden plant or wantonly or wilfully cause him harm. The licensee enters upon the premises at his own risk and enjoys the license subject to its concomitant perils. (29 Cyc. 449, 450, also *King* v. *Northern Navigation Co.*, (1912) 6 D.L.R. 69; *Perdue* v. *C.P.R.* (1910), 1 O.W.N. 665; *Gunn* v. *C.P.R.*, (1912) 1 D.L.R. 232, and annotations.)

In *Hounsell* v. *Smyth*, (1860) 29 L.J. C.P. 203, the declaration alleged that the defendants were seised in fee of waste land, and, before the grievance alleged, a quarry had been opened on the land, which was worked by leave of the defendants, who received a royalty, that the waste was open to the public, and all persons having occasion to cross it had been used to cross it with the license of the owners; that the quarry was actually near to and between two public highways leading over the waste, and was dangerous to persons who might accidentally deviate or have occasion to cross the waste for the purpose of crossing from one road to the other; that the defendant, well knowing the premises, left the quarry unfenced, and the plaintiff, having occasion at night to cross the waste to get from one of the roads into the other, and not being aware of the existence of the quarry, fell into it and was injured. It was held on demurrer that the declaration shewed no cause of action.

Williams, J., at p. 207, says;

> No right is averred but merely that the owners allowed persons, for diversion or business to go across the waste without complaint . . . But a person so using the waste has no right to complain of any excavation he may find there; he must accept the permission with its concomitant conditions, and, it may be, its perils.

The plaintiff, therefore, under the circumstances here, can have no greater right than the licensee itself as against the defendant Board.

There was another point urged on behalf of the respondent, namely, that because of his youth he should not have been allowed to use so dangerous a machine. Apart from the question of who might be liable for negligence, I do not think any effect can be

ALTA.

S. C.

SMILES v. EDMONTON SCHOOL DISTRICT.

Hyndman, J.

given to this point. Where a danger is obvious or known, a person is bound to use ordinary care to avoid it, and recovery cannot be had, where the person injured, by the exercise of ordinary care, could have avoided the injury, even though the defendant was negligent. (29 Cyc. 515.)

No arbitrary age has been fixed at which a child is required to exercise the care demanded of an adult . . . and in every case the question of the intelligence and the measure of his capacity is one for the jury to determine. (29 Cyc. 540-1.)

If such is the law, it is clear that the plaintiff is a boy of even more than the average brightness and intelligence. He knew of the danger, and the duty was cast upon him, just as it would have been upon an adult to exercise very great care in the operation causing the injuries.

The trial judge also finds that the examiners had the right to assume that the boy, when he undertook to operate the saw, had sufficient practical familiarity with it to enable him to do it in safety, when his instructors, who should have known that he had absolutely none, stood mutely by and allowed him to undertake it.

I do not think the defendant can be held liable on this ground. It was the exclusive business of the Department of Education, just as though some other distinct building or plant had been utilised. If such had been the case, certainly the officers of the defendant Board would not have been expected to attend and advise the examiners with regard to each candidate. In my opinion that would be a matter entirely for the Department. The same rule, I think, must be applied, even though the defendant's premises were used.

It seems to me, therefore, for the reasons above referred to, the chief one being that the defendant Board were not in control at the time of the accident, but that the premises were under the complete management of the Board of Education, that the defendant cannot be held liable to the plaintiff. If he has a claim at all, which I do not think is the case, it is solely against the Provincial Board of Education.

I would, therefore, allow the appeal and dismiss the action with costs here and in the Court below. *Appeal allowed.*

ANDERSON v. JOHNSON.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., and Newlands and Elwood, JJ.A. October 31, 1918.

MALICIOUS PROSECUTION (§ II—10)—EVIDENCE UNDISPUTED—CONCLUSIONS OF TRIAL JUDGE—INFERENCES—REASONABLENESS.

Where the trial judge, sitting without a jury, has found on undisputed evidence that an offence for which the plaintiff might have been arrested without a warrant has been committed, and that the defendants honestly believed that such an offence had been committed, and that it had been committed by the plaintiff, he is justified in drawing the inference that there were reasonable and probable grounds for the arrest and granting the protection of s. 30 of the Criminal Code.

Statement.

APPEAL from the judgment of Lamont, J., in an action for wrongful arrest. Affirmed.

W. A. Beynon, for appellant.

Hon. W. E. Knowles, K.C., for respondents.

The judgment of the court was delivered by

Haultain, C.J.S.

HAULTAIN, C.J.S.:—In my opinion this appeal should be dismissed. The trial judge has found on facts, which are not in dispute, that the arrest of the plaintiff by the defendants was justifiable under the circumstances, and that the defendants are entitled to the protection of s. 30 of the Criminal Code, so far as the original arrest is concerned. That section is as follows:—

30. Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is *justified* in arresting such person without warrant, whether such person is guilty or not.

This section is simply declaratory of the common law. By the common law, any person (whether a peace officer or not) may arrest any one on probable suspicion of felony, and a peace officer under such circumstances is protected, even if it should turn out that no such felony had been committed by anyone, provided he can shew that he had reasonable ground for suspecting the party arrested. Stephen's Comm. (14th ed.) 310; 2 Hale P.C. 78; *Allen* v. *L. & S-W. R. Co.* (1870), L.R. 6 Q.B. 65.

The case of *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521, established the general principle that

It is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable and probable cause. No definite rule can be laid down for the exercise of the judge's judgment.

SASK.

C. A.

ANDERSON v. JOHNSON.

Haultain, C.J.S.

My brother Lamont, sitting without a jury, has found, on undisputed evidence, that an offence for which the plaintiff might have been arrested without a warrant had been committed. He had the opportunity of seeing the plaintiff and comparing him with the photograph and description sent to the defendants by the police authorities at Saskatoon. He also found, on the evidence, that the defendants honestly believed that such an offence had been committed and that it had been committed by the plaintiff. Upon these two findings, which cannot be questioned, the trial judge has, in my opinion, exercised a sound judgment in drawing the inference that, in each case, there were reasonable and probable grounds for the defendants' belief.

The judge has further found that, while the arrest of the plaintiff was justifiable, he was thereafter unreasonably detained by the defendants on account of their delay in communicating with the Saskatoon authorities. This finding is in accord with the decision in *Wright* v. *Court* (1825), 4 B. & C. 596, 107 E.R. 1182. The defendants do not appeal on this point, but the plaintiff appeals on the ground that the period of unreasonable detention as found by the trial judge was too short.

On this point, reference was made to the case of *Reg.* v. *Cloutier* (1898), 2 Can. Cr. Cas. 43. That case supports the opinion I have already expressed with regard to s. 30 of the Criminal Code. So far as the present point is concerned, it decided that, in the case of an arrest under s. 30, the common law rule applied, and that, in such a case, the person arrested should be brought before a justice of the peace within a reasonable time. What is a reasonable time must depend upon the particular circumstances of the case. Taking all the facts of this case into consideration, I can see no reason for altering the finding in this respect. The appeal is therefore dismissed with costs. *Appeal dismissed.*

B. C.

C. A.

DOMINION TRUST Co. v. MUTUAL LIFE ASSURANCE Co.
B. C. SECURITIES v. MUTUAL LIFE ASSURANCE Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. October 1, 1918.

FIXTURES (§ II—12)—SAFETY DEPOSIT BOXES—AFFIXED TO FREEHOLD BY OWN WEIGHT—INTENTION.

If an intention to make chattels part of the freehold is sufficiently established from all the circumstances of the particular case, they may be held to be part of the freehold notwithstanding that they are not affixed otherwise than by their own weight to the freehold.

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

Macdonald, C.J.A.

APPEAL by defendant and cross-appeal from the judgment of Gregory, J., in an action between a mortgagee and the assignee of a mortgagor who is the owner of the equity of redemption to establish whether certain safety deposit boxes form part of the freehold or are merely chattels. Appeals dismissed.

S. S. Taylor, K.C., and *Smith*, for appellant.

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

MACDONALD, C.J.A.:—The question is whether or not the safety deposit boxes in question were part of the freehold or were merely chattels. It arises, in this case, as between mortgagee and the assignee of the mortgagor; who is now the owner of the equity of redemption.

The building now known as the Dominion Trust Building was erected by the British Canadian Securities Co., a company subsidiary to the Dominion Trust Co., and I think it can fairly be inferred from the facts that the building was intended mainly for occupation by the Trust Company. It was erected and equipped to meet the business requirements of the Trust Company.

The trial judge found that the boxes originally installed during the construction of the building by the said B.C. Securities Co., the mortgagors, were part of the freehold, but that certain other boxes placed in the building by the Dominion Trust Co. about a year afterwards were chattels. The term "vault" is sometimes used in this case as signifying the strong room and sometimes the boxes in the room. But this confusion in terminology apart, the case has to do with steel boxes and their frames installed in a room specially constructed for the safe deposit and care of documents and valuables. At the date of the mortgage, these boxes had not been installed, but their installation was clearly in the contemplation of the parties to the mortgage and the Dominion Trust Co. The Trust Company at first occupied a considerable part of the building, including the strong room and its equipment, as tenants of the Securities Company, and after a year of such tenancy took a conveyance of the premises subject to the mortgage. The Securities Company and the Trust Company are now in liquidation. The mortgagee is in possession and the Trust Company brought this action to recover the boxes in dispute.

The circumstances under which the first lot of boxes were installed in the strong room are, in my opinion, important as

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

Macdonald, C.J.A.

indicating the intention of the owners of the premises, and also the understanding of the Dominion Trust Co. as to what the relationship of these boxes to the freehold was intended to be. A large number of the boxes were purchased from the Trust Company by the Securities Company for installation with others purchased from the manufacturers. They were installed in accordance with plans of the strong room prepared by the architect. The strong room was constructed specially for the business of safe deposit. The installation of these boxes appears to me to be part of the general scheme to construct and equip a building or room for a particular purpose. Those which the trial judge held to be part of the freehold, while not actually attached thereto by bolts or other fastenings, were placed in such a way as to suggest permanency. They occupied one side of the room from end to end and from floor to ceiling, with appropriate finished moulding along the top, and rested upon the concrete floor below the rubber tiling which covered the rest of the floor, and which was fitted against the base of the boxes. Complementary to the boxes, were certain cubicles or small apartments affixed to the freehold, designed for the convenience of depositors in examining their documents in private.

It appears to be well established by authority that if an intention to make chattels part of the freehold is sufficiently established from all the circumstances of the particular case, they may be held to be part of the freehold, notwithstanding that they are not affixed otherwise than by their own weight to the freehold: *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, in which Lord Blackburn points out that, in such circumstances, the onus of proof lies on the party who alleged that the chattel has been made part of the realty. In *Leigh* v. *Taylor*, [1902] A.C. 157, at 158, Lord Macnaghten said that:—

> The mode of annexation is only one of the circumstances of the case and not always the most important, and its relative importance is probably not what it was in ruder or simpler times.

One may be permitted to ask in view of the fact that the Trust Company was to become tenant, why the boxes which belong to the Trust Company should have been purchased from them by the Securities Company and installed as part of the original scheme of construction if they were to remain chattels? That portion of the building including the strong room which was leased

by the Trust Company was leased at a lump sum without distinction between the building as freehold and these boxes as chattels. In my opinion, the completeness of the equipment of the room by the installation of the boxes and cubicles strongly supports the defendants' contention that the boxes were intended to be a permanent adjunct of the strong room. The removal of these boxes would leave the floor of the room in an incomplete condition. The rubber tiling would have to be extended over the surface formerly occupied by the boxes, and while this is not in itself a matter of very great weight, yet in conjunction with other circumstances it is not to be overlooked.

As regards the second class of boxes, namely, those which were placed in the strong room by the Trust Company after they became the owners of the equity of redemption, I entertain considerable doubt as to their status. They were no part of the original construction or installation, and I am unable to say that the judge came to a wrong conclusion when he held that the mortgagees did not satisfy the burden of proof resting on them to shew that these boxes were made part of the freehold. They did not form even a complete "nest of boxes" and were not embraced in the general scheme of numbering applicable to the others.

I would, therefore, dismiss the appeal.

GALLIHER, J.A.:—I would dismiss the appeal and allow the cross-appeal. Galliher, J.A.

I realize that it is a case of no little difficulty, and one on which different minds can very well come to opposite conclusions, as indeed is instanced by the fact that no two minds have wholly met here.

After a careful perusal of the evidence, and an endeavour to apply the authorities cited to us, and others which I have read, I am unable to conclude that the articles in question here are fixtures and come within the purview of the mortgage.

Mr. Taylor presented to us a very forceful and elaborate argument as to the architectural design, location and numbering of the nests of boxes, the cubicles, grills and other fittings, their general erection and construction on a well defined plan, and urged that he was well within the decision in *D'Eyncourt* v. *Gregory* (1866), L.R. 3 Eq. 382, 394.

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

Galliher, J.A.

In that case Lord Romilly, M.R., expressed himself as not coming to his conclusions with any degree of confidence or complete satisfaction to himself, but even had the decision been given absolutely free from doubt, I must confess I cannot see the application of a principle under the circumstances of that case which was the beautifying of an expensive manor house and grounds by the harmonizing and symmetrical designing and construction of objects of art to the furnishing of a safety deposit vault in a business block.

As regards the rule laid down by Lord Blackburn (then Justice Blackburn), who delivered the judgment of the court in *Holland* v. *Hodgson*, L.R. 7 C.P. 328, followed and approved in subsequent cases in England and in our Supreme Court of Canada, it resolves itself into a question of what was the intention of the parties under the particular circumstances of each case.

I think we must find upon the evidence here that the several articles in question could be easily removed without damage to the property.

Of course, that alone does not determine what are fixtures and what are chattels, and, as evidence of intention, Mr. Taylor points to the fact that, when negotiating for the loan, the plaintiffs made a point of the earning capacity of the safety deposit vault.

I think it may be assumed that generally speaking loan companies do not advance their money with the view of, at some future time, acquiring the property by foreclosure or sale proceedings, but rather for the purpose of income by way of interest on such loans, but, of course, with a view to obtaining ample security in case of failure to repay the loan and interest.

After the valuation of the property as a property pure and simple, they enquire into the earning capacity of the premises, not so much perhaps with a view to placing an enhanced value thereon as to the probability of the mortgagor being able to meet his payments when due.

I admit both conditions may be in mind, but not so as to warrant us in assuming that the defendants believed or the plaintiffs intended, that the fittings or fixtures, whichever we may for the moment call them, would be covered by the mortgage.

The mortgage was upon the lands and premises, describing them, and making no reference to fixtures (though fixtures of

course would be included), and I mention it merely to point out that in most of the cases cited to us by Mr. Taylor, of counsel for the defendants, which were cases where machinery was being used for manufacturing purposes, and where without the active operating creative power the purposes for which the premises were utilized could not be carried out, fixtures were specifically mentioned in the mortgage.

Some of these nests of boxes were laid on steel beams and rubber tiling, with which the floor of the vault was finished, was brought up to and against the base of the boxes, while those brought in later were placed on top of the rubber tiling, a fact which rather argues against their being an intention to attach these as fixtures to carry out a completed plan as a whole.

The removal of one row of rubber tiles, which would be sufficient to enable the boxes to be removed, seems to me to affect the realty in so slight a degree as to constitute practically no appreciable damage.

Nothing would be gained by dwelling upon the matter further, as rightly or wrongly I have reached a conclusion satisfactory to my own mind as to the nature of these articles.

McPHILLIPS, J.A.:—The two actions were tried together by Gregory, J., and involved the question of the determination as to whether the safety deposit boxes, cubicles and other fixtures connected therewith of the safety deposit vault of the Dominion Trust Co. were the property of the Mutual Life Assurance Co. of Canada, mortgagees, later mortgagees in possession, and still later the owners of the freehold by an order absolute of foreclosure. The trial judge, in a very careful judgment, in which he goes, very fully into the facts, and discusses the law as it is interpreted and applied by him, found that the safety deposit boxes called by him as lot 1 were the property of the Dominion Trust Co., being part of the realty, that as to lot 2 they were and remained chattels of the Dominion Trust Co. The Mutual Life Assurance Co. of Canada appealed as to the finding relative to lot 2, and the Dominion Trust Co. cross-appealed as to the finding relative to lot 1. The British Canadian Securities Limited was, in its action, held to be entitled to the steel bookcases and map and voucher cases and the Mutual Life Assurance Co. of Canada was held to be entitled to the steel shelving and wire partition in the storage vault and

McPhillips, J.A.

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

McPhillips, J.A

counter plate glass on the counters, and in this action there is an appeal and cross-appeal. In my opinion, and with great respect to the trial judge, I am entirely unable to accept the view that the Dominion Trust Co. or the British Canadian Securities Limited, are entitled to any of the claimed articles, but that they are all fixtures and are the property of the Mutual Life Assurance Co. of Canada, the owners of the freehold.

It would be too long a story to, in detail, set forth the various changes in the business relations and realty holdings changes of the Dominion Trust Co. and the British Canadian Securities Limited ending in disastrous financial failure, but this much can be said, that the two companies were one, in so far as that can be said where they were separate entities, managed wholly by the one person, namely, the late W. R. Arnold, who was the managing director of both companies. The mortgage held by the Mutual Life Assurance Co. of Canada now foreclosed was given by the British Canadian Securities Limited, the then owners of the freehold, being a most modern and substantial office building in the City of Vancouver of extensive proportions, and was later the home and the property of the Dominion Trust Co., subject to the mortgage, becoming, subsequent to the mortgage, the owner of the freehold by conveyance from the British Canadian Securities Limited. The Dominion Trust Co. (hereafter called the Trust Company) was a party to the application for the loan made to the Mutual Life Assurance Co. of Canada (hereafter called the Assurance Company) and was a party to the mortgage and bond as a principal debtor along with the British Canadian Securities Limited (hereafter called the Securities Company) for the due payment of the mortgage. Elaborate forms of application plans and other data were placed before the Assurance Company, and great stress was laid upon the nature of the building, its adaptation, in fact, architectural design, to house the safety deposit vaults and to generally carry on an extensive financial and trust business of a permanent nature, and the business carried on was certainly of large, even vast proportions, unfortunately, only to end in disastrous failure. There was displayed in large letters upon the building this legend: "Dominion Trust Company—The Perpetual Trustee—Armour Plate Safety Deposit Vaults"—evidencing the declared permanent nature of the business carried on in the build-

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

McPhillips, J.A.

ing. It is true that the whole office building was not devoted to the business of the Trust Company and the Securities Company, there being other tenants, but the building was most certainly ear-marked in particular as the permanent abode of the Trust Company, and was built and especially adapted for the business of the Trust Company and the Securities Company, and this was generally impressed upon the Assurance Company. It would take too long to enter into the details as to this, but I consider that the subject warrants at least the setting forth of a letter which went to the Assurance Company at the time of the application for the loan. It reads as follows:—

Vancouver, B.C., October 4th, 1912.

Messrs. Mutual Life Insurance Co.,
Waterloo, Ont.

We beg to advise you that we are sending you to-day under separate cover blue prints of our building at the corner of Pender and Homer Streets, Vancouver, as requested by Mr. R. L. Drury.

With regard to the rentals for safe deposit vaults, we beg to advise you that the earnings for the first eight months of 1912 were $5,000. The vaults being installed in the building at the corner of Pender and Homer Streets are double the size of the present vaults, and the earning capacity will be $25,000. At the present time the Dominion Trust Company have some ten different sizes of deposit boxes for rent, but a number of sizes are all rented *and they are waiting to instal new boxes in the new building.*

We would like to know regarding this loan by wire after your full board meeting to be held on the 10th inst. I might say that since your president and managing director were here we have refused this loan from other parties on account of assurances which they gave us at that time.

W. R. Arnold, managing director.

The Assurance Company finally advanced the sum of $225,000 by way of mortgage, and became possessed of the legal estate in the lands upon which the building is situate, and were mortgagees thereof; the Trust Company became the owners thereof subject to the mortgage by purchase from the Securities Company for the sum of $625,000 being conveyed the land upon which the building is "together with all buildings, fixtures, etc."—words to be found in the conveyance. Now, at the time of the conveyance, the bulk of the articles called in question were in place and situate in the building, and in use in connection with the business there carried on, and all of the articles are, in their nature, not only useful, but, in these modern times, may be said to be necessary in the carrying on of the business, especially when carried on in the extensive way in which it was—being a business of great

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

McPhillips, J.A.

volume—and the building was advertised far and wide as having the most complete fittings of the most modern kind, and of undoubted convenience and safety, in fact, in perfect keeping with the character of safety deposit vaults now so well understood in the large cities of the United States and Canada. It is clear beyond question that a very material inducement for the making of the loan by the Assurance Company was the character of the building and its special adaptation to the business carried on and its very complete architectural design and construction, together with all the necessary fittings of safety deposit vaults—*i.e.*, safety deposit box units and all the necessary attendant features to complete the same, together with the steel bookcases, map and voucher cases, steel shelving, wire partition and storage vault, in short, all the claimed articles find their natural place upon the premises in which the business was being carried on, and were essential and necessary in the carrying on of the business, and evidenced the special character of the building and its adaptation for the special class of business carried on therein.

I do not find it necessary to enter into detail as to which company placed the respective claimed chattels upon the premises, it not being a matter material to the inquiry as I view it. They all became fixtures, and were not removable as against the mortgagee in possession and the owners of the building and land by way of foreclosure of the mortgage. It may be remarked in passing that no attempt was made to set up any title to the claimed chattels until after the mortgagee was in possession. The Trust Company and Securities Company are both in the course of being wound up, and the claims made are being made by the liquidators thereof, that is, the actions are being carried on in connection with liquidation.

In the argument upon the two appeals—(I am dealing with the actions and the appeals in one judgment as the facts and the law are so interlaced that it would only mean undue repetition otherwise, and I cannot really see any differentiation in the matter for consideration; that is, my view of the law applicable to the special facts is equally decisive and comprehensive of both appeals)—a great many authorities were referred to. I do not intend to, in detail, discuss all of these authorities. With deference to counsel, upon both sides, some of them seem quite inapplicable, but I

admit that there would appear to be quite a good deal of confusion in the many opinions of the eminent judges who have so laboriously and ably examined into the principle of law as affecting fixtures. This, though, is apparent throughout all the decisions and has been given voice to by the judges that each case must really be decided upon the special facts thereof, that is, that the principle is elastic in its application and should, of course, be equitably applied. In the appeals which are before this court, we have the original parties, no intervening interests, the fact that the Trust Company and Securities Company are in the course of being wound up confers no greater rights than the rights exercisable by the mortgagors, and both companies, as we have seen, were parties to the mortgage. In passing, it may be further noted, as the evidence shews that the conveyance from the Securities Company to the Trust Company is the only instrument passing the articles which, in the main, are the subject-matter of the appeals, that is there is here cogent evidence of intention, that they were considered fixtures and passed with the conveyance of the land upon which the building was situate, no bill of sale was executed, in fact, no evidence whatever that there was any sale independent of the sale of the realty.

It is a further matter for remark and particularly pertinent to the inquiry that the safety deposit boxes, accompanying appliances, attachments and conveniences were all put in place under special architectural supervision and in accordance with plans made. There is here no casual bringing into a building of chattels, the placing of same, with more or less fixity to the premises, with no intention, whatever, of making them part of the building, but here we have substantial articles, all coming within the plans and scheme of the building, to constitute a permanent safety deposit vault, with all its modern accessories, and to otherwise put in place and make serviceable a modern and up-to-date office building having, in particular, these special features. But now the contention is that there must be a complete emasculation of the creation which was so much enlarged upon when the very considerable loan was applied for to the Assurance Company, which loan was made upon the faith of these professions; and when the mortgagee seeks, in accordance with the terms of the mortgage, to exercise the right of possession and ownership of that which

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

McPhillips, J.A.

was mortgaged to it—these companies (the liquidators cannot assert any greater right) have the hardihood and effrontery to submit that the law supports them in their contention, with all respect to contrary opinion, my view is that the law fails to support any such submission, and it would be an instance, were it otherwise, of bringing the law into disrepute. We have here special circumstances that cannot be overlooked, and whatever confusion there may be in the law, no confusion can arise in its application to the special facts so apparent in these appeals. An early case much cited in later cases which well demonstrates what the law is and its proper application is *Walmsley* v. *Milne* (1859), 7 C.B. (N.S.) 116, 141 E.R. 759, and it was a case of bankruptcy, the assignee claiming. The case well warrants careful perusal and consideration, and wholly supports the arguments of the counsel for the mortgagee, the Assurance Company, in the appeals before us. See Crowder, J. at p. 139:—

> We think, therefore, that, when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a permanent purpose, and for the better enjoyment of his estate, he, thereby, made them part of the freehold which had been vested by the mortgage-deed in the mortgagee; and that, consequently, the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action.

This case has been cited in the following cases: *Gough* v. *Wood*, [1894] 1 Q.B. 713; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; *Crossley* v. *Lee*, [1908] 1 K.B. 86; *Ellis* v. *Glover*, [1908] 1 K.B. 388.

The extent to which the law has been carried in its application, even where the ownership in the chattel was not really in the mortgagee, is evidenced in *Hobson* v. *Gorringe*, *supra*.

A. L. Smith, L.J., at p. 195, said:—

> 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 retake possession, we do not doubt, but how a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchase 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.

Reynolds v. *Ashby & Son*, [1904] A.C. 466, a decision of the House of Lords, is a leading case dealing with the law calling for consideration upon these appeals. I will only quote one portion of the judgment of Lord Lindley, appearing at p. 472:—

> The question is whether they passed by the mortgage. But for the fact that Holdway had not paid for them the question would not in my opinion be open to the slightest doubt. There is a long series of decisions of the highest

authority shewing conclusively that as between a mortgagor and a mortgagee machines fixed as these were to land mortgaged pass to the mortgagee as part of the land. The decisions in question begin with *Walmsley* v. *Milne* (1859), 7 C.B. (N.S.) 115, and include *Barclay, Ex parte* (1855), 5 DeG. M. & G. 403, *Mather* v. *Frazer* (1856), 2 K. & J. 536, *Climie* v. *Wood* (1868-9), L.R. 3 Ex. 257, *Longbottom* v. *Berry* (1869), L.R. 5 Q.B. 123, *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, *Gough* v. *Wood*, [1894] 1 Q.B. 713, and *Hobson* v. *Gorringe*, [1897] 1 Ch. 182. Others were referred to in the argument, but I need only mention *Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 37 Ch. D. 64, where it was held that whether the mortgagor is an owner in fee or is only a leaseholder (as in this case) is immaterial with reference to the question now under consideration. It is quite impossible to overrule these decisions.

In the present appeals, there is no question that the legal estate passed to the mortgagee. *Re Samuel Allen & Sons*, (1907) 76 L.J. Ch. 362—Parker, J. (afterwards Lord Parker of Waddington, lately deceased, one of England's greatest jurists) had under consideration rights under a hire purchase agreement.

The circumstances surrounding the giving of the mortgage in question in these appeals, the character of the business to be carried on upon the premises, the special construction of the building, its adaptation to the particular business, all punctuate the creation of premises of a special character with a present and potential value, that should appeal to a mortgagee in making the loan, and was undoubtedly an inducement to make the same, so as to create an equitable position that the Trust Company and the Securities Company cannot be allowed to now dispute. But quite apart from that, the legal estate became vested in the mortgagee and there was no removal before the mortgagee took possession, of course, though, in my opinion, no removal would have been justified, and if there had been, there would be a right of action therefor. A case which is apposite is *Monti* v. *Barnes*, [1901] 1 K.B. 205. The head-note is in the following terms:—

> The mortgagor of a freehold dwelling-house after the execution of the mortgage removed certain fixed grates from the house and substituted for them an equal number of dog grates. The substituted dog grates were not physically attached to the freehold, but rested in their places merely by their own weight, which was considerable; *held*, that, the true inference being that the dog grates were substituted for the purpose of improving the inheritance they were fixtures.

It is noteworthy that A. L. Smith, M.R., used this language:—

> It is obvious that a dwelling-house cannot continue without grates and manifestly the mortgagor never intended that the house should be without them.

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

McPhillips, J.A.

Here we have a building specially constructed and with a declared present and potential value, founded upon having therein a safety deposit vault. Of what practical value would it be without the necessary accessories, the safety deposit boxes? To state the proposition only shews how untenable it is, that as against this declared intention, the very parties who induced the Assurance Company to make this very considerable advance of money, should now be interfered with in its right to the security, that it should be left intact, not destroyed; and, in passing, the evidence shews that the Assurance Company, in the endeavour, no doubt, to recoup itself for the investment made, is now maintaining and carrying on a safety deposit vault business upon the premises.

The Scotch case of *Howie's Trustees* v. *M'Lay* (1902-3), 5 Fraser's Session Cases, 214, 5th series, is much in point. The head-note is as follows:—

Held, that a heritable security over a factory included as part of the heritable subjects five lace looms therein, which were bolted to a long iron sole-plate attached only by its own weight to the floor, the upper part of the looms being tied by substantial iron stays to the roof beams.

Then it is to be noted that the facts disclose in these appeals that the fixtures were placed by the owners of the realty, and, in this connection, the judgment of Joyce, J., in *Re Chesterfield's Settled Estates* (1911), 80 L.J. Ch. 186, is much in point.

Mowats Limited v. *Hudson Bros. Ltd.* (1911), 105 L.T. 400, is an interesting case, although in no way decisive of the points we have to consider, being solely a case of landlord and tenant, but a statement of the law as understood by that great judge, Vaughan Williams, L.J., appearing at pp. 402-403 (although in the particular case dissenting from his brethren) is instructive. The Lord Justice speaks of "the scheme for the conversion of the building into a provision shop." We have the erection of a building specially constructed and adapted for a safety deposit vault and the carrying on of that business—"Armour Plate Safety Deposit Vaults"—and the case of the granting of the legal estate. A most decisive case upon the points calling for decision upon the present appeals is that of the House of Lords in *Meux* v. *Jacob* (1875), 44 L.J. Ch. 481—the head-note reading as follows:—

Trade fixtures pass by a mortgage of the freehold or of a leaseholder's interest in the property to which they are attached, whether such mortgage be effected by a regularly executed deed, or by deposit with memorandum, and such mortgage will be effectual, though not registered, as against any sub-

sequent unregistered bill of sale. Trade fixtures added subsequently to the mortgage are subject to this rule as much as those attached before the mortgage.

Lord Hatherley, in this case, at p. 485, said:—

I apprehend that a mortgage or assignment out and out of all a leaseholder's interest in the property itself as distinguished from the fixtures carries with it, also the interest in the fixtures attached to the property, although those fixtures might be subject to the right of removal if the mortgage had not been executed by the party entitled to the lease. I mention that because it appears to me to cover the question of any fixtures that may have been added subsequently to the memorandum of deposit by the mortgagor in this instance. If, subsequently to the memorandum of deposit, he had attached other chattels to the property, the mortgagee of the lease stood in the same position as his mortgagor, and those things, when attached to the freehold, passed during the interest that still remained in the lease. Therefore, the mortgage would attach to them, and the mortgagee would, at any time during the lease, have the benefit which his mortgagor had of removing those chattels that first attached anterior to his mortgage and also that subsequently attached posterior to his mortgage. That being so, the only argument on this subject which we have heard to-day appears to me to be entirely untenable.

I particularly rely upon this statement of the law, as the mortgage in the present case was executed by both the Trust Company and the Securities Company, and both companies have placed fixtures in the building which in my opinion passed under the mortgage and are of the freehold, the property of the Assurance Company. See also Lord Selborne at p. 486.

The present appeals indicate that note must be taken of the modern advance in the use to which buildings are put—and that that which might be at first thought upon the cases to be trade fixtures or chattels, not fixtures, forming part of the freehold, may well have to be considered as forming part of the freehold, and in the inquiry it is particularly a matter for careful consideration, to give full effect to the intention of the parties and the special character of the building, and when that special character may be said to give the main or a particular value to the freehold, the nature of the attachment to the freehold or non-attachment at all is to be considered. But there may be no attachment at all, and yet it may be just and right and a true application of the law to hold that the property in the at one time chattels has passed and has become incorporated in the freehold. In this connection the language of Lord Shaw in *Att'y-Gen. of Southern Nigeria* v. *Holt*, [1915] A.C. 599, at p. 617, is indeed most instructive.

In my opinion, the mortgage was effective to pass the property

B. C.

C. A.

DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO.

in question, and as owners of the freehold, the Assurance Company is the owner thereof, *i.e.*, the articles in question became part of the freehold, and the Trust Company and the Securities Company both fail in their appeals, and the Assurance Company should succeed in their appeals. In the result, the actions should, in my opinion, be dismissed.

B.C. SECURITIES v. MUTUAL LIFE.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The questions to be decided here, like those in *Dominion Trust* v. *Mutual Life*, judgment in which has just been delivered, are very close to the line, and as I am unable to say that the judge came to a wrong conclusion, I must dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal and allow the cross-appeal (except as to the spare armature and counter plate glass) for the reasons already given in *Dominion Trust* v. *Mutual Life*, just decided.

As to the armature and plate glass, I am in some doubt, but not sufficient to warrant me in reversing the finding of the trial judge.

MCPHILLIPS, J.A.'s reasons are included in his judgment in *Dominion Trust* v. *Mutual Life*, *ante*, both cases having been heard together.

Plaintiff's appeal dismissed (GALLIHER, J.A., *dissenting*).

Defendants' appeal dismissed (MCPHILLIPS, J.A., *dissenting*).

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 18, 1918.

CONTRACTS (§ IV B—333)—IMPOSSIBILITY OF PERFORMANCE—REASONABLE CAUSE NOT TO BE DEEMED A BREACH—MACHINERY FOR MAKING SHELLS —NOT CONSIDERED AS FIXTURES.

By the terms of a written contract the plaintiffs agreed to convey in fee simple to the defendants a ten-acre plot of land together with a partially constructed building. The defendants covenanted to complete the building before a certain date, to equip the building as a factory for the manufacture of farm machinery and municipal supplies, etc., and to employ a certain number of men; on default, etc., the defendants covenanted to transfer the site and all buildings and fixtures back to the plaintiffs. There was also a proviso that it should not be deemed a breach of any of the clauses or covenants if the defendants could shew reasonable cause. By agreement between the parties, machinery was installed for making shells. The building and contents were subsequently destroyed by fire. The defendants removed some of the machinery, had it repaired and removed to another site, where they continued the manufacture of shells as before. The plaintiff alleged default and claimed specific performance. Harvey, C.J., and Stuart, J., held that

the machinery was not covered by the word "fixtures," which in the agreement meant "landlord's fixtures," Harvey, C.J., also held that reasonable cause had been shewn for not carrying on the business. Beck, J., held that the case was not one of non-compliance with the agreement, but of an accident creating an impossibility of performance and this, by virtue of an implied condition, operated as a termination of the contract with respect to both parties to it, entitling the plaintiff, on the basis of a resulting trust, to a reconveyance of the land. Hyndman, J., held that, assuming the machinery to be fixtures within the meaning of the agreement, the permission of the plaintiffs to remove the damaged machinery operated as a waiver by them to any right to it.

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Statement.

APPEAL from the judgment of the trial judge in an action alleging default under an agreement and claiming specific performance, a re-conveyance of land and the return of machinery alleged to be "fixtures." Reversed.

I. C. Rand, for appellants; *G. M. Blackstock*, for respondents.

HARVEY, C.J.:—I am disposed to agree with my brother Stuart that the machinery in this case does not come within the description of fixtures as intended by the agreement. The purpose for which it was to be used, namely, the manufacture of war supplies, shews clearly that it could not have been intended to remain on the premises permanently and when its use came to an end it would have to be removed, to be replaced by the necessary machinery for the class of manufacturing contemplated by the agreement, so that the machinery actually in the premises—whatever might be said of machinery for the purposes specified in the agreement—was clearly there only for temporary purposes and should not, I think, be considered a fixture.

Harvey, C.J.

I am likewise of opinion that in any event there was no breach of the agreement. Apart from the principle mentioned by my brother Beck, the agreement itself provides that reasonable cause would prevent any apparent breach of the agreement from being deemed an actual breach. The destruction of the building by fire for which the defendants were in no way responsible was surely reasonable ground for their not continuing to carry on the business which could be performed only if a building existed.

I agree, therefore, in the disposition proposed by the other members of the court.

STUART, J.:—The plaintiff was a real estate company operating in Medicine Hat. They owned a tract of land which had been subdivided and which they were hoping to sell advantageously in lots. They owned a 10-acre plot upon which, for some purpose not disclosed, they had partially erected a building at a cost of

Stuart, J.

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Stuart, J.

about $7,500. In order to enhance the value of their surrounding lots, and to create a market for them, they, on January 16, 1915, entered into a written contract with the defendants, whereby they agreed to convey, in fee simple, to the defendants, on March 26, 1915, the said 10-acre plot together with the said partially constructed building. In consideration of this transfer, the defendants covenanted to proceed and complete the building on or before March 26, 1915, to equip the building as a factory for the manufacture of farm machinery and municipal supplies, to use the land for industrial purposes only, to commence operations in the factory on or before May 1, 1915, and to continue to operate the same continuously, to employ at least 6 men continuously during 1915, to employ continuously during 1916 at least 25 men, "provided that conditions were such as to warrant such increase in the number of men employed" and to erect all other buildings "in connection with the local branch of the company" on the said site.

There was a proviso that, in case of default on the part of the defendants in the performance of any of these covenants, or in default of the defendants being able to satisfy arbitrators that on March 26, 1918, the factory was a "good and substantial going concern" the defendants covenanted to transfer the site in fee simple free of encumbrances and all buildings and fixtures thereon to the plaintiffs. There was also a proviso that it should not be deemed a breach of any of the clauses or covenants in the agreement if the defendants could shew reasonable cause. There was a clause also by which the plaintiffs agreed, if all the covenants were performed by the defendants, that it would, on March 26, 1918, cause a caveat referred to in the agreement as having been placed against the land to be removed.

This caveat was in fact never lodged against the land, the reason being that it was found that it would embarrass the defendants' credit.

The defendants completed the building, but, before installing the machinery intended, it obtained a contract from the authorities to make shells for the war, and, with the consent of the plaintiff, installed machines adapted for this different purpose, and not, with the exception of one or two small machines, adapted for the originally intended purpose of manufacturing farm machinery and municipal supplies.

The defendant proceeded with the manufacture of shells and, apparently fulfilled the terms of its contract respecting the employment of men. In April, 1916, the building and contents were wholly or partially destroyed by a fire.

The defendants removed some of the machinery which was capable of repair to another site, repaired it at considerable expense, about $7,000, and proceeded to manufacture shells as before.

On September 22, 1916, the plaintiff began this action, alleging a default and claiming specific performance of the agreement, a re-conveyance of the land and a return of the machinery, an injunction against its sale, and, alternatively to delivery of the machinery, damages to the amount of its value. There was no claim for damages for breach of the covenants.

The defence was a denial of default, an assertion of impossibility of performance, which was a legal excuse, a denial that the removed machinery came within the true meaning of the term "fixtures" as used in the contract, an allegation of an offer to re-convey the land as a compromise before action brought, and of continued readiness so to do.

The trial judge gave judgment for the plaintiff. He ordered the defendant to re-convey the land and to pay $2,000 as damages in lieu of the return of the machinery. This was, in his opinion, shewn to be the fair value of the machinery, removed as it stood after the fire and before repair.

From this judgment the defendant has appealed.

The contract is in some respects rather badly drawn and leaves much room for doubt as to its true interpretation. In any case it is certainly a contract for the interpretation of which few, if any, precedents can be found. I think one is, perhaps, apt to lose rather than gain by attempting to obtain light from cases about fixtures as between landlord and tenant. These are in a class by themselves and rest very much upon considerations which are not present here. Also, though there is perhaps some analogy between the relation of the parties under the contract now in question and the relation between mortgagor and mortgagee, I doubt if the analogy is so complete as to justify the adoption of precedents in cases in which mortgagors and mortgagees were concerned.

We have here a contract to convey land which was carried out. The consideration was to be the performance by the transferee

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Stuart, J.

both before and after the transfer of certain acts upon the land. Though the agreement does not expressly so stipulate, there was, I think, in law, a right in the transferor to recover damages for the breach on the part of the transferee of the covenants to do these things. The parties were, however, not content to leave the transferor merely to this remedy. They proceeded to stipulate that, upon default by the transferee in the performance of his covenants, he would re-convey the land with all buildings and fixtures thereon to the transferor or grantor.

It does seem to me that we have here, in substance, a stipulation for a forfeiture or penalty. It may be that, if the defendant had not done anything even towards completing the building, had taken no steps at all to do anything in performance of his covenants, that the stipulation ought to be considered as an intended rescission of his contract, leaving the parties as they were before. But, where the parties contemplated the expenditure of large sums of money by the grantee, first, in completing the building, which would undoubtedly become part of the realty, and in affixing thereto apparatus, much of which also would undoubtedly become part of the realty, and then proceeded to speak of what would happen in case of a default, say, during 1916, in keeping the full complement of 25 men continuously employed, and to specify that, upon such default, not merely what the grantee had got from the grantor, but a great deal of very valuable property which he had put there at his own very large expense, should be given up by him to the grantor—can it truly be considered that this is anything else but a forfeiture or a penalty imposed in the place of the ordinary damages recoverable for a breach of covenant? To make it perhaps more clear, suppose the case that the contract had been fulfilled to the letter for 2 years and 11 months, and that just one month before the end of the 3 years, which may be termed the probation period, the defendant made clear default and did not keep up any longer a "good and substantial going concern" and gave no "reasonable excuse" therefor, but nevertheless had added to the land buildings very many thousand dollars in value. Would we not say that this was a true case of forfeiture or penalty if, instead of merely suing for damages for breach of the covenant to operate the plant continuously (which meant no doubt for 3 years, in view of the wording of the agreement), the plaintiff had

sued for a return and re-conveyance of the whole land and plant, without either proving or even alleging any damages as a consequence of the default?

On the other hand, we may perhaps view the contract as one providing a condition subsequent or for a defeasance of the grant. The transfer was given upon completion of the building but until the full 3 years had elapsed without default in the covenants payment of the consideration for the transfer was not to be considered as complete, and if it was never made complete, then the land was to revert. If everything had been in a deed of grant, covenants and all, it would look like a defeasance clause. But with a simple transfer given under the Land Titles Act, and with a separate document containing the covenants and conditions it is more difficult to view the matter in that light.

I am not suggesting at all that it is a case for the exercise by the court of its right to relieve against penalties and forfeitures, for there was no suggestion of such a course made at the trial or upon the appeal. But it seems to me necessary to discover the true nature of the contract, to understand at least its general character (for it is neither a lease nor a mortgage) in order to proceed to the interpretation of the crucial word "fixtures" and to give the contract its right legal effect.

Certainly, if events had taken one of the turns which I have above suggested, the court would have been face to face with a fairly plain case for relieving against a forfeiture. The obligations placed upon the defendant in case of a default cannot, it seems to me, be looked upon as merely liquidated damages. It was quite uncertain what amount of valuable machinery the defendant would have upon the site at any given time. It might have $20,000 worth or $100,000 worth. There was nothing "liquidated" about that.

Of course, it can be put this way. The plaintiff said in effect to the defendant: "You covenant to do these certain things which will incidentally be of great benefit to us in an extraneous way. For any default for which you have a reasonable excuse you will not suffer. But if you make default without any reasonable excuse you know precisely what you must do. You must return the land and all the buildings and fixtures thereon to us." The defendant agreed to do this with its eyes open.

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Stuart, J.

Well, we may call that a provision for a forfeiture or a penalty or we may not. Certainly it was a definite substitution for the ordinarily recoverable damages for a breach of covenants of something else which was agreed to be done, *i.e.*, the surrender of valuable property. The recoverable damages might have included the original value of the land and of the partially erected building which the plaintiff had lost, plus what it had lost in value in its surrounding lots owing to the default. The latter would be very uncertain and this no doubt was the reason for the substitution of something which was supposed to be very definite in place of general damages. It was at least supposed to be quite definite in substance though it could not have been supposed to be definite in value.

But the trouble is it has not turned out to be very definite even in substance and this because of the uncertainty in the meaning intended by the word "fixtures."

The peculiarity of the contract is that the grosser the default the less the defendant would suffer. If it did absolutely nothing it would lose nothing, only giving back what it gave nothing for. But the more it did in fulfilment of its contract, at least up to a certain point, the more it would suffer if it, after all, made a default.

In view of the unusual characteristics of the contract to which I have referred, it is my opinion that the court ought to adopt a strict interpretation of its terms, and that the defendant ought not to be taken as having agreed to surrender any part of its property which it is not absolutely clear that it had agreed to surrender.

If I am right in my suggestion that there was a forfeiture provided for, then forfeiture is a matter *stricti juris*, as stated by Holroyd, J., in *Doe d. Lloyd* v. *Powell* (1826), 5 B. & C. 308, 108 E.R. 115. The condition upon which the forfeiture was to happen must be shewn to have strictly and clearly occurred, and the property claimed must be strictly shewn to have been specified in and covered by the words of the contract.

And even if the terms "forfeiture" or "penalty" are not properly applicable, it seems to me that, in any case, in such a contract as this, with a provision for the re-conveyance of very valuable property as compensation for a default in a covenant no property should be taken as within it unless it is beyond all doubt covered by it.

The word "fixtures" is, as we all know, used in different senses.

The machines in question here were some of them placed on cement foundations into which bolts were inserted and cemented with the heads down and with the other ends passing through iron footings on the machines and fastened with screwed nuts. Others were merely attached to the wooden floors with screwnails. No harm whatever could be done to the building by their removal. If it had been a case of landlord and tenant they would have come within the common term "trade fixtures," which a tenant may remove at any time during the term. If it had been a case of mortgagee and mortgagor, the mortgagee, after taking possession, would have been able to claim them even as against lien-holders, at least according to the decisions in *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and *Reynolds* v. *Ashby*, [1904] A.C. 466. It will be observed, however, that, in both of these cases, the fact that the mortgagee had taken possession under his mortgage was considered as a material point, and what the result would have been if there had been no possession is not very clear. The matter was also fully discussed by the English Court of Appeal in *Ellis* v. *Glover & Hobson*, [1908] 1 K.B. 388. In that case, the mortgagee succeeded even without having taken possession, but much reliance was placed on a special covenant by the mortgagor not to remove without consent. For myself, I would be inclined to share the views there expressed by Fletcher Moulton, L.J., who hesitated even in face of the special covenant. There does not appear to be any recent decision on the general question beyond the Court of Appeal except *Reynolds* v. *Ashby*, *supra*, and there possession had been taken.

It was in this latter case that Lord Lindley used the following language (p. 473):—

> My lords, I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last, *but not least*, to the position of the rival claimants to the things in dispute.

The last consideration, here mentioned, is that which has appealed to me as deserving of very great attention, and it is for this reason that I have entered into the foregoing discussion of the facts of the case, and the possible result of the terms of the agreement in different contingencies as applied to those facts.

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Stuart, J.

There is no doubt that the court has made exceptions to the old rule, *quicquid plantatur solo, solo cedit.* See *Re Hulse*, [1905] 1 Ch. 406, at 411. And in this case which is, so far as I can discover, quite new in its facts I think for the reasons I have given an exception should also be made. This, of course, would only carry us so far as to say that a covenant to re-convey the land without more ought not to cover the machines in question. But, I think, also for the reasons given that, in interpreting the covenant even with the words "buildings and fixtures," the latter word ought to be read in the restricted sense of "landlord's fixtures."

The fact that this would not be giving the covenant any effect which it would not have had if the word "fixtures" had not been there, should not, it seems to me, seriously concern us. In *Bishop* v. *Elliott* (1855), 11 Exch. 113, at 122, 156 E.R. 766, at 770, Coleridge, J., delivering a judgment for the Exchequer Chamber, said:—

> It may be that by so construing the covenant we reduce its operation to that merely which the general rule of law would have given the landlord without it. But this is an argument of little weight. No modern lease probably will be found which does not contain covenants merely to secure rights subsisting at common law but perhaps more easily enforced by the help of an express contract.

I have also found the same view expressed in a later case to which I am now unable to refer. So in the case of the present covenant I think it is no objection to a restrictive interpretation of the word that it leaves the meaning the same as it would have been without it, because it may have been inserted simply to make it clear that real fixtures, generally looked upon indeed as part of a building, such as shafting or pipes or boilers built into or attached to the walls and capable of being used in any kind of manufacturing, but, with regard to which a possible doubt might arise, were intended to be included. In the case of *Lambourn* v. *McLellan*, [1903] 2 Ch. 268, again, of course, a case of landlord and tenant, there was a covenant by the tenant to yield up the premises

> together with all doors . . . hearths . . . and all other erections, buildings, improvements, fixtures and things which are now or which at any time during the said term hereby granted shall be fixed fastened or belong to

the demised premises. The word "machinery," as the court pointed out, was not used. The Court of Appeal held that certain machines, which, for the purpose of his business, the tenant had fastened to the floor by screws or nails, passed to the trustee in bankruptcy of the tenant and not to the landlord.

Stuart, J.

It is worthy of observation, also, I think, that in the mortgage cases the mortgagee held only a security for the repayment of a debt, while here the property is claimed absolutely and finally as the consequence of a default in performance of a covenant, not to pay money, but to do certain acts.

Upon the whole, therefore, I am of opinion that the machines here in question should not be considered as being covered by the word "fixtures" and that the defendant was not bound to surrender them. I prefer to place my judgment upon this ground, although I am also much inclined to agree that there was no real default in any case.

The appeal should, therefore, be allowed with costs and the judgment below modified so as to direct a re-conveyance of the land. Inasmuch as the defendant offered to do this in its defence, I think the plaintiff should have costs only up to that stage, and that the defendant should have the subsequent costs, including those of the trial.

Beck, J.

BECK, J.:—This action is founded on a contract in writing. It is dated January 16, 1915.

In consideration of covenants contained in the contract on the part of the Harvester Company the Kokomo Company agreed to convey to the Harvester Company a 10-acre plot of land in the City of Medicine Hat, together with a partially constructed building thereon. In consideration of the transfer the Harvester Company agreed: (1) To complete the building by March 26, 1915; (2) To equip the building as a *factory* for the manufacture of farm machinery and municipal supplies; (3) To use the land for *industrial* purposes only; (4) To commence operating the factory by May 1, 1915, and to continue operating continuously; (5) To employ at the commencement of operations at least 6 men and to continue to employ at least 6 men for the remainder of the year 1915; (6) To employ continuously during the year 1916, at least 25 men, provided that conditions are such as to warrant such increase in the number of men employed; (7) To erect all further and other buildings in connection with the local branch of the company on the said site.

Provided that in default in respect of any of the foregoing seven items or in default of the Harvester Company being able to satisfy certain arbitrators, whose appointment was provided for

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Beck, J.

in certain events, that on March 26, 1918, the factory is a good and substantial going concern, the Harvester Company agreed to transfer the site free of incumbrance together with all buildings and fixtures thereon to the Kokomo Company.

Provided that it shall not be deemed a breach of any of the clauses or covenants in the agreement if the Harvester Company can shew reasonable cause.

The Kokomo Company agreed that if the covenants on the part of the Harvester Company were performed it would, on March 26, 1918, cause to be withdrawn the caveat placed by it upon the land.

The caveat was not in fact placed against the land owing to the Kokomo Company yielding to the representations of the Harvester Company that its credit would be affected thereby. What the terms of the proposed caveat were, or were intended to be, does not appear, but presumably it would in effect embody the terms of the agreement and claim an interest under it, whatever that interest might turn out to be in the circumstances arising in the future.

The clause relating to the caveat would seem to disclose an intention that if the Harvester Company fulfilled the terms of the agreement up to March 26, 1918, that is, for 3 years following the date fixed for the commencement of the completion of the agreement, it would be discharged from all obligation in the future, its business interests being thought to be a sufficient guaranty of its continuing the operation of the factory under any circumstances in which it would be fair and reasonable to expect it to continue.

The building was completed, but, by mutual agreement, machinery for the manufacture of shells was installed instead of the class of machinery originally contemplated. The factory was put into operation, and, while being operated, a fire occurred—in April, 1916—destroying, practically, the building and damaging the machinery and appliances. No default had been made by the Harvester Company up to the time of the fire.

Ultimately, a number of machines were taken from the debris, repaired and placed in another building. From the evidence it would appear that the cost of extricating and repairing was about $2,500, the time occupied being about 6 weeks. The value put on them was about $5,000. The trial judge fixed their net value at $2,000, giving the plaintiff company judgment for that amount and costs. The defendant appealed.

In my view, the case is not one of non-compliance with the agreement, but of an accident creating an impossibility of performance and thus operating, by virtue of an implied condition, a termination of the contract with respect to both parties to it—leaving them both in the position in which the accident found them; with this addition, that the circumstances, including the contract itself, shew that the consideration for the conveyance to the defendant company has failed, entitling the plaintiff company, on the basis of a resulting trust, to a re-conveyance of the same property as was the subject of the first conveyance, so far as it still remains.

The case, clearly to my mind, comes within the proposition laid down in 7 Hals. tit. "Contract," p. 430, and supported by ample authority. "Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing, without which the contract cannot be fulfilled, will continue to exist . . . the contract, though in terms absolute, is to be construed as being subject to an implied condition, that if before breach performance becomes impossible without default of either party, and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance."

Appleby v. *Myers* (1867), L.R. 2 C.P. 651, is a suitable instance: In this case the plaintiffs contracted to erect certain machinery on the defendant's premises at specified prices for particular portions and to keep it in repair for two years—the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract; but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not.

Blackburn, J., in the course of giving the judgment of the court, said: "We think that where, as in the present case, the premises are destroyed by fire without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract but giving a cause of action to neither."

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Beck, J.

I insert here a case which I have found since these reasons were written, decided by the House of Lords, *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119, which clarifies the law upon the foregoing proposition and confirms the opinion I have expressed.

For the proposition that there is a resulting trust of the land because the purpose of the conveyance has failed there is, I think, ample authority. I refer to the text and the cases cited in 13 Hals. tit. "Equity," 28 Hals. tit. "Trusts," pp. 49, 52, 54. At p. 54 it is said: "Where property is purchased in the name or transferred into the possession of a person ostensibly for his own use, but really to effect or assist a purpose which is never carried out, there is a resulting trust of it for the purchaser or transferor, and he can make good his claim to it even if the purchase or transfer was made for the fraudulent purpose of evading the law."

The case of *Wilson* v. *Church* (1879), 13 Ch. D. 1, affirmed by the House of Lords *sub. nom. National Bolivian Navigation* v. *Wilson* (1880), 5 App. Cas. 176, lays down the same principle. The case is the one which was made the ground of decision in *Royal Bank* v. *The King*, [1913] A.C. 283, 9 D.L.R. 337. In the latter case the principle is stated as follows at p. 344:—

> It is a well established principle of the English common law that when money has been received by one person which in justice and equity belongs to another under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use.

The principle indicated cannot be confined to money. The case is one of a particular application of the well settled principle that failure of consideration entitles the grantor to a *restitutio*.

I see no reason why the exoneration of the parties from their contract, by reason of the accident, should carry with it any greater burden than to restore to the grantors so much of the property received from the grantors as the accident has left remaining. It is to that only that the resulting trust applies, see *Re Trusts of the Abbott Fund; Smith* v. *Abbott*, [1900] 2 Ch. 326. In this view, the plaintiff company was entitled to a re-conveyance of the land. The defendant company by the statement of defence offered to re-convey.

In the result, therefore, I would allow the defendants' appeal with costs and direct the defendants to give a re-conveyance

of the land as it now stands free of incumbrance, but I would order the defendant company to pay the costs of the action up to the statement of defence and the plaintiff to pay the costs subsequent thereto.

HYNDMAN, J.:—This is an appeal from the decision of Walsh, J., who gave judgment in favour of the plaintiff for a re-conveyance of the land in question and for the sum of $2,000 damages.

The essential facts are that the plaintiffs were the owners of a certain parcel of land, 10 acres in area, being part of legal subdivision 4 of section 19, tp. 12, r. 5, west of the 4th m., in or near the City of Medicine Hat. Upon the land there was a building partially constructed. On January 16, 1915, the parties entered into a properly executed agreement whereby, in consideration of certain covenants, later referred to, to be performed by the defendant company, the plaintiff agreed to convey in fee simple free from encumbrances the said land together with the partially constructed building thereon.

As consideration for the agreement by the plaintiff to transfer the lands in question the defendant company covenanted to do the following things: (See judgment of Beck, J.).

It was further provided that in default of any of the covenants under the said clauses 1 to 7 inclusive, or in default of the defendant company being able to satisfy the arbitrators thereinafter mentioned that on March 26, 1918, the factory is a good and substantial going concern, the defendant covenanted and agreed to re-transfer the said lands free of encumbrances and *all buildings and fixtures* thereon.

The building was duly completed and the title to the land was transferred to the defendant in May, 1915.

Clause 2 of the agreement, above recited, is to the effect that the building was to be equipped as a factory for the manufacture of *farm machinery and municipal supplies*. However, about the time of the completion of the building the defendant company obtained an order for the manufacture of munition shells and, in consequence, with the knowledge and consent of the plaintiff company purchased and installed a considerable quantity of machinery suitable for such purposes and continued the manufacture of shells under various contracts until the month of April, 1916, when the building was destroyed by fire and the contents seriously damaged. The

ALTA.

S. C.

KOKOMO INVESTMENT CO. v. DOMINION HARVESTER CO.

Hyndman, J.

structure was not rebuilt, but the damaged machinery was removed from the ruins by the defendant who had it repaired and later set up in another building in Medicine Hat (not on the 10 acres in question), and about September 1, 1916, work was recommenced on the shell contracts and continued there until about November 1, following, when, as the result of some transactions, the machinery was transferred to and became the property of the Canadian Western Foundry and Machine Co. Ltd.

The trial judge found that

> the defendant removed the remains of the machinery from the property with, I think, the *knowledge and consent* of the plaintiff, and expended upon repairs upon it a very large sum of money. I think it was within the contemplation of the parties when that was done that this stuff would not be returned to this property and I do not think the plaintiff can recover more than the value of this plant as it was left after the fire.

The plaintiff's claim is for, (1) reconveyance of the land in question, and (2) delivery of the machinery thereon at the date of the fire, or, in the alternative, damages.

In view of the willingness of the defendant, expressed at and before the trial, to re-convey the lands to the plaintiff, it will not be necessary to deal with that phase of the case and the judgment in that respect must stand.

The difficulty arises over the damages awarded in respect to the machinery.

Whether or not the special shell-making machinery, under the circumstances of this case, can be considered as fixtures is open to much doubt, and I am inclined to agree with Stuart, J., that it should not be so considered.

But apart from that feature, the fact is clear that the plaintiff knowingly permitted the defendant company to depart from the strict performance of the contract, and took no exception, whatever, to what they did under it, but apparently were entirely satisfied with what was done. The evidence of Frank Bending, president of the plaintiff company, is conclusive on this point. His evidence is as follows:—

> Q. And at the time of the fire they were manufacturing shells? A. Yes, sir. Q. And the Kokomo Investment Co., Ltd., were quite satisfied with what the defendant company was doing at that time? A. At that time, before the fire, yes. Q. There had not been any breach of their contract at the time by the fire? A. No, not that I can think of just now.

The plaintiff does not contend that the defendant was in any way responsible for the fire which occurred, and hence I take it

that this event cannot in any way be regarded as a breach of this contract. Therefore, it seems to me that, in the absence of some breach, the plaintiffs would have no right to demand the delivery to them of the machinery. But even if I am incorrect in this (assuming that the machinery in question were "fixtures" within the meaning of the agreement) it seems to me their permission to the defendant company to remove the damaged machinery would operate as a waiver by them of any right to it. The agreement, if strictly construed, I think, means that the defendant will re-convey the lands and such buildings and machinery as may be thereon *at the time of the breach*. It is clear that no breach had been declared or charged up to the date of the fire or removal and if the fixtures were removed, especially with the consent of the plaintiff, before default, I am of opinion that the plaintiff cannot, under the circumstances of this case, now properly claim them. In the absence of a provision to the contrary, I think, before any breach, the defendant would undoubtedly have the absolute right to remove fixtures at will whether it was intended to substitute others for them or not, and it cannot be said that on a subsequent breach plaintiffs could claim any right in such removed articles.

That there was a waiver as to non-observance of the clauses governing operations for the first year, I think there can be no doubt. The plaintiffs were fully aware of everything which was done, and the president, in his evidence, says there was no cause of complaint up to the time of the fire.

In *Darnley* v. *London, Chatham and Dover R. Co.* (1867), L.R. 2 H.L. 43, at 60, Lord Cranworth said:—

> When parties who have bound themselves by a written agreement depart from what has been so agreed on in writing and adopt some other line of conduct it is incumbent on the party insisting on and endeavouring to enforce a substituted verbal agreement to shew, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding, that both parties were proceeding on a new agreement, the terms of which they both understood.

I think the rule, in the circumstances of this case, is substantially complied with.

Being of opinion, therefore, that at the time of the removal of the machinery in question, there was no breach of which the plaintiffs could, or at any rate did, take advantage, I think the plaintiffs' claim for damages must fail. I would, therefore, allow

ALTA.

S. C.

Hyndman, J.

the appeal as to the verdict for $2,000 damages—the judgment with regard to the land to stand. I agree with my brother Beck as to the disposition of the costs. *Appeal allowed.*

B. C.

C. A.

EVANS v. CORPORATION OF RICHMOND.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. October 1, 1918.

1. JUDGMENT (§ I—30)—JOINT NEGLIGENCE CHARGED—ONE PARTY NOT LIABLE—JUDGMENT AGAINST THE ONE REMAINING.

The fact that an action of joint negligence has been brought against two defendants, and one has been proven to be not liable is no reason why judgment cannot be maintained as against the one remaining.

2. NEGLIGENCE (§ I C—49)—DRAWBRIDGE—SITUATION DANGEROUS—FLIMSY BARRIER ACROSS BRIDGE—LIABILITY OF CORPORATION FOR DAMAGES—NEGLIGENCE OF DRIVER OF MOTOR—PASSENGER NOT CHARGEABLE WITH DRIVER'S NEGLIGENCE.

A corporation which, by the situation of a drawbridge, the approach thereto, and a flimsy barrier across the bridge when open, makes such bridge a trap for the unwary and an invitation to accident is liable for damages, due to a jitney breaking through the barrier and plunging into the river, notwithstanding that the highway was known to the driver, and that he was reckless and disregarded the danger.

The negligence of the driver was not chargeable to a passenger in the car so as to prevent recovery although if the action had been brought by the representatives of the driver the question of contributory negligence would have arisen.

3. TRIAL (§ II B—46)—NEGLIGENCE—EVIDENCE SUFFICIENT TO GO TO JURY—DISTURBING VERDICT—ERROR IN LAW—FAMILIES COMPENSATION ACT. (B.C.)

If in an action under the Families Compensation Act (B.C.), the finding of the jury is that there was negligence, and if upon the facts there was evidence sufficient to admit of the question being passed upon by it, the verdict will not be disturbed unless some error in law has taken place.

Statement.

APPEAL from the judgment of Clement, J. Affirmed.

Joseph Martin, K.C., for appellant.

A. D. Taylor, K. C., for respondent.

Macdonald, C.J.A.

MACDONALD, C. J. A. (dissenting):—I am of the opinion that no negligence has been proven against the appellants, and that, therefore, the appeal should be allowed.

This being so, it becomes unnecessary to consider the other questions involved in the appeal. The driver of the car had driven a jitney on the highway crossing this bridge daily for a period of 3 years. He was, therefore, well acquainted with the draw, the light and the gates. The lantern suspended above the centre of the bridge shed a red light down the highway when the bridge was closed to highway traffic which could be seen, by persons approaching the bridge, at a distance of 2 or 3 miles. The light was a

single light in a lantern having red and green lenses. The lantern served for the highway as well as for navigation.

When the bridge was swung open to navigation the red lenses faced the highway and the green the water. When the span was open to highway traffic the green lenses faced the highway and the reds the water. In addition to the light there were gates on the highway some distance back from the span which were closed when the bridge was closed to highway traffic.

On the evening in question, the gates were closed. The span was open to navigation and the red light was shining down the highway. Some time before the jitney reached the bridge the red light faced the highway. Notwithstanding this fact, the driver drove on heedlessly, crashed through the closed gates, and plunged his car into the river, causing the death of the passenger whom the respondent represents. If the action had been brought by the representative of the driver, who was also killed, contributory negligence would have been a complete defence. That may not be a defence to the action of this respondent, since the person whom he represents may not have been negligent or guilty of want of care in the premises. But, be that as it may, unless it can be said that the defendants were negligent, and that that negligence caused the disaster, the question of contributory negligence does not arise.

It was argued that the system of warning adopted by the lighting of the bridge in the manner above specified would not be effective while the bridge was being swung open or was being closed. This may be quite true, and had the span been in course of turning while the jitney was approaching the bridge, the jury must have considered that circumstance, but when the evidence is clear and uncontradicted that the jitney was a long distance away when the span was being turned, and that the light was in position for a considerable time before the vehicle came to the span, or even to the approach to the bridge, the defect suggested can have no bearing upon the case. To succeed, the respondent would have to prove, not a negligent system of warning under all conditions, but that the system was negligently insufficient to meet the circumstances of this case. I would allow the appeal.

MARTIN, J. A., dismissed the appeal.

Martin, J.A.

B. C.
C. A.
EVANS
v.
CORPORATION
OF
RICHMOND.
McPhillips, J.A.

McPHILLIPS, J. A.:—The action was one brought under the provisions of the Families Compensation Act. The deceased, Anne Evans, who was a passenger in an automobile fell into the Fraser River and was drowned owing to the draw of the Fraser Avenue Bridge being open at the time the automobile reached the bridge, the driver thereof being evidently unable to check the way of the automobile. The action was brought for the benefit of the husband and children of the deceased. The verdict of the special jury was a general verdict, finding the defendants, as well as the driver of the automobile, negligent. The action was not brought against the driver of the automobile, and the finding of negligence against him may be disregarded, unless it can be said that his negligence disentitles the plaintiffs to succeed, and no contention of that kind would appear to be advanced, the point is not taken in the notice of appeal, nor is it tenable upon the facts. The appellants must be held bound by the course of the trial and when the jury brought in their verdict no exception was taken that admits of any question arising upon this point at this stage. The general verdict, as found by the special jury, specifically finds that the defendants, both the corporations, were guilty of negligence. Upon motion made for judgment by the plaintiff upon the findings of the jury, the Corporation of the District of South Vancouver was dismissed from the action, it appearing that the bridge in question was not within its corporate jurisdiction, and the agreement as between the defendants for the cost and maintenance of the bridge was of no force and effect, owing to the necessary provisions for the change of boundaries as provided for in the South Vancouver City Incorporation Act (Statutes of B.C. 1910) not having in pursuance thereof been brought into effect: and there is no cross-appeal upon the part of the plaintiffs asking judgment to be entered against the Corporation of the District of South Vancouver. So that that corporation may be dismissed from consideration, save that the appellants contend that the action, as launched, was one of joint negligence as against both corporations, and that no judgment can now be maintained as against the one remaining, namely, the Corporation of the Township of Richmond. Any such contention, in my opinion, is without force. The negligence found is negligence as against both, and if sustainable as against the Corporation of the Town-

ship of Richmond, that the Corporation of the District of South Vancouver has escaped liability is no effective answer nor does it dispose of the liability that the verdict imposes upon the Corporation of the Township of Richmond. (See *Bullock* v. *L.G.O. Co.*, [1907] 1 K.B. 204.) Considerable argument has been addressed to the point that it has not been sufficiently shown that the bridge in question and the place of accident were within the corporate limits or within the jurisdiction of the Corporation of the Township of Richmond. In my opinion, this defence is not open upon the pleadings, and if I were wrong in this, the evidence, in my opinion, is sufficient to establish that the scene of the accident was within the corporation limits. Further, the course of the trial and the defence generally throughout was not that the bridge was not within the corporate limits, that it was not the bridge of the Corporation of the Township of Richmond, but that it was maintained and operated in a proper manner and without negligence, and that the negligence was the negligence of the plaintiffs or the negligence of the driver of the automobile, which negligence the plaintiffs were chargeable with and thereby were disentitled to recover, that in any case the draw of the bridge was open at the time, and open at a time with such safeguards as to lights and barriers, that the Corporation of the Township of Richmond should be excused from all liability, that the causation of the accident was alone the negligence of the driver of the automobile, it being driven at an immoderate rate of speed without proper and sufficient brakes and without notice being taken of the red light and gates, and the bridge tender's signals. All these defences were passed upon by the special jury, and evidence was led to support the contention that the Corporation of the Township of Richmond was without negligence, but notwithstanding this, the finding is that negligence was present and if it be that upon the facts there was evidence sufficient to admit of the question being passed upon by the tribunal called upon to try the issues, the verdict must stand, unless some error in law has taken place. Counsel for the appellant has attempted to submit that it is a case of no evidence whatever, and that it was not a case which reasonably should have been submitted to a jury. With deference, no such proposition is capable of being established. The evidence is of cogent nature, well demonstrating that the situation of the bridge, the

B. C.
C. A.
EVANS
v.
CORPORATION
OF
RICHMOND.
McPhillips, J.A.

approach thereto, and the flimsy barrier some 20 ft. only from the draw, *i.e.*, the open space was a veritable trap for the unwary, in fact, it may reasonably be said that it was an invitation to accident. In these days of modern conditions, and within a short distance of the City of New Westminster, it would not seem unreasonable to expect that better conditions should have existed to safeguard the lives of the travelling public. It is impossible for the corporation to shelter itself behind the fact that all this inadequacy of provision against danger to the travelling public upon the highway was known to the driver of the automobile, well known to him, and that he was reckless and regardless of the danger, whether that be the fact or not. There is no evidence whatever that the deceased lady was at all acquainted with the facts as they are alleged to have been known to the driver of the automobile. The extent of the knowledge of the deceased lady was apparently not more than could be gathered by a person of intelligence, a passenger as she was in the automobile, and certainly there was no apparent or reasonable warning that the automobile was approaching a bridge swung out of its normal position, leaving a gap in the highway.

It would appear that the lights in use were lights maintained in respect to the marine regulations and for the guidance of mariners, and cannot be held to be any guide or warning to users of the highway. In short, it may, upon all the facts, be stated that there was no reasonable or proper safeguard or warning to the travelling public upon the highway, and the opening of the draw without proper safeguards constituted misfeasance. Were it merely non-repair of the bridge, unquestionably there would be no right of action, (*Pictou* v. *Geldert*, [1893] A.C. 524; *Maguire* v. *Liverpool*, [1905] 1 K.B. 767; see however *City of Vancouver* v. *McPhalen* (1911), 45 Can. S.C.R. 194. The editor of the Canadian Municipal Manual, Sir William R. Meredith, C.J.O., said relative to the above case, at p. 603 of his monumental work, that: "In the opinions of the Judges of the Supreme Court all the most important cases bearing upon the question in issue are collated and reviewed"—and I would in particular refer to what Duff, J., said at pp. 209-11, 213-14), in that there is no express provision in British Columbia imposing a liability upon a municipality for neglect to keep its highways and bridges in

repair and safe for the public in their rightful user of the same—liability is confined to such only as is imposed by the common law. But when we have the active interference with the bridge, *i.e.*, the swinging of the bridge, and the creation of a dangerous chasm, an open trap, unquestionably we have misfeasance proved.

Considerable argument was addressed to the question of whether the Corporation of the Township of Richmond could be said to have been legally responsible in any way in connection with the bridge, whether it was a bridge within its municipal boundaries, whether there had been the exercise of ownership or management thereof, and with respect to all these questions, in my opinion, the Corporation of the Township of Richmond is, upon the facts, conclusively proved to have been in possession of the bridge, exercised the rights of ownership thereof, and it is situate within its municipal boundaries. No contention to the contrary is open upon the pleadings, or capable of being successfully advanced upon the facts as proved at the trial. In passing upon this point, one fact alone demonstrates that this bridge is the bridge of the Corporation of the Township of Richmond, namely, the Richmond Loan by-law, 1907, whereby an arrangement was made between the corporation and the government of the Province of British Columbia to reconstruct the bridge in question at the point where situate and where the accident took place—the total cost being $40,000—the government contributing $20,000 and the corporation $20,000, the government engineer supervising the work. The bridge was constructed, taken over by the corporation, and its quota of the cost of construction was duly paid, and thereafter the bridge was under the control and management of the corporation, and that was the position of matters at the time of the accident. That the corporation was in possession of the bridge is clear beyond question, and a bridge tender was employed, and in charge of the bridge, an employee of the corporation. The evidence of Stephen, the clerk of the corporation, is conclusive upon this point. (And see s. 54 (186) and s. 332, Municipal Act, c. 524, 4 Geo. V., B.C. (1914)). The facts as proved in *Victoria Corporation* v. *Patterson*, [1899] A.C. 615, 68 L.J. P.C. 128, and the law as there defined, imposing liability upon the City of Victoria, can be relied upon in the determination

B. C.
C. A.
EVANS
v.
CORPORATION
OF
RICHMOND.
McPhillips, J.A.

of this appeal, and what the Earl of Halsbury, L.C., said, is particularly applicable to this present appeal:—

The headnote of the *Patterson* case, 68 L.J.P.C. 128, reads as follows:—

Where a statute enacts that roads and bridges are originally vested in the province, but may be adopted by a municipality—no special form of adoption, however, being necessary—acts done and authority exercised by a corporation in respect of such roads and bridges will, in the absence of evidence to the contrary, be taken as proof of adoption.

A bridge within the limits of the appellant corporation gave way and persons were drowned. The jury found that the proximate cause of the accident was the defective condition of a beam into which, some years previously, an officer of the corporation had bored holes. There was evidence that for a considerable time the corporation had undertaken the care and management of the bridge: *Held*, as matter of legal inference from the facts found, that the corporation had adopted the bridge, and were, therefore, liable for damages in respect of the accident.

It is true that in *The City of Vancouver* v. *Cummings* (1912), 2 D.L.R. 253, 46 Can. S.C.R. 457, the statute law there under consideration imposed a duty to repair, but there was also considered the liability for misfeasance, and it was there held, as in my opinion it can be rightly held in the present case, that upon the evidence there was a proper case for submission to the jury.

There is no point in the contention that the negligence of the driver of the automobile prevents the plaintiff's recovery in this action. That point was set at rest by the House of Lords in *The "Bernina"* (1888), 13 App. Cas. 1; also see *Matthews* v. *London Street Tramways Co.* (1888), 58 L.J.Q.B. 12; *British Columbia Elec. R. Co.* v. *Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4; and *Columbia Bithulitic* v. *B.C. Elec. R. Co.* (1917), 37 D.L.R. 64, 55 Can. S.C.R. 1. One consideration that gives me some hesitation is whether the verdict is in such a form as renders it unnecessary to direct a new trial, coupling as it does the negligence of the driver with that of the other defendants—but after some anxious consideration, I am of the opinion that the verdict is sufficiently definite, and certainly the facts make it clear that the deceased lady was in no way chargeable with any negligence of the driver of the automobile. Beven on Negligence (3rd ed., 1908), vol. 1, at 175 In the present case, upon the facts, unquestionably the negligence was that of the Corporation of the Township of Richmond; it was the negligence of those in charge of the bridge. The headnote in the *Matthews* case, *supra*, puts the point very precisely:—

In an action by a passenger on an omnibus, against the owners of a tramway car, for compensation for injuries sustained in a collision, the direction of the jury since the decision of the House of Lords in *Mills* v. *Armstrong, The "Bernina,"* 13 App. Cas. 1, should be, "Was there negligence on the part of the tramway car driver which caused the accident? If so, it is no answer to say that there was negligence on the part of the omnibus driver": the plaintiff in such a case not being disentitled to recover by reason of the negligence of the driver of the omnibus on which he was a passenger.

The verdict is a general one, and that being the case, it really becomes unnecessary to point out specifically what may be said to have been the negligence, but it is patent that there was not present any manner of safeguard which modern conditions can be reasonably said to require. Many could be suggested, but it is profitless to speculate thereon, or intimate what they might have been. The verdict is, in itself, sufficient, being founded upon sufficient evidence. In *Newberry* v. *Bristol Tramway and Carriage Co.* (1912), 29 T.L.R. 177 (C.A.), at p. 179, we read:—

Now if the jury had simply given a general verdict, his Lordship Cozens-Hardy M.R., thought they could not have interfered. But they had told the court what they meant by their verdict.

Here we have no definition upon the part of the jury of the precise negligence, but it can be inferred—there may be said to have been no proper safeguard. This is a case within the language of Hamilton, L.J. (now Lord Sumner):—

His Lordship did not think that a jury could fix a defendant with liability for want of care without proof given or error assigned, out of their own inner consciousness and on their own notions of the fitness of things.

Here it is understandable, with all due and proper deference to those who may hold a contrary opinion, that many safeguards could have been provided that would most assuredly have prevented this very appalling accident and loss of life. That the verdict of the jury must not be lightly overthrown is shewn by what Lord Loreburn, L.C. said in *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Co.* (1907), 23 T.L.R. 696, at 697.

Certainly the present case was not one which could have been withdrawn from the jury, and we find Sir Arthur Channell in *The Toronto Power Co.* v. *Paskwan*, [1915] A.C. 734, 22 D.L.R. 340 at 344, saying:—

It is enough to say, as both the judge who tried the case and the judges on appeal in the Supreme Court have said, that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The judge could not have ruled that as a matter of law the answer of the defendants was necessarily conclusive in their favour. It is unnecessary

B. C.

C. A.

EVANS v. CORPORATION OF RICHMOND.

McPhillips, J.A.

to go so far as Middleton, J., did in the court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion, which on the evidence is not unreasonable. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In my opinion, the negligence found was justifiably found, and if I am right in this conclusion, and if the facts are such as to warrant but that one view, that the Corporation of the Township of Richmond was guilty of negligence, then the case is one entitling the Court of Appeal to sustain the verdict and the judgment entered for the plaintiffs. Even if the verdict of the jury was for the defendants or be wanting in completeness of form or have involved therein, as in the present case, a finding of negligence against the driver of the automobile as well, it matters not if the Court of Appeal has all the facts before it, and no other relevant facts can be suggested as being capable of proof which would alter the case as made out, the province and authority of the Court of Appeal extends to the full length to give judgment for the plaintiffs. See *McPhee* v. *Esquimalt and Nanaimo R. Co.* (1913), 16 D.L.R. 756, 49 Can. S.C.R. 43; also *Winterbotham* v. *Sibthorp*, (1918) 87 L.J.K.B. 527.

In my opinion, upon a review of all the facts of the present case, and applying the law thereto, the proper course for this court to adopt is to approve and sustain the entry of judgment for the plaintiff, and, in my opinion, that would be the proper judgment had the finding of the jury negatived negligence upon the part of the Corporation of the Township of Richmond. The case is one which comes completely within the language of Lord Loreburn, L.C., in *Paquin* v. *Beauclerk* (1906), 75 L.J.K.B. 395, at 401, 402.

I would dismiss the appeal.

With respect to the cross-appeal, it must, in my opinion, be dismissed. There is no jurisdiction in British Columbia such as was relied upon and supports the judgments in *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 204, and *Besterman* v. *British Motor Cab Co.*, [1914] 3 K.B. 181, viz: Judicature Act, 1890, s. 5, giving discretion to the court or judge over costs.

Eberts, J.A.

EBERTS, J. A. dismissed the appeal. *Appeal dismissed.*

ZAISER v. JESSKE.

SASK.

C. A.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., and Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

SALE (§IB—5)—CONTRACT—GOODS NOT SPECIFIED OR ASCERTAINED—NO PROPERTY PASSES TO BUYER TILL GOODS ASCERTAINED—SALE OF GOODS ACT (SASK).

A contract for the sale of 1,200 bushels of wheat, which may be complied with by the delivery of any 1,200 bushels of wheat, is not a sale of any specific or ascertained wheat; sec. 18 of the Sale of Goods Act (Sask) applies, and no property in the goods is transferred to the buyer, unless and until the goods are ascertained.

Statement.

APPEAL by plaintiff from the judgment at the trial in an action for damages for the conversion by the defendant of 1,200 bushels of wheat, payable to the plaintiff. Affirmed.

G. H. Barr, K.C. for appellant; *J. F. Frame*, K.C., for respondent.

Lamont, J.A.

LAMONT, J.A.:—On March 27, 1917, the plaintiff and defendant executed the following document:—

G. Zaiser, Prussia, Sask., Mar. 27, 1917.

To Simpson-Hepworth Co. Ltd.,
446 Grain Exchange,
Winnipeg, Man.

I have this day sold to you 1200/00 bushels of wheat at 1.66 per bushel, basis No. 1 Northern in store Fort William or Port Arthur, or 1.66 per bushel net to me at Prussia on track, lower grades to apply on this contract at existing differences or spreads on day of inspection of the cars. If any dockage, freight on same is charged to me, or if car should be loaded under capacity, and minimum weight charged by railroad, I agree to pay such charge.

Delivery of this grain in this contract to be made by cars being shipped to you and actually unloaded at Fort William or Port Arthur on or before the 31st day of May 1917, or by terminal warehouse receipts covering grain in store Fort William or Port Arthur delivered to your office at *Winnipeg* Prussia by same date.

I agree to deliver to you the bills of lading of cars shipped on this contract as soon as possible after each car is loaded.

I hereby acknowledge the receipt of one dollar to bind this contract.

Dated and signed at Prussia this 27th day of March 1917.

We hereby agree to accept the above contract and terms thereto.

Witness John Zaiser, Simpson-Hepworth Co. Ltd., Per G. Zaiser, agent.
Rudolf Jesske, seller.

[The words in "italics" were crossed out.]

The document was drawn up by the plaintiff's son in presence of both parties.

Immediately after the document was executed the plaintiff and defendant walked to the bin or granary in which the defendant had a quantity of wheat stored, and the plaintiff says that while there the defendant gave him the key of the bin. At the time the

SASK.

C. A.

ZAISER v. JESSKE.

Lamont, J.A.

document was signed, the plaintiff did not know what bin the defendant had. The defendant, in his statement of defence, denies that he sold or delivered any wheat to the plaintiff.

At the trial, the plaintiff testified that the writing above set out was not the contract entered into with the defendant, but that the contract was a verbal one, by which he bought the wheat outright and received the key of the bin in which it was stored. He explains the document by saying that the defendant wanted something to shew that he had sold the wheat, and he (the plaintiff) wanted something to shew that he had purchased it, so he got his son to draw up the document, and having no blank forms of his own they used one belonging to the Simpson-Hepworth Co. Ltd. At the close of the plaintiff's case the trial judge dismissed the plaintiff's action.

The questions to be determined are: (1) does the document above set out truly represent the contract entered into between the parties, and (2) if so, was the delivery of the key of the bin a delivery of the wheat therein contained to the plaintiff?

In my opinion, the document signed and the evidence of the plaintiffs shew conclusively that the contract was in the terms of the document above set out. In the document, the date of delivery —May 31, 1917—was inserted by the plaintiff's son. It was not part of the form. He could only have got that date from the parties. The fact that it was written into the agreement shews that it must have been agreed upon at the time, as, otherwise, the son would not have known what date to insert. Again, at p. 32 of the appeal book, I find the following in the plaintiff's evidence:—

Q. You say you made a contract with the defendant? A. Yes.

Q. And you drew up or your son drew up this document, ex. A? A. Yes.

Q. Did this document, ex. A, contain all that was agreed to between yourself and the defendant? A. Yes, I think so.

His Lordship (to witness):—Does that contract have more in it than you agreed to? A. No, not more.

These admissions on the part of the plaintiff establish that the contract was in the terms of the document above set out. The contract was for 1,200 bushels of wheat. It was not for all the wheat which the defendant had in a particular bin, estimated at 1,200 bushels. The defendant could have complied with his contract by delivering any 1,200 bushels of wheat. It was, therefore, not a sale of any specific or ascertained wheat. That being so,

s. 18 of the Sale of Goods Act applies. That section reads as follows:—

18. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

In 25 Hals. 167, the following is laid down:—

In particular, where the individuality of the goods depends upon their being separated, weighed, measured, tested, or counted, or upon some other act or thing being done in relation thereto for their ascertainment, the goods are not ascertained until such act or thing be done.

Goods are unascertained, notwithstanding that they are to be taken from a specific larger bulk, if the identity of the portion so to be taken is unascertained.

The ascertainment of the goods does not of itself necessarily pass the property. It is necessary that the parties should agree that the property in the goods, when ascertained, should pass.

See also *R.* v. *Tideswell*, [1905] 2 K.B. 273.

To pass the property in wheat covered by the contract, the 1,200 bushels therein referred to must have been ascertained and unconditionally appropriated to the contract. S. 20, r. 5: Was this ever done? The plaintiff contends that it was; by the delivery to him of the key of the bin the day the contract was signed.

I am of opinion that it should not be so held. There is no evidence as to the quantity of wheat the defendant had in the bin, and we cannot presume that it was just 1,200 bushels. If there were more than 1,200 bushels there, the handing over the key could not, in any event, pass the property until 1,200 bushels had been separated from the bulk and appropriated to the contract, which was never done. Moreover, under the circumstances of this case, the handing over of the key cannot, in my opinion, be taken as conclusive of an intention to pass the property in the wheat to the plaintiff. It is equally consistent with an intention to retain the property therein in the defendant.

The evidence discloses that the defendant was a busy man, and the plaintiff says, that under the arrangement which they made, he (the plaintiff) was to load the car.

Where under the terms of a contract of sale the property in the grain sold remains in the vendor, but the purchaser agrees that he will put the grain on the car, the handing over to the purchaser of the key is just as consistent with an intention merely to enable him to take 1,200 bushels out of the bin and put it in the car as it is with an intention to pass the property in any wheat which may be in the bin.

SASK.

C. A.

ZAISER v. JESSKE.

Lamont, J.A.

It cannot, therefore, in my opinion, be inferred that the key was delivered to the plaintiff as a symbolical delivery of an ascertained 1,200 bushels of wheat. That being so, the property in the wheat when it was sold on May 10 was in the defendant.

The wheat being the defendant's, no action for conversion lies against him. I am, therefore, of the opinion that the trial judge was right in dismissing the plaintiff's action.

The appeal should be dismissed with costs.

Haultain, C.J.S. Elwood, J.A.

HAULTAIN, C.J.S., and ELWOOD, J.A., concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The appellant brought an action for conversion against the respondent. He alleges that respondent sold him 1,200 bushels of wheat for $1.66 per bushel, on which he paid him $1 to bind the bargain; that the grain was delivered to him on the day of the purchase by the delivery to him by the respondent of the key of the bin in which the grain was stored; that, afterwards, the respondent wrongfully converted the grain to his own use, and he asks for damages.

At the trial, a written contract for the sale of this grain from the respondent to appellant signed by both parties was put in.

The appellant sought to give evidence that this contract was not the agreement made by the parties, but was only to shew that the respondent had sold appellant 1,200 bushels of wheat for $1.66 per bushel. As this evidence would contradict the terms of the written contract, the trial judge held, and I think properly, he could not do this. The written contract, on its face, is complete. The appellant's evidence was not to add a term to it, but to contradict all of its terms. His statement that the written contract was only to shew the price of the wheat is not borne out by the writing itself, because, in the copy which the appellant retained, the clause as to delivery is filled in, fixing the delivery for May 31, 1917, and one of the methods of delivery by delivering terminal warehouse receipts to appellant at his office in Prussia. The word "Prussia" being written over the word "Winnipeg" in the printed form. These particulars were not filled in in copy given to respondent.

As no time is fixed for payment, the date of delivery becomes important, as appellant could refuse to accept unless delivered in accordance with the terms of the contract, and he would not be liable to pay for the same until the grain was delivered to him.

SASK.

C. A.

ZAISER v. JESSKE.

Newlands, J.A.

Now, although the contract specifies that the delivery is to be made in one of two ways on or before May 31, there is nothing to prevent the appellant from actually accepting delivery of the grain at Prussia. This he claims to have done. This delivery, which he claims was made to him by the respondent handing him the key of the bin in which the grain was stored, he says in one part of his evidence was before the written contract was made out and signed, and later he says that it was afterwards. The trial judge having dismissed the action, he must have found, on this contradictory evidence, that the wheat was not delivered after the written contract was made in performance of that contract.

It was also alleged that the appellant was not the purchaser of this wheat, but that he purchased for the Simpson-Hepworth Co. Ltd., as their agent. The fact that this company's name was struck out at the beginning of the contract and the appellant's name inserted in its place, leads to the belief that he omitted to strike out that name and the word "agent" at the end thereof. It is not, however, necessary to decide this point, in view of the opinion I have already expressed.

I think the appeal should be dismissed with costs.

Appeal dismissed.

JUDSON v HAINES.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., Latchford, J. and Ferguson, J.A. April 16, 1918.

AUTOMOBILES (§ III—221)—COLLISION—BOTH PARTIES NEGLIGENT—RESPONDENT NOT GUILTY OF ULTIMATE NEGLIGENCE—DISMISSAL OF ACTION.

An action for damages for injuries caused by a collision between motor vehicles is properly dismissed, where the answers of the jury indicate that each party was to blame and there is nothing to suggest that the respondent was guilty of ultimate negligence.

[See annotations 31 D.L.R. 370, 39 D.L.R. 4.]

Statement.

AN appeal by the plaintiff from the judgment of RIDDELL, J., upon the findings of a jury, in favour of the defendant, dismissing the action, which was brought to recover damages for injury and loss sustained by the plaintiff by reason of a collision of his motor-cycle with the defendant's automobile, upon a highway, by reason of the defendant's negligence, as the plaintiff alleged. The findings of the jury were in the form of answers to questions (set out below). The jury assessed the plaintiff's damages at $3,500.

ONT.

S. C.

JUDSON v. HAINES.

Hodgins, J.A.

J. P. MacGregor, for appellant.

H. H. Dewart, K.C., and *G. W. Mason*, for respondent.

HODGINS, J.A.:—The occurrence giving rise to this action was a collision between the appellant's motor-cycle and the respondent's motor-car, at the corner of Bernard avenue and Spadina road, in Toronto.

The jury were directed by the learned trial Judge to answer questions, which they did as follows:—

"1. Has the defendant satisfied you that the occurrence was not caused by his negligence? A. No.

"2. Did the plaintiff contribute to the occurrence by his negligence? A. Yes.

"3. If so, in what did that negligence consist? A. Excessive speed.

"4. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

"5. If so, how? A. Driving slower.

"6. Damages, if any? A. $3,500.

"7. If you find that the negligence of the defendant caused this accident, state fully in what the negligence consisted? (Not answered.)

"8. Notwithstanding the negligence of the plaintiff, could the defendant, by the exercise of reasonable care, have avoided the accident? A. Yes.

"9. If so, how? A. By stopping his car.

"10. Notwithstanding the negligence of the defendant, could the plaintiff, by the exercise of ordinary care, have avoided the accident? (Not answered.)

"11. If so, how? (Not answered.)"

The appellant was going east on Bernard avenue; and, when 25 feet west of Spadina road, saw the respondent's motor about 35 feet north of Bernard avenue, travelling south. Under the regulations in force at that time, the respondent had the right of way.

The appellant put on his brakes and reduced his speed, he says, from 15 miles an hour to about 12 miles, but kept straight on, and blew his horn. The respondent momentarily checked his motor; but, concluding that if he stopped he would come to a standstill directly in front of the appellant, he went on, swerving to the east, thinking to give more room. The result was a collision.

ONT.

S. C.

JUDSON v. HAINES.

Hodgins, J.A.

The speed of the appellant was said by the respondent to be about 35 miles an hour; that of the respondent 18 to 20 miles an hour. The appellant says that he was only going 15 or perhaps 12 to 10 miles an hour, and could have stopped in 15, 12, or 10 feet respectively. He did not do so, nor did he turn up or down Spadina road. He ran 43 feet before the motors met, and this throws doubt on the accuracy of his evidence on the question of speed. The respondent says he could not have turned east on Bernard avenue except to its south side, owing to the narrowness of that thoroughfare.

These matters were fully canvassed in the evidence and in the charge of the learned trial Judge.

The findings of the jury summarised amount to this: that the appellant's speed was excessive, and that he could have avoided the accident if he had maintained a slower speed; and that the respondent, notwithstanding that fact, could have avoided the accident by stopping his car. In other words, both parties, by taking the precautions stated, could have escaped a collision, the one by going at a less speed and the other by stopping dead.

But for the form of the questions, no difficulty would have presented itself, as the answers of the jury indicate that each party was to blame, and their comment seems to be that recklessness on the one hand and want of prompt action on the other brought about the resultant disaster.

The learned trial Judge announced that he intended to treat the action as one of negligence against the respondent, and that on him the statutory onus rested. As to the appellant the sole question, he indicated, was that of contributory negligence, treating the statutory provision as inapplicable. He so charged the jury, and hence the form in which their findings are expressed.

I can find nothing to suggest that the respondent was guilty of ultimate negligence, nor anything to lead me to suppose that the jury's answer would have been different if the question of onus had been expressly left to them. The respondent was coming on fast, thought first of stopping, changed his mind, and went ahead. In fact his car moved continuously just as did that of the appellant, and each did, on the moment, what he thought would be best to avoid trouble. There was only one point of time at which the danger presented itself to both parties, that is, when

ONT.

S. C.

JUDSON v. HAINES.

Hodgins, J.A.

each became visible to the other, and their consequent action was immediate, and hinged entirely upon their first perception of peril.

At that time the fault of the appellant was excessive speed and of the respondent in maintaining his course instead of stopping, and the jury thought both to blame for not then doing something to escape coming together.

The case is like *Herron* v. *Toronto R. Co.* (1913), 28 O.L.R. 59, 6 D.L.R. 215, 11 D.L.R. 697, where each negligence arose and existed unchanged until the moment of collision, and was "concurrent and simultaneous negligence of similar character by both parties."

It is unnecessary, in the view I take of the situation, to discuss the contention that the charge to the jury should have pointed out that the statutory provision* applied to both and put each in the wrong unless he could satisfy the jury that he was free from blame. The answers really amount to such a finding, and the appeal should therefore be dismissed.

This case is another melancholy example of the desire to go fast, literally, at all hazards, and it is to be regretted that where the findings implicate both parties the appellant should be compelled to pay the costs of his associate in recklessness.

Maclaren, J.A. Latchford, J.

MACLAREN, J.A., and LATCHFORD, J., agreed with HODGINS, J.A.

Ferguson, J.A.

FERGUSON, J.A.:—This is an action for damages resulting from a collision between the plaintiff's motor-cycle and the defendant's motor-car. The damages (if any) were assessed at $3,500; but Mr. Justice Riddell, who presided at the trial, interpreted the jury's answers to the questions submitted as meaning that the accident was the result of concurrent negligence, and dismissed the action.

The plaintiff appeals, and the result of the appeal turns on the meaning of the jury's answers. The appellant contends that they mean that the defendant's negligence was the ultimate cause of

* The Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 23: "When loss or damage is sustained by any person by reason of a motor-vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver."

ONT.

S. C.

JUDSON v. HAINES.

Ferguson, J.A.

the accident; the respondent supports the view adopted by the learned trial Judge.

[The learned Judge then set out the questions put to the jury and their answers, as above.]

The plaintiff's negligence in driving too fast continued to the time of the accident; but the jury appear to have been of the opinion that, notwithstanding the fast driving of the plaintiff, the defendant could have avoided the accident by stopping. The answers do not, however, make it clear at just what point of time the defendant should have stopped or that he could have stopped after he became aware of the danger; neither do they make it clear that the plaintiff, after he became aware of the danger, could not himself have slowed up and thus avoided the accident. If he could, and did not do so, he is not in a position to complain. The weight of evidence favours that view. The jury, however, have not answered questions 10 and 11; and, to my mind, we are in consequence left in doubt as to the real meaning of their answers to the other questions.

Under these circumstances, I would direct a new trial; the costs of this appeal to be costs in the cause to the appellant; the costs of the former trial to be costs in the cause to the successful party.

MAGEE, J.A., agreed with FERGUSON, J.A. Magee, J.A.

Appeal dismissed; MAGEE *and* FERGUSON, JJ.A., *dissenting.*

GRAND TRUNK PACIFIC COAST STEAMSHIP Co. v. VICTORIA-VANCOUVER STEVEDORING Co.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ., and Cassels, J. ad hoc. June 25, 1918.

CONTRACTS (§ IID—152)—WORKMAN—INJURY TO—RECOVERY OF DAMAGES—INDEMNITY CLAUSE—ACTION TO RECOVER AMOUNT OF DAMAGES PAID.

The appellant having failed in its supply of what it had contracted for, one of the men was sent to get it from the respondents' warehouse. He met with an accident in doing so for which he had recourse against the respondent and rightfully recovered damages. The court held that the respondent was entitled to be indemnified by the appellant under a clause in an agreement between the parties as follows: "that the S.S.Co. shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced within this agreement." The workman at the time he was injured was performing labour embraced in the agreement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 38 D.L.R. 468, maintaining, upon an equal division Statement.

CAN.

S. C.

GRAND TRUNK PACIFIC COAST STEAMSHIP CO. v. VICTORIA VANCOUVER STEVEDORING CO.

Fitzpatrick, C.J.

of the court, the judgment of Murphy, J., at the trial, by which the plaintiff's action was maintained with costs.

Geo. F. Henderson, K.C., for appellant; *Wallace Nesbitt*, K.C., for respondent.

FITZPATRICK, C.J.:—The case really depends upon the interpretation of clause 5 of the agreement between the parties which reads:—

5. That the S.S. Co. shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

It has been held, and I think rightly, that an employee of the respondents was injured while performing labour embraced in the agreement. If the workman's employment compels him to be at a particular place when the accident happens, the accident must be taken to arise out of the employment, although it is not being contributed to in any way by the nature of the employment. It is not, I think, disputed that the accident was due to the respondents' negligence.

The trial judge held that clause 5 above quoted was intended and the language used was sufficiently wide to cover the respondents' own negligence.

In the appeal court, where there was an equal division of opinion, Macdonald, C.J., thought that the contract should be construed only to relieve the respondent of the burden of making compensation to employees under the Workmen's Compensation Act, which compensation is payable irrespective of the employee's negligence. He relied in support of this view on the case of *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K.B. 412, but with all respect I think he has failed to appreciate the principle on which that decision is based. Walton, J., the trial judge whose judgment was approved by the Court of Appeal, says:—

There is a well-established rule of construction applicable to the present case. The law of England, unlike in this respect the law of the U.S. of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms.

And this is no arbitrary distinction of the case of carriers, but depends on the fact that a carrier is liable not only for the due conveyance of goods as he is of passengers, but is also liable as an insurer of the goods. It is fallacious to say that the greater

liability of carriers than of other classes of contractors is "merely a question of degree." Under his contract the carrier has a duty of conveyance for the neglect of which he is liable, but as an insurer he is liable irrespective of any negligence on his part and this is a liability of a different kind. The rule of construction established in the case of the contracts of carriers is that the exemption clause refers to conveyance in contradistinction to insurance—that it limits the liability, not the duty.

But, in truth, these cases have nothing to do with the present one, for in all contracts, even including those of carriers, it is a question of what was the intention of the parties. Now, I think nothing can be clearer than the intention of the parties to express in clause 5 of the agreement under consideration that the respondents should be relieved of all liability, however occurring, to any of their employees. McPhillips, J., says that to construe the provision in accordance with the submission of the appellant would be to render it wholly illusory: it certainly would restrict its operation within very narrow bounds, for it cannot consistently be held to apply even to all cases under the Workmen's Compensation Act, since damages may of course be recovered under this Act where the employer has been guilty of negligence as well as when he has not.

The wording of this clause of the contract is as wide as possible, and there is no reason for attributing to the parties any intention of restricting its natural meaning. I do not think, therefore, the rule of construction adopted for a totally different class of contracts and for reasons which have no application here can be invoked to restrict such natural meaning.

In my opinion, the appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant having contracted with respondent for services to be performed by its men, amongst other things, agreed as follows:—

> That the Steamship Company shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

The appellant having failed in its supply of what it had contracted for, one of the men was sent to get it from the respondent's warehouse. He met with an accident in doing so for which he had recourse against the respondent and rightfully recovered

CAN.

S. C.

GRAND TRUNK PACIFIC COAST STEAMSHIP CO. v. VICTORIA VANCOUVER STEVEDORING CO.

Idington, J.

damages. The appellant claims this liability for a personal injury did not fall within the meaning of what the contracting parties had in contemplation in the clause I have quoted.

I cannot so fritter away the very obvious purpose of such a contract of indemnity. It does not appear to me that the appellant can be heard to say that its own default in making the service more onerous than it might have turned out can thus escape responsibility.

The very obvious purpose of such a contract as in question was to free the respondent from that incidental loss that every employer of labour may incur, and in all probability must incur, by reason of negligence, from time to time, in the course of executing what he has undertaken.

The cases relied upon do not seem to me to touch the question.

If the accident had arisen from something wilful on the part of respondent, then one could hardly say that it had fallen within the scope of what, in reason, was within the contemplation of those making such a contract.

Nor can I see how the contract, under which the parties had been operating beyond the period originally named, can be said, as argued for appellant, to have terminated when they, by mutual consent, to be implied from their conduct, had extended its operation. All the terms of any such like time contracts are in law, when so extended, presumed, so far as applicable, to govern those so acting thereunder.

I suspect, if the appellant had been sued for an increased rate of wages, it would have been able to see the point and understand the law in the sense I refer to.

The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—It is common ground that one Scott, an employee of the plaintiffs, recovered judgment against them in respect of a personal injury sustained on July 31, 1915, which was caused by negligence imputable to them either at common law or under the Employers' Liability Act. Rightly or wrongly, the defendants have admitted that the finding of such liability is binding upon them. The plaintiffs, on the other hand, do not suggest that their liability to Scott could have been based on anything other than fault or negligence.

The chief defences to their claim to indemnity made in this

action are that Scott at the time he was injured was not "performing labour embraced in (the) agreement" for stevedoring made between the plaintiffs and the defendants, and that injuries ascribable to the plaintiffs' negligence are not within the provisions for their indemnification, which reads as follows:—

That the Steamship Company shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

It was also alleged that the stevedoring agreement had been terminated before Scott was injured.

It recites that

The Stevedoring Company is desirous of undertaking the stevedoring business of the Steamship Company at Vancouver, B.C., and Victoria, B.C., and the Steamship Company is willing to accord this privilege upon terms and conditions and at prices hereinbefore set forth,

and it provides that it shall

remain in force for a period of one year from the date hereof (20th Nov., 1911) and if not then terminated, to remain in force thereafter until either party should give three months' notice in writing terminating the same.

Primâ facie this agreement would continue in force unless some step were taken to bring it to an end at the close of the first year. Action by one of the parties was required to terminate it on November 20, 1912. No evidence of any such action or of any subsequent notice to bring it to an end on the expiry of three months was given. The burden of proving termination was, in my opinion, on the party alleging it. The agreement must, therefore, be deemed to have been in force when Scott was injured.

For the reasons assigned by the trial judge, I am also satisfied that the work Scott was engaged on when injured was "labour embraced in (the) agreement." He was carrying out a lawful direction to bring from their place of housing or storage some wheelbarrows belonging to the plaintiffs which were required for unloading coal—part of the stevedoring work undertaken by the plaintiffs. The arrangement that the defendants were to supply all necessary gear did not necessarily make it part of their obligation to bring such gear to the ship's side. They appear to have arranged to "borrow" these wheelbarrows from the plaintiffs. Obtaining them from the place where they were ordinarily kept in order to use them in unloading would seem to have been part of

CAN.

S. C.

GRAND TRUNK PACIFIC COAST STEAMSHIP CO. v. VICTORIA VANCOUVER STEVEDORING CO.

Anglin, J.

the stevedoring work for which the defendants undertook to supply labour and therefore to have been "labour embraced in (the) agreement."

Unless the plaintiffs were "undertakers" within the meaning of that term as defined by s. 2 of the Workmen's Compensation Act, R.S.B.C., 1911, c. 244, they would not be liable under that Act for personal injuries sustained by their employees. S. 4 restricts its application to employment by "undertakers" as defined in the Act.

"Undertaker" (as defined) in the case of a railway means the railway company; in the case of a factory, quarry, laundry, smelter or workhouse, means the occupier or operator thereof, in the case of a mine, means the owner thereof; and in the case of an engineering work or other work specified within this Act means the person undertaking the construction, alteration, repair or demolition.

I agree with Mr. Nesbitt's contention that a person or company engaged in the work of stevedoring is not an undertaker within this definition.

Apart from that established by the Workmen's Compensation Act in cases that fall within it, I know of no foundation for liability of an employer to his employee for personal injuries sustained by the latter in the course of his employment except fault or negligence imputable to the employer either under the common law or the Employers' Liability Act. Under these circumstances, since it was against liability of the plaintiffs to their employees for personal injuries that the defendants engaged to indemnify them, I think such liability arising from negligence must not only have been within the contemplation of the parties but must have been the very thing in respect of which they were contracting. The case of the *City of Toronto* v. *Lambert* (1916), 33 D.L.R. 476, 54 Can. S.C.R. 200, relied upon by counsel for the appellants, is clearly distinguishable on this ground. Had this view of the matter presented itself to the Chief Justice of the Court of Appeal of British Columbia, I incline to think he would have reached the same conclusion. His citation of *McCawley* v. *Furness R. Co.* (1872), L.R. 8 Q.B. 57, appears to warrant this inference.

I express no opinion on the question whether injuries caused by negligence of, or ascribable to, the Stevedoring Company would or would not have been within the purview of the term "any and all liability for personal injury," were it not reasonably

certain that such liability must have been, and that liability apart from and without negligence or fault cannot have been, within the contemplation of the parties to the agreement under consideration.

The appeal fails and should be dismissed with costs.

BRODEUR, J.:—The liability of the appellant depends upon the construction of an agreement between the parties by which the appellant company undertook to hold the respondent company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

In my opinion, there is no doubt that the man Scott was injured when he was doing some stevedoring work contemplated by the contract. Wheelbarrows were required for the unloading of the ship and when he was bringing them he had an accident for which he sued and obtained judgment against his employer, the respondent company. The latter now seeks to be indemnified by the appellant under the above clause of the contract.

It is common ground that the accident was due to the Stevedoring Company's negligence. Nobody would suggest, however, that the negligence was wilful. But it is one of those accidents inherent to the carrying out of work of that kind. The indemnity clause is a very wide one. It is not restricted to liability arising out of the Workmen's Compensation Act or Employers' Liability Act; but it is general "from any and all liability for personal injury."

One of the greatest risks the contractor for labour must incur is his liability for damages for personal injury to his workmen. The number of persons employed and the lack of care on the part of some of those employees render the undertaking a risky one.

In this case we have besides a provision in the contract that all the gear and apparatus for performing the work should be supplied by the Steamship Company.

The defective appliances are to a very large extent the cause of those accidents to workmen. It was only natural for the parties to agree that all those accidents, whether they were caused by the ordinary neglect of the Steamship Company or of the Stevedoring Company, should be provided for. It is not giving then to the contract too wide an interpretation to declare that the liability of

CAN.
S. C.

Brodeur, J.

the appellant company covers a case similar to the one we have before us.

The judgment that has declared the appellant company liable should be confirmed with costs.

Cassels, J.

CASSELS, J., *ad hoc*:—I am of the opinion that this appeal should be dismissed with costs.

Appeal dismissed.

ALTA.
S. C.

STEVENSON v. DANDY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 28, 1918.

EVIDENCE (§ II B—114)—JUDGMENT NOT BINDING UNTIL ACTUALLY ENTERED—MATERIAL FACTS DISCOVERED SUBSEQUENT TO HEARING MAY BE REVIEWED.

A court or judge is not bound by any decision until the judgment or order has actually been taken out and entered. If there are material facts which were not brought to his attention at the trial, he should hear them, and should consider affidavits as to further evidence suggested or proposed to be given and the circumstances under which and when it was discovered.

Statement.

APPEAL by the defendant from the trial judgment in an action on promissory notes. Reversed.

A. Stuart, K.C., for appellant. *J. K. MacDonald*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Beck that the trial judge was in error in thinking that he had no jurisdiction to hear the new evidence and that the appeal from his order should be allowed. The formal judgment should be set aside and the application renewed before the judge. As the appellant did not ask, except by way of alternative, for a reversal of the judgment, and a judgment in his favour, I do not think it would be proper for us to consider the correctness of the finding of the trial judge on any of the matters on which he expressed an opinion.

I agree that the appellant should have the costs of the appeal.

Stuart, J.

STUART, J:—I concur.

Beck, J.

BECK, J:—This is an appeal by the defendant from the judgment of His Honour Judge Morrison.

The plaintiff's claim is on two "notes;" one a "note" for $598 dated May 1, 1914, due November 30, 1914, bearing interest at 8% and stated to have been given for seven cows (separately described) and one heifer, the ownership to remain in the plaintiff till payment; and the other, a "note" for $124.85 dated April 17,

1912, bearing interest at 8% and stated to have been given for two cows and one calf, the ownership to remain in the plaintiff till payment.

The plaintiff gave credit for $362 as having been paid on March 15, 1915, on account of the first mentioned note, and shewed by his particulars a balance of $301.81 owing on the first mentioned note on April 17, 1916, when the action was commenced. The amount shewn as then owing on the second mentioned note was $164.53, making a total of $466.42, which the plaintiff claimed by his statement of claim. He, however, attached to his statement of claim a notice to the effect that he reduced his claim "by the sum of $164.53, being the amount of the second note," leaving the amount claimed $301.81 with interest and costs.

Substantially the defence, which was directed only to the first mentioned note, was that the plaintiff had delivered only four of the cattle for which it was given and that these four head had been paid for.

There was also a counterclaim. In substance it was as follows: The plaintiff employed the defendant to obtain a purchaser for a farm belonging to the plaintiff, which the defendant succeeded in doing, and the plaintiff agreed to pay $400 for these services by assigning a chattel mortgage for that sum made by one Walsh to the plaintiff, accompanied by a promise that if the defendant could not collect the amount the plaintiff would himself pay it; that the plaintiff did execute an assignment of the chattel mortgage; that the defendant realised under the mortgage only $70, and is entitled to judgment for the balance owing thereon against the plaintiff.

In his reply the defendant denied all material allegations and alleged that the reason for the assignment of the chattel mortgage was as follows:—The plaintiff was about to leave Alberta; he was not aware of the whereabouts of the cattle described in the chattel mortgage, which he proposed to realise upon; the defendant offered to assist the sheriff's bailiff in finding the cattle and, thereupon, as a matter of convenience, the assignment was made to the defendant as a bare trustee for the plaintiff; and the plaintiff claimed an account and payment by the defendant of all moneys collected under the chattel mortgage.

At the trial, the plaintiff was allowed to amend as so to claim the $70.

ALTA.

S. C.

STEVENSON v. DANDY.

Beck, J.

The plaintiff, in his evidence, said that the assignment of the chattel mortgage was made simply for convenience, to enable the defendant to realise on the mortgage for the benefit of the plaintiff; that he went to the East immediately afterwards; that he returned a year afterwards, having written to the bailiff and the defendant twice or three times without getting an answer; that he had copies of the letters, but hadn't them with him; that on asking the defendant if he had realised anything under the mortgage the defendant said that he had not realised anything. The action was commenced on April 17, 1916, that is, after the lapse of another year. The counterclaim in which the defendant states that he had realised $70 was filed in July, 1916. The plaintiff intimates that this was the first knowledge that he had that the defendant had realised anything. The plaintiff says nothing about having looked up the bailiff.

Walsh, the mortgagor, was connected by marriage with the plaintiff. He said that he always saw the plaintiff when he came up from the East and that the plaintiff sometimes stayed with him. He did not, however, see him in 1915 nor again until the trial, Walsh being then in gaol on conviction for a criminal offence. Walsh says that the defendant seized some of the animals covered by the chattel mortgage and sold them, realising, so the defendant told him, $85 or $86.

The defendant said that the assignment of the chattel mortgage, the consideration expressed being $1 and other considerations, was given for introducing the purchaser of the plaintiff's wife's land—the sale in fact was made—and for compensation for certain damage done by the plaintiff to the defendant's house and for the care of some of plaintiff's stock. The defendant produces a receipt from the solicitor of his bill for drawing the assignment, which was drawn on the personal instructions of the plaintiff.

In accepting the plaintiff's evidence as sufficient to overcome the evidence of the assignment itself and of the defendant, it seems to me that the judge had not in his mind the rule that in order to contradict a written document or to make it subject to a trust not expressed in it, where one party maintains on oath that the document expresses the true agreement, the evidence adduced by the other party must be so clear and convincing as to leave no room for doubt of its truth. 17 Cyc., tit. Evidence, pp. 774-5.

In addition to this the judge gives in his reasons for judgment as an additional ground for rejecting the defendant's counterclaim a reason which, I think, is quite untenable, namely, that the defendant was, in any case, not entitled to a commission by reason of c. 27 of 1906, which requires a written contract of agency; but that provision would clearly have no application to a security founded upon actual services.

Again, in his written reasons for judgment on April 8, the judge says:—

> Admittedly neither the plaintiff nor the defendant gives a wholly satisfactory account of their transactions with each other. Of the two the defendant is the brighter mind, the more alert, and more systematic man of affairs.

The evidence is, to my mind, so unconvincing that I think the judge ought to have let the document speak for itself and consequently have held the defendant not liable to pay the $70 he realised, and on the other hand to have refused—as in fact he did—to give the defendant any remedy against the plaintiff for any balance of the face value of the mortgage, inasmuch as there was no satisfactory evidence of any agreement nor a covenant on the assignment to that effect.

I refrain from going into the evidence with respect to the note sued on because I think the defendant is entitled to succeed upon that part of his appeal which relates to an application made by him to the trial judge to receive further evidence in the action.

The trial took place on February 15, 1918, at Edmonton. The judge reserved his decision until March 8, when he gave written reasons. Counsel for both parties subsequently appeared before the judge and again argued it to some extent. The judge then, on April 6, gave further reasons for adhering to his first decision. Then, on April 19, the defendant made an application to the trial judge for permission to be allowed to adduce further evidence and filed three affidavits, those of (1) the defendant, (2) McKeone, and (3) Olmstead. The judge gave written reasons for refusing this application. He held that he had no jurisdiction to entertain the application, and so far as appears did not consider the material contained in the affidavits.

I think he was wrong in holding that he had no jurisdiction.

It is quite clear on the authorities and in full accordance with common sense and justice that a court or judge is not bound by

ALTA.

S. C.

STEVENSON v. DANDY.

Beck, J.

any decision until the judgment or order has actually been taken out and entered.

Miller's case (1876), 3 Ch. D. 661, is an instance. *Re Gray* (1887), 36 Ch. D. 205, is another.

In *Re St. Nazaire Co.* (1879), 12 Ch. D. 88, at 91, Jessel, M.R., said:—

> In *Miller's* case no order had been drawn up. A judge can always reconsider his decision until the order has been drawn up.

In *Re Suffield & Watts* (1888), 20 Q.B.D. 693, at p. 697, Fry, L.J., says:—

> So long as the order has not been perfected the judge has a power of reconsidering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end.

The foregoing case was followed in *Re Crown Bank* (1890), 44 Ch. D. 634.

In *Baden-Powell* v. *Wilson*, [1894] W.N. 146, Kekewich, J., had tried the case and given judgment refusing a rectification of a settlement. The plaintiffs moved, the judgment not having been drawn up, to have the action re-tried on the ground that at the trial material facts had not been drawn to the judge's attention.

Kekewich, J., said:—

> As the order has not yet been drawn up, I have no doubt I may re-hear the case. If there are material facts which were not brought to my attention at the trial, then I ought to hear them. On the assurance of the plaintiff's counsel that there are material facts, and as the defendants do not object, I will give the plaintiffs an opportunity of having the case re-heard. The plaintiff's counsel may apply on a future day to have the case restored to the paper.

Obviously, the assurance of plaintiff's counsel and the absence of objection by defendant's counsel were taken as merely justifying the judge from refraining from examining the affidavits upon which the motion was made.

It is a much simpler and less inconvenient thing for a District Court Judge to re-try a case or to continue a trial already begun before him by taking further evidence than it is for a judge of a superior court holding circuits. The judge having undoubtedly jurisdiction to hear further evidence in the case ought to have considered the affidavits as to the further evidence suggested or proposed to be given and the circumstances under which and when it was discovered. He is the one in the best position to judge of its bearing upon the case in the light of the evidence already given.

ALTA.

S. C.

STEVENSON v. DANDY.

Beck, J.

In considering such material I think a judge dealing with such an application is not bound by the same rule as is a court of appeal on an application to hear further evidence or to grant a new trial for the purpose of the further evidence being given upon a new trial, whatever may be the exact rule in the latter case. See *Riverside Lumber Co.* v. *Calgary Water Power Co.* (1915), 25 D.L.R. 818, 10 A.L.R. 128. The reasons for that rule do not apply with the same force to the case merely of the same judge hearing further evidence.

I would reverse the trial judge with respect to the item of $70.

I think the order of the judge dismissing the application to continue the hearing of the case should be set aside and the application be remitted to him to consider the application upon its merits, which it seems to me are such as might well induce him in the exercise of a judicial discretion to grant the application. For the purpose of leaving the judge free to proceed with the trial, the judgment below already entered ought to be set aside.

I would give the appellant the costs of the appeal.

HYNDMAN, J., concurred with Harvey, C.J.,

Hyndman, J.

Appeal allowed.

MONTREAL TRAMWAYS Co. v. HAMILTON.

QUE.

K. B.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross and Carroll, JJ. April 27, 1918.

NEGLIGENCE (§ II B—86)—CONTRIBUTORY—ATTEMPT TO CROSS STREET CAR TRACK—CAR TOO CLOSE TO BE STOPPED—DAMAGES.

A person who attemps to cross a street car track, when a car is too close to him to make it practicable for the motorman to stop the car or avoid striking him, cannot recover damages against the company.

Statement.

APPEAL by defendant from the judgment of the Superior Court, in an action for damages for injuries caused by being struck by a street car. Reversed.

Meredith, Macpherson & Co., for appellant.

Brodeur v. *Bérard*, for respondent.

Cross, J.

CROSS, J.:—The respondent, in continuance of suit, was a young man 19 years of age at the time at which he was injured, namely, on August 20, 1915.

On that day, about 11 o'clock in the forenoon, he had assisted his sister-in-law and her child to take passage in an east-bound

QUE.

K. B.

MONTREAL TRAMWAYS CO. v. HAMILTON.

Cross, J.

tramcar at the west side of St. Patrick St. on Wellington St. That tramcar having started eastward, Hamilton went to cross the car tracks to go to the north side of St. Patrick St. He noticed a west-bound car coming towards him, but nevertheless made a movement to cross in front of it, but was struck by the nearest corner of the car, that is, the front left corner, and knocked down. He fell clear of the wheels on the space between the tracks and was picked up in an unconscious state at that place, the car having come to a standstill at a point where its rear vestibule was opposite the place where Hamilton was lying.

It is clear that Hamilton was negligent in trying to cross in front of the car and the Superior Court so found, but the judge also came to the conclusion that the motorman of the car was negligent also, in that he ran the car faster than was prudent in the particular circumstances. Judgment was, therefore, given against the appellant for $1,000.

The decision of this appeal thus turns upon the question whether negligence on the part of the motorman in running the car too fast contributed to the accident or not. There is a wide conflict between the statements or guesses of the witnesses about the speed of the car.

In my opinion, the speed of the car was not a factor in bringing about the accident. It might have been such a factor, if this had been a case of a pedestrian incautiously crossing behind a tramcar, and stepping in front of another on the next car-track. But here the fact is that Hamilton looked and saw the car coming and, nevertheless, tried to cross in front of it. Moreover, he was struck by the corner of the car before he could even get in front of it. In the circumstances, it cannot be said that the exercise of vigilance by the motorman could be expected to be exercised in these last seconds of the occurrence so as to avert the collision. The car was in fact brought to a stand-still in less than its own length. The pedestrian, who sees the danger and decides to take his chance notwithstanding, is the author of the mishap.

I would reverse the judgment and dismiss the action.

Judgment: Considering that the plaintiff-respondent (now represented by Stephen Hamilton, plaintiff in continuance of suit), has failed to prove his allegations of fault or negligence on the part of the defendant-appellant;

Considering that the said Stephen Hamilton, on the occasion on which he was injured by being struck by the appellant tramcar, imprudently attempted to cross the car-track in front of the said car after he has seen it coming in his direction;

Considering that the movement of the said Stephen Hamilton, in attempting to cross in front of the said car, was made when the car was too near to him to have made it practicable for the motorman to stop the car or avoid striking the said Stephen Hamilton who in fact did not have time to get upon the car track; but was struck by the left corner of the front of the car;

Considering that there is error in the judgment so appealed from, in so far as it is therein set forth that the said motorman was in fault;

Doth maintain the appeal, doth reverse the said judgment appealed from, to wit., the judgment pronounced by the Superior Court at Montreal on October 4, 1916, and, now giving the judgment which the said Superior Court ought to have pronounced, doth dismiss the present action with costs in the Superior Court and those of the present appeal against the plaintiff-respondent continuance the suit. *Appeal allowed.*

MARSHALL v. HOLLIDAY.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Clute, Riddell, Sutherland and Kelly, JJ. April 11, 1918.

STATUTES (§ II—104)—DIVISION COURTS ACT—SUM IN DISPUTE—MEANING OF. The words "sum in dispute" in s. 125 of the Division Courts Act, R.S.O. 1914, c. 63 mean "sum in dispute in the action"—"the sum sought to be recovered" mentioned in s. 106.

AN appeal by the defendant from the judgment of the First Division Court of the County of Norfolk. Statement.

The action was on a promissory note for $94.31, payable on demand, made by the defendant and endorsed over to the plaintiff.

The particulars given in the summons were:—

Principal	$94.31
Interest	4.71
	$99.02

At the trial, the Judge added a further sum of $1.17 as interest, by way of damages, and gave judgment for $100.19 and costs.

ONT.

S. C.

MARSHALL v. HOLLIDAY.

T. J. Agar, for the plaintiff, respondent, raised the preliminary objection that an appeal did not lie.

J. E. Jones, for the defendant, appellant, *contra*.

Section 125 of the Division Courts Act, R.S.O. 1914, ch. 63, provides that, "subject to the provisions of section 107 an appeal shall lie to a Divisional Court from the decision of the Judge . . . (*a*) in an action . . . where the sum in dispute exceeds $100, exclusive of costs; . . ."

Section 106 provides that the "clerk shall place all actions in which the sum sought to be recovered exceeds $100 at the foot of the trial list, and the Judge shall, in such actions, unless an agreement not to appeal has been signed . . . take down the evidence in writing. . . ."

Section 107 provides that "an appeal shall not lie if, before the commencement of the trial, there is filed . . . an agreement in writing not to appeal. . . ."

The provision in the earlier Division Courts Act, R.S.O. 1897, ch. 60, with regard to appeals, contained in sec. 154 (1), was: "In case a party to a cause . . . wherein the sum in dispute upon the appeal exceeds $100 exclusive of costs, is dissatisfied with the decision of the Judge . . . he may appeal to a Divisional Court . . ."

On the argument of the preliminary objection, these statutory provisions were referred to, and also sec. 154 of R.S.O. 1914, ch. 63; and the following cases: *Foster* v. *Emory* (1890), 14 P.R. (Ont.) 1; *Hunt* v. *Taplin* (1895), 24 Can. S.C.R. 36; *Allan* v. *Pratt* (1888), 13 App. Cas. 780; *Petrie* v. *Machan* (1897), 28 O.R. 504, 642; *Lambert* v. *Clarke* (1904), 7 O.L.R. 130; *Rathbone* v. *Michael* (1910), 20 O.L.R. 503; *Re American Standard Jewelry Co.* v. *Gorth* (1913), 5 O.W.N. 600.

THE COURT allowed the objection, and quashed the appeal with costs.

It was remarked that, had the language of the former statute been retained, and an appeal been given when "the sum in dispute upon the appeal exceeds $100," there might have been room for argument that the appeal should be held to lie: *Lambert* v. *Clarke*, 7 O.L.R. 130. But the Legislature had deliberately omitted the words "upon the appeal;" and the Court thought that in the section which now governs, 125, the words "sum in dispute"

ONT.

S. C.

MARSHALL v. HOLLIDAY.

meant "sum in dispute in the action"—"the sum sought to be recovered" mentioned in sec. 106.

Section 106 assists in the interpretation of sec. 125. By the former section, a special class of actions is to be set apart in a separate list; in the ordinary case the evidence in such actions is to be taken down in writing—clearly for the purposes of an appeal.

Here the "sum sought to be recovered" was $99.02; the defendant could have put an end to the action by paying that sum and costs; and the fact that the Judge gave an additional sum as interest, by way of damages, not at all necessarily following a verdict for the plaintiff, could have no effect.

Appeal quashed with costs

LETT v. GETTINS.

SASK.

C. A.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., and Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

LAND TITLES (§ III—30)—HOMESTEAD ACT—AGREEMENT—VENDOR UNMARRIED—LAND SOLD NOT HOMESTEAD—ACT INAPPLICABLE—AGREEMENT VALID.

The object of the Act respecting Homesteads (c. 29, 1915, Sask) was the protection of the wife's interest in the homestead of her husband. The amendment (s. 5, c. 27) of 1916 was to meet the case of a false certificate or affidavit where the Act had been *primâ facie* complied with. Where the land comprised in an agreement of sale and the vendor at the time of signing the agreement is unmarried the agreement is not invalid because it is not accompanied by the required affidavit. The agreement is valid as between the parties and may be enforced upon completion of the affidavit necessary to enable it to be registered.

Statement.

APPEAL by defendant from a judgment of Brown, C.J.K.B., in an action to recover payment of an instalment due under an agreement of sale. Affirmed.

Hon. W. E. Knowles, K.C., for appellant.; *T D. Brown*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—By an agreement in writing dated August 14, 1917, the respondent agreed to sell and the appellant agreed to buy a certain section of land for the sum of $13,440, payable as follows: $200 on execution of agreement, $500 on October 1, 1917, and the balance in crop payments as provided in the agreement. The appellant duly paid the $200, but made default in payment of the $500 due on October 1, 1917, and this action was brought for the recovery of that amount.

SASK.

C. A.

LETT v. GETTINS.

Haultain, C.J.S.

At the time the agreement was made, the land was not the "homestead" of the respondent and the respondent was not a married man. The respondent is the registered owner of the land and is in a position to give good title to the appellant, and is ready, willing and able to make the affidavit required by s. 5 of an Act respecting Homesteads, c. 29 of the statutes of 1915, as amended by c. 27 of the statutes of 1916. At the trial of the action, the whole case turned on a point raised by the statement of defence, which reads as follows:—

The defendant says that the agreement referred to in the plaintiff's statement of claim never became valid and binding inasmuch as the requirements of the Act respecting Homesteads, being c. 29 of the statutes of the Province of Saskatchewan for the year 1915, and the amendments thereto, have not been complied with, inasmuch as neither has the wife of the plaintiff executed the same nor was the said agreement accompanied by affidavit of the plaintiff either to the effect that the land referred to therein was not his homestead or that he had no wife.

The Chief Justice of the King's Bench, who tried the action, found against this contention and gave judgment in favour of the plaintiff. The defendant now appeals.

The object of the 1915 Act respecting Homesteads was to protect "the rights" of a wife "in the homestead" of her husband, and, for that purpose, to prevent the encumbering or alienation of the homestead without her consent. The Act dealt primarily and—except for s. 5—exclusively with "homesteads." The effectiveness of a transfer, etc., and the validity of a mortgage or incumbrance of the land of an unmarried man or of the land other than the homestead of a married man were not affected, but, in order to safeguard any possible rights of a wife, certain conditions were attached to the registration of a transfer in these cases.

If we only had to deal with the original Act of 1915 in regard to the present transaction, there can be no question that the affidavit prescribed by s. 5 would only have been necessary, after the purchaser had completed his agreement and was entitled to a transfer. The absence of the affidavit at an earlier stage would not have affected the transaction at all, and the Act would not have applied, because the vendor was an unmarried man. We have, however, to consider the meaning and effect of the amendments of 1916. By the amending Act of that year, s. 5 of the original Act was repealed and the following substituted therefor:—

5. Every transfer, agreement of sale, lease or other instrument intended

SASK.

C. A.

LETT v. GETTINS.

to convey or transfer an interest in land, and every mortgage or incumbrance, which does not comply with the provisions of the last two preceding sections, shall be accompanied by an affidavit of the maker in form C in the schedule to this Act, either that the land described in such instrument is not his homestead, or that he has no wife.

(2) If the party executing such instrument is acting under a power of attorney, he may, if acquainted with the facts, make the said affidavit in lieu of his principal.

(3) No transferee, mortgagee, incumbrancee, lessee or other person acquiring an interest under any such instrument shall be bound to make inquiry as to the truthfulness of the facts alleged in the affidavit herein provided to be made or in the certificate of examination in form B, and upon delivery of an instrument purporting to be completed in accordance with this Act the same shall become valid and binding according to its tenor save as in s. 7 hereinafter provided.

Haultain, C.J.S.

The agreement in this case does not comply with the provisions of the "preceding sections," and is not accompanied by an affidavit of the vendor that he has no wife. It is, therefore, argued on behalf of the appellant that the agreement never became valid and binding as against him. I cannot agree with this contention. Looking at the main object of the Act, the protection of the wife's interest, I think that the purpose of this amendment was to meet the case of a false certificate or affidavit, and that it goes no farther than to say that in such a case the maxim *omnia praesumuntur rite et solemniter esse acta* applies and the agreement is valid and binding as against the wife, if there is a wife, subject to the provisions of s. 7.

I do not think that the purpose of these enactments was to alter or affect the legal relations of the parties themselves. The object of the amendment seems to be rather to give purchaser or mortgagee in good faith protection against the possible interest of a possible wife when there has been a *primâ facie* compliance with the provisions of the Act.

The appeal must, therefore, be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A.:—On August 14, 1917, the plaintiff sold to the defendant under an agreement of sale sec. 13 in township 23 in range 8, west of the 3rd meridian in the Province of Saskatchewan, for $13,440, payable $200 in cash, $500 on October 1, 1917, and the balance in crop payments. The defendant made default in the instalment falling due October 1, 1917, and this action was brought for recovery of that amount.

The defendant defended, contending that the agreement in

SASK.

C. A.

LETT v. GETTINS.

Elwood, J.A.

question never became valid or binding, inasmuch as the wife of the plaintiff has not executed said agreement, nor was the said agreement accompanied by an affidavit of the plaintiff to the effect either that the land referred to therein was not his homestead or that he had no wife.

Ss. 2 and 5 of c. 29 of the statutes of Saskatchewan for 1915—as amended by c. 27 of the statutes of 1916—as material to the case, are as follows:—

2. Every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in a homestead, and every mortgage or incumbrance intended to charge a homestead with the payment of a sum of money, shall be signed by the owner and his wife, if he has a wife, and she shall appear before a District Court Judge, local registrar of the Supreme Court, registrar of land titles or their respective deputies or any justice of the peace, and, upon being examined separate and apart from her husband, she shall acknowledge that she understands her rights in the homestead and signs the said instrument of her own free will and consent and without compulsion on the part of her husband.

5. Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in land, and every mortgage or incumbrance, which does not comply with the provisions of the last two preceding sections shall be accompanied by an affidavit of the maker in form C in the schedule to this Act, either that the land described in such instrument is not his homestead, or that he has no wife.

. . . . .

(3) No transferee, mortgagee, incumbrancee, lessee or other person acquiring an interest under any such instrument shall be bound to make inquiry as to the truthfulness of the facts alleged in the affidavit herein provided to be made or in the certificate of examination in form B, and upon delivery of an instrument purporting to be completed in accordance with this Act the same shall become valid and binding according to its tenor save as in s. 7 hereinafter provided.

The Chief Justice of the King's Bench, before whom the action was tried, concluded that the omission to furnish the affidavit under the circumstances of this case did not invalidate the agreement of sale, and ordered that, upon the plaintiff filing the required affidavit within 60 days, there should be judgment for the plaintiff for the amount claimed, with costs. From this judgment, the defendant appeals.

The Act in question, in my opinion, had for its object the protection of the wife's interest in the homestead of the husband. In the case at bar, it appears that the plaintiff is not married, and that the land is not his homestead, and, as a matter of fact, an affidavit to this effect has been made since the trial of the action

SASK.

C. A.

LETT v. GETTINS.

Elwood, J.A.

by the plaintiff and is part of the appeal book herein. No request for the affidavit was ever made by the defendant, and the question of an affidavit was only raised after the defendant had made default in the payment of October, 1917, and suit had been commenced for the same

It seems to me that the wife of a homesteader could so conduct herself toward an intending purchaser of her husband's homestead that she could preclude herself from taking any objection to a sale. The object of the statute is not one of general public policy, but is for the benefit of a particular class of persons, and, therefore, in my opinion, the provision in the statute requiring an affidavit is one which renders a contract with respect to which there has been a failure to provide the required affidavit merely voidable, and not void.

If I am correct in this conclusion, then it seems to me abundantly clear that there are no merits in the defendant's appeal. As I have stated above, there was no request for an affidavit and no objection raised until some months after the contract had been entered into and default had been made. The plaintiff is unmarried, and the land was not his homestead. The plaintiff is the only person interested in the land. Under these circumstances it would be, in my opinion, most inequitable that the contract should be declared void.

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

Newlands, J.A.

NEWLANDS, J.A.:—This action is to recover an instalment of $500 due under an agreement for the sale of land. The defence is that the said agreement never became valid and binding on defendant, because the requirements of the Act respecting Homesteads, c. 29 of act of 1915 and amendments, had not been complied with.

This Act was passed to prevent a married man from disposing of or mortgaging his homestead without the consent of his wife. The Act of 1915 provides for her signature and its acknowledgment before certain officers, separate and apart from her husband.

S. 5 of that Act, as amended by c. 27 of the Acts of 1916, provides for an affidavit by the vendor or mortgagor where the land is not his homestead, or, if it is his homestead, where he has no wife.

SASK.

C. A.

LETT v. GETTINS.

Newlands, J.A.

Sub-s. 3 of this section provides that the purchaser or mortgagee is not bound to enquire into the truth of the facts deposed to in the affidavit, but that, upon the delivery of the instrument purporting to be completed in accordance with that Act, "the same shall become valid and binding according to its tenor save as in s. 7 hereinafter provided."

S. 7 provides that it is a fraud upon a wife to take a transfer, etc., without her signature, knowing either that the land in question is a homestead or that the party making the same has a wife, and it allows the wife to have the same set aside for such fraud.

The land in question was neither the homestead of the plaintiff nor had he a wife.

This Act was undoubtedly passed for the purpose of preventing a married man from disposing of or mortgaging his homestead without the consent of his wife. Where he had no wife, or where the land was not his homestead, evidence of those facts would be necessary before the registrar could register a transfer and to protect a mortgagee. For this reason the affidavit was provided for where there was no signature of his wife to the instrument. The amendment was undoubtedly passed to protect a purchaser or mortgagee who took the instrument relying upon facts stated in the affidavit from the fraud of a married man, and, where the purchaser or mortgagee acted *bonâ fide*, the instrument was to become effective without the signature of the wife.

In my opinion, the Act never intended to apply to a case where the land in question was not a homestead, or the instrument was made by a man who had no wife. Under our system of registration, evidence of this fact was necessary in order for the registrar to give effect to the instrument by registration, just as it is necessary to have an affidavit of execution for the same purpose. The language of the Land Titles Act as to an affidavit of execution is the same as that requiring an affidavit in this case. In both cases it says the instrument "shall be accompanied by an affidavit." The only effect of the want of an affidavit of execution on an instrument is that it cannot be registered; the instrument is perfectly good for the purposes for which it is made, and can be completed by the swearing of the affidavit at any time.

This, in my opinion, is the effect of the Act respecting Homesteads. An instrument cannot be registered without the affidavit

SASK.

C. A.

LETT v. GETTINS.

required by s. 5, where there is no signature of a wife, but the instrument is otherwise effective, unless the vendor or mortgagor has a wife, and where he has a wife it becomes effective if the affidavit is made and accepted in good faith by the purchaser or the mortgagee.

Newlands, J.A.

In this case, the vendor not having a wife, the instrument was effective between the parties, and the affidavit required by s. 5 would only be required when some instrument executed by the vendor required to be registered.

I am, therefore, of the opinion that the appeal should be dismissed with costs.

Lamont, J.A.

LAMONT, J.A., concurred with NEWLANDS, J.A.

Appeal dismissed.

THE KING v. FLAHERTY and MALEPART.

QUE.

K. B.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll, and Désy, ad hoc, JJ. June 21, 1918.

HABEAS CORPUS (§ I C—12a)—WARRANT OF COMMITMENT DEFECTIVE—INDICTMENT PROPER AND CONVICTION VALIDLY MADE—AMENDMENT OF WARRANT.

The fact that a warrant of commitment is defective is not a ground for an application by way of *habeas corpus* for the release of the prisoner, if the conviction was validly made under a proper indictment; the warrant may be amended or replaced by another in due form.

Statement.

APPLICATION by way of *habeas corpus* for the release of a prisoner on the ground that the warrant of commitment is irregular. Application refused.

L. Houle, for petitioner; *Walsh & Lafortune*, for the Crown.

Cross, J.

CROSS, J.:—By return to writ of *habeas corpus*, the respondent, warden of St. Vincent de Paul penitentiary, certifies that the petitioner Flaherty is detained by him by virtue of a commitment issued out of the Crown side of this court in the district of Terrebonne, signed by the clerk of the Crown, in that district, in which commitment it is recited that Flaherty was convicted *d'avoir illegalement déchargé une arme à feu sur Albert Elliott.*

Counsel for the petitioner says that that recital discloses no criminal offence and that there is consequently no lawful ground of detainer.

At the hearing, counsel for the Crown intimated that, unfortunately, they had not had time to look into the matter, but contented themselves with the submission that, after trial and

QUE.

K. B.

THE KING v. FLAHERTY AND MALEPART.

Cross, J.

conviction in a court of record, it was not for this court, on *habeas corpus*, to look into the legality of the trial proceedings. While that is true, it is nevertheless to be observed that it does not meet the objection that, whether the trial and conviction have been legal or otherwise, the keeper of the prison should have something in his hands to warrant the custody.

At the hearing, counsel for the petitioner admitted that his client had been tried upon indictment, and it was intimated to the parties that the indictment should be put before us, and I take it that that is a proper course, in such circumstances (*R.* v. *Taylor* (1826), 7 D.& R. 622), though it is for the prosecutor to see that it is carried out if he wishes to rely on a conviction instead of the commitment.

As it happens that the petitioner was indicted and tried by jury in the Crown side of this court at Ste. Scholastique, we have looked at the indictment and it is shewn by it that the petitioner was therein charged with having shot at one Elliott, with a loaded gun with intent thereby to murder Elliott, and it also appears that he was tried, and that a verdict of guilty was given against him, upon which sentence was pronounced.

In these circumstances, it is clear that there is nothing of substance in the petitioner's pretensions. The warrant to the respondent, though important machinery, is mere machinery, and, if defective, it can easily be replaced by another in due form. If this were a case of a warrant of commitment issued by a magistrate, or court of limited jurisdiction, we might appropriately proceed under s. 1120 of the Code to make an order for further detention and direct the issue of a better warrant to the respondent.

Is such a course necessary, in view of the fact of the petitioner having been tried and convicted in this court? The writ does not, in general, lie when the party is in execution on a criminal charge after judgment on an indictment according to the course of common law: *Ex parte Lees* (1860), El. Bl. & El. 827, 120 E.R. 718.

In such a case, the right to hold the prisoner is founded on the fact of a sentence having been passed by a court of record having general jurisdiction of the offence charged: See *Sproule* (1886), 12 Can. S.C.R. 140.

I consider that, while it is open for us to make an order for further detention and to direct the issue of a warrant in better

form reciting all the ingredients of the offence charged in the indictment, that course is unnecessary and would serve no useful purpose.

Seeing the proof that there has been a valid conviction on indictment in the King's Bench in the ordinary course of law, and that sentence has been pronounced by that court, I would quash the *habeas corpus* and remand the petitioner into respondent's custody.

Judgment: Having heard the said Tom Flaherty by his counsel upon the return herein made by the warden of the penitentiary to the writ of *habeas corpus* issued out of this court on May 16, 1918, in obedience to which the body of the said Tom Flaherty was brought before this court; having also heard what was said by counsel appearing on behalf of the Attorney-General; having seen the indictment upon which the said petitioner was convicted in the Crown side of this court; and upon the whole duly deliberated:

It is, by the court now here considered that the said Tom Flaherty ought not, by reason of anything set forth on his behalf, to be discharged out of the custody in which he is held, by virtue of the warrant of commitment mentioned in the said return, and it is, in consequence, now finally adjudged that the said writ of *habeas corpus* be and the same is quashed and the said Tom Flaherty is remanded into the said custody wherein he has been held as aforesaid.

ANDERSON v. CANADIAN NORTHERN R. Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 25, 1918.

RAILWAYS (§ II D—70)—INJURY TO ANIMALS AT LARGE—NEGLIGENCE—WILFUL ACT—RAILWAY ACT, R.S.C. 1906, c. 37 s. 294.

Section 294 of the Railway Act, R.S.C. 1906, c. 37, s. 294, as amended by 9-10 Edw. VII. c. 50, s. 8, means that if animals are allowed by their owner to be at large within one-half mile of the intersection of the railway and a highway at level, the owner takes the risk upon himself of any damages which may be caused to or by them upon the intersection, and if such damages are caused to the animals, not upon the intersection but upon the railway property beyond it, the company would be liable, unless it established that the animals got at large through the negligence or wilful act or omission of the owner or his agent.

[See annotations 32 D.L.R. 397, 33 D.L.R. 418, 35 D.L.R. 481.]

Statement.

APPEAL from the judgment of the Supreme Court of Saskatchewan *en banc* (1917), 35 D.L.R. 473, 10 S.L.R. 325, at p.

CAN.
S. C.
ANDERSON
v.
CANADIAN
NORTHERN
R. CO.
Fitzpatrick, C.J.
Davies, J.

334, affirming the judgment of Elwood, J., at the trial, (1917), 33 D.L.R. 418, 10 S.L.R. 325, at p. 326, which dismissed the plaintiffs' action for damages for horses killed on the railway tracks of the defendant company. Affirmed.

Chrysler, K.C., for appellant.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

DAVIES, J.:—This is an appeal from the unanimous judgment of the Supreme Court of Saskatchewan *en banc*, confirming the judgment of the trial judge dismissing plaintiff's action.

The action was brought to recover damages for the loss or injury caused to the plaintiff's herd of ponies which were killed upon the railway track either at the intersection of the railway and the highway at level or upon the track somewhat beyond that intersection.

The right of the plaintiffs to recover depends in my judgment upon the construction given to s. 294 of the Railway Act of Canada, as amended in 1910.

A suggestion was made that the section was *ultra vires* of the Parliament of Canada and was in conflict with provincial legislation which permitted animals to go at large unless restricted by municipal regulations. I cannot for a moment entertain the suggestion of the section being *ultra vires* nor do I think that it is necessarily in conflict with the provincial legislation. It simply means that if animals are allowed by their owner to be at large within one-half a mile of the intersection of the railway and a highway at level the owner takes the risk upon himself of any damages which may be caused to or by them upon the intersection, and if such damages are caused to the animals not upon the intersection, but upon the railway property beyond it, the company would be liable for them, unless it established that the animals got at large through the negligence or wilful act or omission of the owner or his agent, etc.

In the case before us I am strongly inclined to think the evidence shewed the animals to have been killed at the intersection of the railway and the highway. If so, the animals being at large contrary to the provisions of the section, the plaintiff by the express words of the sub-s. 3 was deprived of any right of action for their loss.

If, on the contrary, the animals were killed not at the intersection but on the railway track beyond it, then the plaintiffs would have a right of action under the 4th sub-section for damages caused by their loss, unless the company proved that they were "at large" by "the negligence or wilful act or omission" of the owner.

That this was proved is beyond doubt. The plaintiffs admitted that they allowed the ponies to be at large on a section adjoining that through which the railway track ran and that they must have wandered or strayed away till they had got upon the highway and then on to the intersection of the railway. The trial judge found these facts on satisfactory evidence to have been proved. In my judgment the animals were beyond doubt at large by the plaintiffs' "wilful act." It was not "negligence" on the plaintiffs' part which allowed the animals to get "at large" but the intentional, deliberate act of the plaintiffs who allowed them to go at large. That was the plaintiffs' "wilful act" which when proved by the company deprived them under sub-s. 4 of a right to recover damages for the loss of the animals. The result, therefore, in my opinion is that, if the animals being at large within half a mile of the railway and the highway crossing at level wandered or strayed on to the railway track and were killed on the intersection, the plaintiffs were deprived by sub-s. 3 of their right of action and if killed beyond the intersection on the railway track were also deprived of his right of action by sub-s. 4 for their loss, once it was established that the animals were at large by their "wilful act."

It was contended that as the cattle-guards had not been maintained at the intersection as required by s. 254, the company was liable whether the animals were killed on the intersection or not, and whether they were at large by the plaintiffs' wilful act or not. But I think clearly this is not so. S. 294 is, in my opinion, a code in itself, with respect to the rights and obligations of the railway company and of the owners of animals killed upon the company's track, whether at the intersection of the railway and the highway level or on other railway property beyond it. S. 254 is of general application, but it cannot control or alter the operation of s. 294, which deals with the particular case now before us and defines with particularity and care the respective obligations and rights of the company and the owners of animals at large in the neighbourhood of level crossings of railways and highways.

CAN.

S. C.

ANDERSON v. CANADIAN NORTHERN R. CO.

Idington, J.

IDINGTON, J.:—The decision of this appeal ought to turn upon the effect to be given to s. 294 (5). The whole section reads, as amended by 9 & 10 Edw. VII., c. 50, s. 8, as follows:—

294. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

2. All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the poundkeeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

3. If the horses, sheep, swine or other cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

4. When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action in any court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; Provided, however, that nothing herein shall be taken or construed as relieving any person from the penalties imposed by s. 407 of this Act (9 & 10 Edw. VII., c. 50, s. 8).

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 the highway, deprive the owner of his right to recover.

The owner is given by s. 4, a right of action unless the company prove that the animal got at large through negligence or wilful act or omission of the owner or his agent.

Does sub-s. 5 dispense with this right of the company when its default causes the accident? Or is it only limited in its operation to the requirements of sub-s. 1, imposing the duty of providing some competent person to be in charge?

The common sense of sub-s. 5 in depriving the company of a defence, when animals not killed on the highway but on the railway track by reason of the company's default in not observing the law, suggests it ought to have been made to apply to all such cases.

I incline, however, to think parliament has failed to so express itself and that the latter or second class is only what is covered, and not the former.

That would not prevent the operation of the exception in sub-s. 4 in favour of the company.

The case of *Canadian Pacific R. Co.* v. *Eggleston* (1905), 36 Can. S.C.R. 641, wherein it was decided that the owner of a band of horses, though in a sense in charge, which, in 1902, strayed upon an unfenced railway track, had no remedy for their slaughter by the defendant's train, I imagine led to this attempt to bring the law in harmony with due regard by railway companies for the rights of others.

Idington, J.

I regret that the effort at amendment seems to have partially miscarried.

I cannot say the court below is wrong in the holding that an owner leaving his horses at large on an unfenced section of land falls within same.

I agree the legislation of the local legislature cannot invade the express declaration of parliament in a railway Act such as that in question.

The appeal should be dismissed with costs.

ANGLIN, J.:—I agree with Davies, J. Anglin, J.

BRODEUR, J.:—I agree with Idington, J. Brodeur, J.

Appeal dismissed.

McKINLAY v. MUTUAL LIFE ASSURANCE Co.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. October 1, 1918.

MUNICIPAL CORPORATIONS (§ II C—50)—BY-LAW—PROTECTION AGAINST FIRE —INTERPRETATION—NOT APPLICABLE TO OTHER ACCIDENT.

A by-law of the city of Vancouver and the legislative authority to make it "for causing all lands, buildings, and yards to be put in other respects in a safe condition to guard against fire and other dangerous risk and accident" (Vancouver Incorporation Act. (1886), c. 32 s. 142, s.s. 54 as amended by statutes of 1887, c. 37, s. 17) and by-law 941, s. 37, in part as follows: "Shall have all public halls, stairways and passageways properly lighted," must be considered only with reference to fire protection and cannot be invoked in case of an accident not being referable to a fire.

APPEAL by plaintiff from judgment of Cayley, Co. J. Statement.

Craig, for appellant; *Robert Smith*, for respondent.

MACDONALD, C.J.A.:—I agree with the County Court Judge in his reasons for judgment. Macdonald, C.J.A.

Apart from the by-law there can be no doubt that the action was not maintainable. I think the by-law was meant to protect

B. C.

C. A.

McKINLAY v. MUTUAL LIFE ASSURANCE CO.

Macdonald, C.J.A.

Martin, J.A.

McPhillips, J.A.

the occupants of such a building as the one in question from personal injury by fire, by requiring the owner to provide fire escapes with indicating lights and with other lights in the halls and corridors to assist the occupants to find the exits. It was not intended, if indeed the municipality had the power to so legislate, to cast on the owner a burden for the protection or convenience of either occupants or strangers in finding their way about the halls, corridors and stairways when a fire was not threatened nor in progress.

I would, therefore, dismiss the appeal.

MARTIN, J.A., dismissed the appeal.

McPHILLIPS, J.A. (dissenting):—The trial judge in the language of Darling, J., in *Lewis* v. *Ronald* (1909), 26 T.L.R. 30, at 31, "has given most careful consideration to this case," but I am unable with respect to arrive at the same conclusion at which he did when he refused to enter judgment for the appellant upon the jury's general verdict in favour of the plaintiff. The verdict of the jury was in the following terms:—

> The jury find that plaintiff is entitled to damages on account of injuries received through falling down an improperly lighted staircase.
>
> Damages: operation, $100; hospital fees, $100, approximately; truss, $3; time lost, $90; inconvenience, etc., $307 equal $600.

The respondent acquiring the reversion, the Order of the Elks became tenants upon the same terms with the respondent, and the plaintiff was a member of the Order entitled and invited to go upon the premises (see Foa (5th ed., 1914); *Brydges* v. *Lewis*, (1842) 3 Q.B. 603 114 E.R. 639).

The trial judge, in a considered judgment, has reviewed the law bearing upon the question for consideration and has very elaborately referred to and distinguished cases of a like or analogous nature, and it cannot be said that the law is at all clear when the special facts of the present case are considered. The judge concluded his judgment by saying:—

> For the reasons given and on the authority of the cases cited, more particularly the case of *Lewis* v. *Ronald*, I think I must grant the non-suit and enter judgment for the defendant.

Lewis v. *Ronald* was a decision of the King's Bench Division (Darling and Bucknill, JJ.) and with unfeigned respect to the court, that decision, in my opinion, cannot be held to detract from or affect the decision of the Court of Appeal in England in *Miller* v. *Hancock*, [1893] 2 Q.B. 177, a case which has received a very great

deal of consideration in the following amongst other cases: *Hargroves* v. *Hartopp*, [1905] 1 K.B. 472; *Williams* v. *Gabriel*, [1906] 1 K.B. 155; *Cavalier* v. *Pope*, [1906] A.C. 428; *Malone* v. *Laskey*, [1907] 2 K.B. 141; *Huggett* v. *Miers*, [1908] 2 K.B. 278; *Lucy* v. *Bawden*, [1914] 2 K.B. 318; *Dobson* v. *Horsley*, [1915] 1 K.B. 634; *Hart* v. *Rogers*, [1916] 1 K.B. 646.

In the present case unquestionably the respondent, "either expressly or by implication," undertook with the tenants, the Elks, of which Order the plaintiff was a member, "to keep in repair an approach to the demised premises." (Farwell, L.J., in *Huggett* v. *Miers*, [1908] 2 K.B. 278.) The counsel for the respondent relied greatly on *Cavalier* v. *Pope*, [1906] A.C. 428; here there was the control of the staircase by the landlord and the lighting of it was undertaken by and as I consider obligatory on the landlord—see what Lord Atkinson said at p. 433. With reference to the learned counsel, I cannot see any forcefulness in that case in the way of assisting the respondent—rather it assists the appellant. The building is a very large modern and up-to-date office building in the city of Vancouver. It is true there is an elevator in the building, but there is also a staircase, and the respondent is in control and charge of the staircase, and lights the same, and at the floor where the accident took place, at the time of the accident, there was no light. At that point in the staircase, the stairs were differently constructed. The appellant in coming down from the floor above, unaware of the difference of construction at this last floor which was unlighted, the other floor being lighted, stepped into space and suffered personal injuries. Can it be said that there is no liability upon these facts? In my opinion if there was no obligation upon the appellant to take the elevator, and there is evidence that for some reason it was either not in commission, that is being operated at the time, or there was some undue delay, and the appellant, quite within his rights, proceeded down the staircase, and could reasonably have expected that the staircase would have been lighted, and at all hours of the night. This is not an unreasonable requirement in these modern days, considering modern conditions, the stamp of building and the size and importance of the city of Vancouver. Then the by-law is not to be overlooked, and the legislative authority to make the same which reads: "54. For causing all lands, buildings and yards to be put in other respects in

B. C.

C. A.

McKINLAY v. MUTUAL LIFE ASSURANCE CO.

McPhillips, J.A.

a safe condition to guard against fire and other dangerous risk and accident." (Vancouver Incorporation Act B.C. (1886), c. 32, s. 142, sub-s. 54, as amended by statutes of 1887, c. 37, s. 17) and by-law 941, s. 37, in part reads: "Shall have all public halls, stairways and passageways properly lighted."

I cannot agree that this by-law must be considered only with reference to fire prevention, and that the accident, not being referable to a fire, cannot be invoked. In my opinion, there was here a breach of a statutory condition, and its breach imports negligence, and gives a cause of action. See *Groves* v. *Wimborne*, [1898] 2 Q.B. 402; *Britannic M. Coal Co.* v. *David*, [1910] A.C. 74; *Butler* v. *Fife Coal Co.*, [1912] A.C. 149; *Watkins* v. *Naval Coll. Co.*, [1912] A.C. 693; *Jones* v. *C.P.R.* (1913), 13 D.L.R. 900, 30 O.L.R. 331; *Holborn Union Co.* v. *St. Leonard* (1876), 2 Q.B. 145, 27 Hals. Laws of England, p. 174.

There was, upon the facts of the present case, a concealed danger. It is not necessary to, in detail, refer to the decided cases at any great length. It would appear to me that there has been established a legal responsibility for the unfortunate happening. The appellant was the sufferer by reason of the neglect of the respondent. There was, in effect, a concealed danger, and there was a duty to warn and to have proper safeguards. These were not provided, and there was a breach of what, in effect, was a statutory duty. (See *Hayward* v. *Drury Lane*, [1917] 2 K.B. 899; *Maclenan* v. *Segar*, [1917] 2 K.B. 325.) I would refer to the very recent case of *Kimber* v. *Gas Light and Coke Co.*, [1918] 1 K.B. 439.

And I would refer in particular to the language of Bankes, L.J., at p. 445, and Scrutton, L.J., at pp. 446, 447. Further, the general verdict of the jury is not to be lightly overthrown, unless there be some error in law, and I do not find that there is any error in law. See Lord Loreburn in the *Kleinwort* case (1907), 23 T.L.R. 696, at p. 697.

In these modern days, staircases, elevators and other modern conveniences must be kept safe. They are virtual highways. Thousands are housed in the skyscrapers of the modern city, and huge rents are derived from tenants. It is justice and right that there should be liability upon the landlord. Lord Shaw in *Att'y-*

B. C.

C. A.

McPhillips, J.A.

Eberts, J.A.

Gen'l v. *Nigeria*, [1915] A.C. 599, said at p. 617: "The law must adapt itself to the conditions of modern society and trade . . ."

I would allow the appeal.

EBERTS J.A., dismissed the appeal. *Appeal dismissed.*

MACKAY v. CITY OF TORONTO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., Riddell, J., and Ferguson, J.A. April 26, 1918.

MUNICIPAL CORPORATIONS (§ III—286)—INSTRUCTIONS GIVEN BY MAYOR TO DO CERTAIN WORK—COUNCIL'S REFUSAL TO PAY—NO EXECUTED CONTRACT—RATIFICATION BY BY-LAW—MISCONCEPTION OF WORK REQUIRED.

The plaintiff, an accountant, was instructed by the Mayor of Toronto by letter to examine the books of the Toronto Electric Light Company "and give me a report of the company as an accountant shewing the probable financial results if the city takes over the company's business and operates at the present load of about 30,000 h. p." These instructions were afterwards extended to include also the Toronto Railway Company. No sum was agreed upon as remuneration. The negotiations for purchase having failed, the plaintiff sent in a bill for $42,546.50 which the council refused to pay, and the plaintiff then brought action to recover this sum. The court held that there was no executed contract in the sense that the council, knowing the facts, had accepted or ratified the act of the Mayor, such ratification would have to be by by-law, upon full knowledge of the facts. The plaintiff had misconceived the nature of the work required to be done and could not recover.

[*Waterous Engine Works Co.* v. *Town of Palmerston* (1892), 21 Can. S.C.R. 556, followed; *Pim* v. *Municipal Council of Ontario* (1855), 9 U. C.C.P. 304, distinguished.]

Statement.

AN appeal by the plaintiff from the judgment of MIDDLETON, J., 39 O.L.R. 34. Affirmed.

A. W. Anglin, K.C., and *Glyn Osler*, for appellant.

A. C. McMaster and *C. M. Colquhoun*, for respondent.

Maclaren, J.A.

MACLAREN, J.A.:—This is an appeal by the plaintiff from a decision of Middleton, J., of the 26th February, 1917, reported in full in 39 O.L.R. 34, dismissing the plaintiff's action, which had been brought to recover $42,546.50 for professional services as an accountant and for disbursements in connection with a proposed purchase by the defendants of the Toronto Railway Company and the Toronto Electric Light Company.

The broad ground on which the judgment was based was, that the defendants had never contracted with the plaintiff under seal or as required by the Municipal Act, and that the case did not fall within the class of cases in which such a formality might be dispensed with.

The trial Judge has carefully reviewed the leading recent English and Canadian cases which bear upon the points involved,

ONT.

S. C.

MACKAY v. CITY OF TORONTO.

Maclaren, J.A.

and I quite agree with the conclusions at which he has arrived, as to the general result of the authorities and as to the effect of the evidence.

It was strongly urged upon us by Mr. Anglin that the case of *Pim* v. *Municipal Council of Ontario* (1855), 9 U.C.C.P. 302, 304, which was not considered or referred to by the trial Judge, was applicable to the present case, and is binding upon us as an authority. It is perhaps a sufficient answer to say that our statute-law on the subject differs widely from that in force when the *Pim* case arose, and that we are bound by the decision of the Supreme Court of Canada in the case of *Waterous Engine Works Co.* v. *Town of Palmerston* (1892), 21 Can. S.C.R. 556, determined under a statute practically similar to that in force when the present case arose.

It was also argued that this case comes within the class of cases in which it has been held that, where a contract has been entered into by or on behalf of a corporation, without being under seal or without the observance of some other required formality, the plaintiff would nevertheless be entitled to recover if it had been fully carried out and the corporation had benefited by it. Mr. Anglin cited a number of cases to establish this proposition, and to shew the distinction made in the cases between those that were fully executed and those that were merely executory. An examination of these cases shews that, where the plaintiff succeeded, the contracts under consideration had been made either with the governing body of the corporation, such as the council or board, or by its duly authorised agent or agents, or had been duly ratified. In the present case it cannot be said that the council had any knowledge that any such contract had been made with the plaintiff as he now claims, and the testimony of the Mayor, of which the trial Judge expresses his "full and unqualified acceptance," shews that he had no idea that he was entering into any such contract in his dealings and communications with the plaintiff; and, even if he had, it had not been fully carried out and could by no means be called an executed contract. The only report made by the plaintiff was designated by him an "interim report," and the final report had not been made even at the time of the trial. Nor can it be said that the defendants had in any way benefited by it. The only part of the work or material by which the defendants might ultimately have benefited was the information derived from the

books of the companies, and that he received under a promise of secrecy, and no part of it was communicated to the defendants.

In a number of the cases the requirement of a seal or some other formality was held dispensed with on account of the subject-matter of the contract being comparatively unimportant, or a matter of routine or of frequent occurrence. There is no evidence in this case nor is it at all probable that the plaintiff had ever previously been called to advise where the sum of $30,000,000 had been even thought of or mentioned as the possible value of the property in question, or that he had ever previously thought of making a charge of $100,000 in the event of his advice being accepted and the campaign in favour of the purchase recommended resulting favourably; and it was probably equally novel to the city council.

He was asked and urged by the Mayor, at the outset, to give an estimate of what his work would cost, and was informed that the city council had first voted $5,000 and afterwards $10,000 for the fees and disbursement of the other experts, Ross and Arnold; and the inference is, that the Mayor expected that his remuneration would be somewhat on the same scale, and apparently the plaintiff did nothing to remove this impression.

I am of opinion that the plaintiff entirely misconceived his position and what was required of him. He was requested by the Mayor practically to furnish him with the material which from the point of view of a financial business and man would be useful in convincing the city council, the electors, and others to be influenced in a prospective campaign in favour of the purchase by the defendants of the two companies in question.

At the trial, the Judge was requested by both parties to express his view as to the amount which the plaintiff would be entitled to receive, in the event of his right to recover being established. No such request was made to us, so that I refrain from expressing any opinion respecting the sum named by the trial Judge.

In my opinion, the appeal should be dismissed.

MAGEE, J.A., agreed with MACLAREN, J.A. Magee, J.A.

RIDDELL, J.:—This is an appeal by the plaintiff from the judgment of Mr. Justice Middleton at the trial, 39 O.L.R. 34. Riddell, J.

The facts are set out in the reasons for judgment in some detail, and most of them are not in dispute. In the view which I take of the case, it is not necessary to disbelieve or discredit the

ONT.
S. C.
MACKAY v. CITY OF TORONTO.
Riddell, J.

plaintiff, or even to discount his statements; he seems to me to disprove his own case.

It must be obvious that the employment of the plaintiff was not of that trivial or everyday character which the cases enable us to hold sufficient without a formal contract or by-law.

The plaintiff (assuming as I do his perfect honesty) clearly understood that he was being employed to give an opinion of the advisability, from a practical and business point of view, of a purchase involving $30,000,000; that it was his opinion that would prevail with the Mayor, and, through the Mayor and other means, with the council responsible for the policy of the city. It is quite clear that he expected to be better paid if the scheme should go through than if it should fail; and it is equally clear that he, very early and before he could possibly have examined into the situation with any degree of fullness, began to prepare for an acceptance of the scheme.

He was convinced (and reminded the Mayor) of "the importance and necessity of convincing the Provincial Commission and the public of the wisdom and advantages of the proposed purchase." Indeed from the very beginning he assumed his employment to be to find reasons why the scheme should go through. Whether it was within the powers of the council to employ any one for these purposes—and I am inclined to think it was not—the employment was of such an extraordinary nature that it called for the utmost formality.

I do not think it necessary to go into the distinction (if any) between executed and executory contracts in this connection. The law cannot be said to be in a perfectly satisfactory state, and probably the last word has not been said. There was no executed contract in the sense that the council, knowing the facts, accepted the results of the plaintiff's labours. He had not even furnished what he set out to do—his "final report" was never delivered. Any acceptance there was, was without a knowledge of the facts—and any so-called ratification was in the same condition. No council would pay the slightest attention to the argument of an expert, however able or eminent, who expected $100,000 if his advice were followed, but only $37,500 if it were rejected.

I would dismiss the appeal.

I should add that the amount fixed by Mr. Justice Middleton

ONT.

S. C.

MACKAY v. CITY OF TORONTO.

Riddell, J.

Hodgins, J.A.

Ferguson, J.A.

as on a *quantum meruit*, i.e., $7,500, seems reasonable, and I should be better satisfied if the defendants would pay that sum. While the plaintiff certainly magnified his office and took a position to which he was not rightfully entitled, his work seems to have been well done; and it would not be unfair to consider payment of a reasonable fee.

HODGINS, J.A., agreed with RIDDELL, J.

FERGUSON, J.A.:—Counsel for the appellant urged that the learned trial Judge, having failed to appreciate that the contract sued upon in *Waterous Engine Works Co.* v. *Town of Palmerston*, 21 Can. S.C.R. 556, was executory, erroneously interpreted that case as deciding that a by-law and contract under seal were essential conditions precedent to the validity of every municipal contract (Ontario), whether executed or executory, whereas that decision, rightly understood, must be limited to executory contracts. Counsel conceded that there are no decisions in the Supreme Court of Canada holding that a by-law and sealed document are not essential conditions precedent to recovery on an executed contract, but urged that it had been so decided in *Pim* v. *Municipal Council of Ontario*, 9 U.C.C.P. 304, followed in *Perry* v. *Corporation of Ottawa* (1864), 23 U.C.Q.B. 391, and in a number of other Ontario cases: that the *Pim* judgment, being an opinion of the Court of Error and Appeal, was binding upon the trial Judge, and upon this Court, and should be followed, even though that decision might appear to be in conflict with the provisions of the Municipal Act and the weight of judicial opinion in England, as shewn by the authorities referred to and quoted by the learned trial Judge. See the Interpretation Act, R.S.O. 1914, ch. 1, sec 27 (*a*); the Municipal Act, R.S.O. 1914, ch. 192, secs. 8, 10, 249; *Hunt* v. *Wimbledon Local Board* (1878), 4 C.P.D. 48; *Young* v. *Corporation of Leamington* (1883), 8 App. Cas. 517; *Hoare* v. *Kingsbury Urban District Council*, [1912] 2 Ch. 452.

As I understand the provisions of the Judicature Act, R.S.O. 1914, ch. 56, this Court is bound by the decisions of the former Court of Error and Appeal; and, if the *Pim* case decided what counsel claims for it, and is not distinguishable or has not been overruled, we must follow it.

In *Silsby* v. *Village of Dunnville* (1883), 8 A.R. (Ont.) 524, 529, attention is called to a statement contained in the opinion of

ONT.

S. C.

MACKAY v. CITY OF TORONTO.

Ferguson, J.A.

Hagarty, J., in the *Pim* case, where (9 U.C.C.P. at p. 311) he says:—

"The defendants" (the Provisional Municipal Council of the County of Ontario) "were incorporated for the express purpose of erecting a gaol and court house, and were declared 'to have all corporate powers necessary for the purpose of carrying into effect the object of their erection under such provisional municipal council, and none other.' Nothing is said in the statutes as to their having a corporate seal, or how they are to contract."

A perusal of the opinions in the *Pim* case shews that the transactions there in question took place in 1852 and 1853, and therefore several years before the passing of the Municipal Institutions Act of 1858, 22 Vict. ch. 99; and, though the case is not reported until 1860, none of the learned Judges who took part in the judgment upon the appeal treated that case as being in any way governed or affected by sec. 186 of 22 Vict. ch. 99, which in its provisions is similar to, though not identical with, the sections of our present Municipal Act, R.S.O. 1914, ch. 192, sec. 249 (1) of which reads as follows:—

"Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law."

The opinion in the *Pim* case appears to have been based upon an Act authorising, among other things, the creation of corporate bodies known as Provisional Municipal Councils, enacted in 1849, and being 12 Vict. ch. 78. Section 13 of that Act reads:—

"And be it enacted, that every such Provisional Municipal Council shall be a body corporate by the name of the Provisional Municipal Council of the County of , and as such, shall have all corporate powers necessary for the purpose of carrying into effect the object of their erection into such Provisional Municipal Council as herein provided, and none other."

A perusal of the Act confirms the statement of Hagarty, J., "that nothing is said in the statutes as to their having a corporate seal, or how they are to contract," from which it follows that only the common law requirement of a seal would be necessary to evidence corporate action.

Under these circumstances, it seems to me that the *Pim* case

must be classed with those cases in which there is said to be no express statutory provision requiring corporate action to be evidenced either by by-law or seal: *South of Ireland Colliery Co.* v. *Waddle* (1868), L.R. 3 C.P. 463; *Douglass* v. *Rhyl Urban District Council*, [1913] 2 Ch. 407; *Lawford* v. *Billericay Rural District Council*, [1903] 1 K.B. 772.

In the case at bar we are dealing with the effect of express statutory provisions; and, therefore, it seems to me the *Pim* case cannot be considered as deciding the question in issue, which is, do these statutory requirements bring the case at bar within the principles enunciated in *Hunt* v. *Wimbledon Local Board*, *Young* v. *Corporation of Leamington*, and *Hoare* v. *Kingsbury Urban District Council* (*supra*)?

As the contract in the *Waterous* case was declared to be executory, any statements in the reasons for judgment in reference to executed contracts should, I think, be treated as not necessary to the decision and as mere *obiter dicta*; but I do not think that we may, for that reason alone, disregard that judgment, or the opinions therein expressed.

The authorities are so well collected in the reasons of the trial Judge and in the judgments delivered in the Supreme Court of Canada in *Bernardin* v. *Municipality of North Dufferin* (1891), 19 Can. S.C.R. 581, and in the *Waterous* case, that it would be a waste of time and effort for me to attempt to review them. I will content myself with saying that, as I read these opinions and the citations therein, they establish that where there are no express statutory provisions requiring a seal or by-law the Court may and does dispense with the common law formality of a seal in respect to corporation contracts which have been fully executed, and are, in the opinion of the Court, within the power of the corporation to enter into as being for work or material necessary or proper for the conduct of the business for which the corporation was created; but that the Court cannot dispense with a seal or by-law, if such requirement is statutory, and such statutory requirement is, in the opinion of the Court, imperative, and not merely permissive or directory, that the proof of compliance with such a statutory provision is as essential in an action to enforce payment of the consideration for an executed contract as it is to the establishment or enforcement of an executory contract.

ONT.
S. C.
MACKAY
v.
CITY OF
TORONTO.
Ferguson, J.A.

All the learned Judges who wrote opinions in the *Waterous* case were of the opinion that the provisions of the Ontario Municipal Act requiring a by-law under seal were imperative; but Gwynne, J., was of the opinion that they only applied when the municipal corporation was exercising its legislative or statutory powers, and did not apply when the corporation was exercising its administrative or common law powers.

The learned authors of Meredith's Municipal Manual, 1917, at p. 15 of their work, express the opinion that the reasoning of Mr. Justice Gwynne in his dissenting opinion in the *Waterous* case is unanswerable; while I think the adoption of the view there expressed would render the Municipal Act more workable than the result at which I am arriving, yet it seems to me that the majority of the Court expressly rejected that view, and decided that these statutory requirements were essential prerequisites to the exercise by the municipal corporation of both its legislative and administrative powers; and, if that be the correct view of the opinion of the Supreme Court of Canada, we are, I take it, not concerned with whether the result is reasonable or unreasonable, wise or unwise. We should follow that interpretation till the opinion is overruled by a higher Court or the Act is amended by the Legislature. See the opinion of Lennox, J., in *Bradshaw* v. *Conlin* (1917), 40 O.L.R. 494, at p. 499, 39 D.L.R. 86, at p. 90.

In the *Bernardin* case, the statutory requirements of the Manitoba Act were held to be permissive or directory, while in the *Waterous* case the requirements of the Ontario statute were, in my view, held to be imperative; and that difference seems to me to determine, in favour of the respondents, the crucial point in the case at bar, and necessitates our affirming, on this question of law, the opinion of the learned trial Judge. See *Manning* v. *City of Winnipeg* (1911), 21 Man. L.R. 203.

I am also of the opinion that the plaintiff has not made out a case of adoption or ratification by the city council sufficient to establish a contract to pay.

A perusal of the correspondence, whereby the scope of the plaintiff's retainer by the Mayor was enlarged, convinces me that the Mayor and the plaintiff had entirely different views as to the real nature and extent of the work and services which the plaintiff

would undertake and the remuneration he would seek or receive therefor, and that the Mayor did not appreciate the extent of the retainer which the plaintiff in this correspondence sought to obtain from him. That such is the case appears to justify what has been stated as the reason for enacting and maintaining as imperative even in executed contracts these statutory prerequisites to the contracts of certain corporate bodies. See the opinion of Lord Bramwell in *Young* v. *Corporation of Leamington*, 8 App. Cas. at p. 528, quoted by the learned trial Judge as follows:—

"The Legislature has made provisions for the protection of ratepayers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into."

It is also clear from the evidence of the Mayor that he intended that the services to be rendered by the plaintiff should be limited so as to bring the cost thereof to the defendants in the neighbourhood of $5,000. It is equally clear that the plaintiff contemplated the earning of a much larger fee, and intended that his remuneration should be much more in case the defendants entered into the proposed purchase than it would be if the purchase was not completed. By assuming this attitude, the plaintiff, to my mind, placed himself in a position where his interest must necessarily conflict with his duty. It is not asserted that the plaintiff disclosed his intention to the city council, and it seems to me that, before the plaintiff can succeed or we can say that the city council was satisfied to and did receive, ratify, and adopt the plaintiff's work and report as the work and report of a trustworthy, competent, unbiased adviser, it must be established that they had knowledge that the plaintiff did the work and prepared the report with the intention of making a larger claim in the event of the completion of the proposed purchase than he would make in case the council and the ratepayers of the municipality refused to exercise their option. I do not wish to be understood as saying that the plaintiff's opinion was necessarily or actually biased by

ONT.
S. C.
MACKAY
v.
CITY OF
TORONTO.
Ferguson, J.A.

the views he admits he entertained as to the manner in which the amount of his remuneration should or would be fixed. It may not have been influenced in the least; but whether it was or was not must be, I think, a question on which the members of the city council have a right to exercise their judgment and form an opinion before we can say that they have ratified, adopted, or knowingly received and enjoyed the benefit of the plaintiff's labours and advice, so that we may presume, as against them and the city corporation, an agreement to pay.

It is not necessary for me to deal exhaustively with the sum mentioned by the learned trial Judge as a proper remuneration for the plaintiff's work in case he is found entitled to succeed. I am not impressed, however, with the view that the fee or remuneration of a competent, trustworthy, unbiased expert as to whether or not a municipal corporation should enter into a transaction involving such a large amount of money as was involved in the proposed purchase of the properties and franchises of the Toronto Electric Light Company and the Toronto Railway Company, should be fixed by considering the amount of time he expended in preparing the opinion or in the length of the opinion prepared. Once it is established that the employers were satisfied that the adviser had the proper qualifications to advise and did advise in such a transaction, not as an advocate, but as an unbiased expert, then the fee or remuneration allowed him should be on a liberal scale.

I would dismiss the appeal with costs.

Appeal dismissed.

ALTA.
S. C.

GREEN v. HENNEGHAN.

Alberta Supreme Court, Walsh, J. November 8, 1918.

SUMMARY CONVICTIONS (§ VI—65)—COMMON ASSAULT—TRIAL BY JUSTICE—PROTECTION FROM SUBSEQUENT CIVIL PROCEEDINGS—CRIMINAL CODE, SEC. 734.

Sec. 734 of the Criminal Code applies only to summary convictions, therefore it is only one who has been tried by a justice upon a charge of common assault—which is the only kind of assault punishable on summary conviction—who can claim protection from subsequent civil proceedings.

One who has been tried summarily for one of the indictable offences specified in sec. 773(c) is entitled to immunity under sec. 792 "from all further or other criminal proceedings for the same cause," but not from civil proceedings.

[*Nevills v. Ballard* (1897), 28 O.R. 588, followed.]

ALTA.

S. C.

GREEN v. HENNEGHAN.

Walsh, J.

ACTION for damages for an assault.

Watt & Watt, for plaintiff, *Corey, Locke & Thomas*, for defendant.

WALSH, J.:—The plaintiff's action is for damages for an assault committed upon him by the defendant. The defendant pleads, *inter alia*, that the plaintiff "laid or caused to be laid on his behalf an information against the defendant in criminal proceedings with respect to the assault complained of," and that he was tried for said offence before two justices of the peace having jurisdiction therein and convicted thereof and ordered to pay a fine and costs and to enter into a recognizance to keep the peace and be of good behaviour, and that he has paid the fine so imposed and the costs and has entered into the said recognizance by reason whereof the plaintiff's claim is barred by s. 734 of the Criminal Code. The plaintiff, by his reply, admits the facts thus alleged except the payment of the fine and costs and the giving of the said recognizance, as to the truth whereof he pleads ignorance, and puts the defendant to proof thereof, and avers that such conviction and payment do not constitute, at law, any bar to the action. The order for directions provides that the question of law thus raised shall be set down for argument and determination before a judge, and the solicitors subsequently agreed that I should dispose of it on written arguments. The solicitors for the plaintiff have sent me their argument but none has been sent in for the defendant. Instead, they have written saying that they do not intend filing any, and that they are quite content to leave the matter for my decision upon the pleadings as they now stand.

The pleadings, unfortunately, are not in such a shape as to enable me to properly dispose of the question as it is raised. When a question of law arising upon the pleadings is to be determined before the trial, all of the facts necessary for its proper determination should be set out in them. That is not the case here. I find it quite impossible from the pleadings to say what charge was preferred by the plaintiff against the defendant before these justices or what offence he was convicted of. All that I can gather from them is that he was convicted of the charge set out in the information, and that it was laid "in criminal proceedings with respect to the assault complained of." It is admitted that it was for an offence over which the justices had jurisdiction and it must,

ALTA.
S. C.
GREEN
v.
HENNEGHAN.
Walsh, J.

therefore, have been either one punishable on summary conviction, or an indictable offence which they had power to summarily try. The question which I have to dispose of stands to be determined according to my view of it by the character of the offence with which he was so charged, and of which he was so convicted, and for this reason I think it should have been set out in the defence with some degree of care. A copy of the notes of the proceedings before the justices has been sent to me by the plaintiff's solicitors, and a statement of the facts in this connection appears in their argument, but upon such a motion as this I cannot look elsewhere than at the pleadings themselves for the facts upon which the question of law is to be determined.

I think, however, that I can deal with the question in another way which will enable me to dispose of it. This defence is set up in bar to the action, and to make it a good defence it should disclose such facts as are necessary to shew that, in the face of them, the plaintiff cannot maintain his action. If it fails to do that, it is not a good plea. And so, if, as a matter of law, a conviction of the defendant by justices having jurisdiction "with respect to the assault complained of" followed by the payment of the whole amount adjudged to be paid releases the defendant from civil liability regardless of the exact character of the offence with which he was charged and of which he was convicted, the plea is well pleaded. But if, on the other hand, such a defence is only available when the offence is of a certain specified character, then the plea is bad for not shewing upon its face that the defendant was charged with and convicted of such an offence.

S. 734 of the Code enacts that

> If the person against whom any such information has been laid by or on behalf of the person aggrieved . . . having been convicted pays the whole amount adjudged to be paid . . . he shall be released from all further or other proceedings, civil or criminal, for the same cause.

The information mentioned in this section obviously refers to the information spoken of in the immediately preceding s. 733, namely, one laid by or on behalf of the party aggrieved in "any case of assault or battery." It is to be found in Part XV. of the Code, which deals only with summary convictions. Part XVI. deals with the summary trial of indictable offences. S. 773 (c), contained in this part, confers jurisdiction upon a magistrate (which term in this province includes any two justices) to hear and deter-

mine, subject to the subsequent provisions of Part XVI., a charge of unlawful wounding or inflicting grievous bodily harm upon any other person either with or without a weapon or instrument. S. 792, which is also one of the sections of Part XVI., provides that every person who obtains a certificate of dismissal or is convicted under the provisions of this part shall be released from all further or other criminal proceedings for the same cause.

I am of the opinion that s. 734 only applies to summary convictions and, therefore, that it is only one who has been tried by a justice upon a charge of common assault, which is the only kind of assault punishable on summary conviction, who can claim its protection from subsequent civil proceedings. If that is the case here, the defendant is entitled to the benefit of this section. One who has been tried summarily for one of the indictable offences specified in s. 773 (*c*) is entitled to immunity under s. 792 "from all further or other criminal proceedings for the same cause," but that is all. If, therefore, the accused was charged and convicted under s. 773 (*c*), his only release is from further criminal proceedings. This is apparently the view taken of it by the Divisional Court in Ontario in *Nevills* v. *Ballard*, (1897) 28 O.R. 588, and it is to my mind the only view to which it is open.

I think, therefore, that this paragraph, as it stands, is not well pleaded because it does not shew that the information was for an assault punishable on summary conviction and that the conviction was a summary one. I might, perhaps, be justified in assuming that this was not a summary conviction, for the maximum fine for a common assault on summary conviction is $20 and here, according to this plea, the defendant was fined $100, but I prefer not to do so. The parties of course know what the facts are and can adjust this opinion to them. If the defendant can bring the conviction within s. 734, as I construe it, he should have the chance.

The order will be that par. 4 of the statement of defence be struck out, unless within 4 days of the service of the same upon the defendant's solicitors he amends it so as to allege that he was charged by the plaintiff with and convicted of an assault punishable on summary conviction.

The costs of this application will be to the plaintiff in any event of the cause. *Judgment accordingly.*

B. C.

C. A.

GIBBS v. NORTHERN CONSTRUCTION Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. October 1,1918.

NEW TRIAL (§III B—19)—FAILURE OF JURY TO ANSWER NECESSARY QUESTION SUBMITTED.

A new trial will be ordered where the jury has failed to answer a question of fact submitted to them, the answer to which is necessary to the proper determination of the case.

[*McPhee* v. *Esquimalt & Nanaimo R. Co*, 16 D.L.R. 756, referred to.]

Statement. APPEAL by defendants from judgment of Murphy, J. New trial ordered.

R. L. Reid, K.C., for appellant; *R. Cassidy*, K.C., and *Baillie*, for respondent.

Macdonald, C.J.A. MACDONALD, C.J.A.:—I think there must be a new trial. The jury's answers are incomplete. Their finding that a contract was entered into between the parties on August 8 may refer to a verbal contract of which evidence was given. That verbal contract included a term that the plaintiffs should furnish security for the due performance of their obligations. A verbal contract is not enforceable in the absence of a memorandum in writing. The memorandum in writing which is relied upon is the document which is put forward alternatively as a written contract and a memorandum in writing of a verbal contract.

This document was handed to the plaintiffs by Cummings, who, it is admitted, was agent for both defendants, but the question is, was it handed to the plaintiffs as the signed contract or as only the proposed contract to be formally executed when the security aforesaid should have been perfected? When Cummings said "There is your contract," what did he mean? That was a question of fact to be decided by the jury, and question No. 8, the answer to which would have decided it, was left unanswered. Had the document been delivered as the signed contract, then evidence of some omitted stipulation could not have been given in this action as framed. On the other hand, if it can be relied on merely as evidence of the verbal agreement, it does not contain all the terms of it.

Galliher, J.A. GALLIHER, J.A.:—I am, though not without some hesitation, concurring in the granting of a new trial owing to the failure of the jury to answer the 8th question.

McPhillips, J.A. MCPHILLIPS, J.A. (dissenting):—This appeal involves the determination as to whether, upon the facts as led at the trial, a

contract has been established within the meaning of s. 11 (1) of the Sales of Goods Act (c. 203, R.S.B.C. (1911), the Sale of Goods Act (1893) Imp. is in like terms, see s. 4 and sub-sections thereto). The jury has failed to find, as a fact, whether the writing which is claimed to be a sufficient "memorandum in writing of the contract was made and signed by the party to be charged or his agent in that behalf." Two questions were put to the jury which were not answered which went to the question of fact whether there was a signature within the statute, being Nos. 6 and 8, and in the absence of any answer or finding of the jury upon this crucial point, in fact, the crux of the case, the trial judge has undertaken to find the question of fact. With great respect to the trial judge, this was without his jurisdiction. The tribunal, the constitutional tribunal, in the case was the jury. It is only the Court of Appeal that can exercise any such jurisdiction. *McPhee* v. *Esquimalt and Nanaimo R. Co.* (1913), 16 D.L.R. 756, 49 Can. S.C.R. 43.

Very recently, in fact, in February of this year (1918), the Court of Appeal in England had the same point up for consideration in *Winterbotham* v. *Sibthorp*, [1918] 87 L.J.K.B. 527.

Now, the situation in the present case is this, unless it is a case in which it is right and proper to enter judgment, there must be a new trial. In my opinion, but with great respect to contrary opinion, the case is one in which judgment should be entered for the defendants, and the action dismissed; that is, it is a case in which this Court is entitled to so decide, namely, within the language of Duff, J., in the *McPhee* case, 16 D.L.R. 756, at 762:—

> In the absence of a finding of a jury or against such a finding where the evidence is of such a character that only one view can be taken of the effect of that evidence—

and the language of Swinfen Eady, L.J. (now Master of the Rolls), in the *Winterbotham* case, at p. 529:—

> But where the evidence is such that only one conclusion can properly be drawn, then, in my opinion, this court is bound to draw that conclusion and to enter judgment accordingly.

We find this statement in Chalmers' Sale of Goods, 7th ed., 1910, under the heading "Formalities of the Contract," at pp. 23-24:—

> Signature is the writing of a person's name on a document for the purpose of authenticating it. If the name appears in an unusual place, it is a question of fact whether it was intended as a signature. (*Johnson* v. *Dodgson* (1837), 2 M. & W. 653, at p. 659, 150 E.R. 918; *Caton* v. *Caton* (1867), L.R. 2 H.L.

B. C.

C. A.

GIBBS v. NORTHERN CONSTRUCTION CO.

McPhillips, J.A.

127.) Signature by mark, initials or stamp is sufficient (Benjamin on Sale, 4th ed., at p. 232). The signature to a telegram form suffices (*Godwin* v. *Francis* (1870), L.R. 5 C.P. 295), so, too, does the signature of an agent in his own name, for then evidence is admissible to charge the principal, though not to discharge the agent (*White* v. *Proctor* (1811), 4 Taunt. 209, 128 E.R. 309; *cf. Newell* v. *Radford* (1867), L.R. 3 C.P. 52). The authority of the agent is to be determined according to the ordinary rules of agency; but it seems that one party cannot be the agent of the other to sign for him. *Sharman* v. *Brandt* (1871), L.R. 6 Q.B. 720; *cf. Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333, 106 E.R. 1213. A letter written by an agent which refers to and recognises an unsigned document containing the terms of the contract, may satisfy the statute. *John Griffiths Cycle Co.* v. *Humber & Co.*, [1899] 2 Q.B. 414 (reversed on another point, [1901] W.N., p. 110), decided on s. 4. It is obvious that a person may be an agent to sign, though he may not have authority to settle the terms of the contract between the parties. The two questions are distinct.

The counsel for the respondents in his, if I may be permitted to say so, very ingenious argument, did not contend that the rubber stamped document was a solemn and duly executed contract with all the formalities that are required when corporations are parties, but that it was a sufficient "memorandum in writing of the contract" to satisfy s. 11 (1) of the Sales of Goods Act (c. 203, R.S.B.C. 1911). The alleged sufficiency of signature to the document in writing it in the following form, the word "and" between the names of the two companies (the names of the companies being rubber stamped thereon) being inserted in the handwriting of Cummings, the agent for both companies:—

In witness whereof the parties hereto have caused these presents to be executed.

In the presence of NORTHERN CONSTRUCTION CO. LIMITED
and
CARTER-HALLS-ALDINGER CO. LIMITED

Witness ..... (Seal)

..... President and general manager.

..... (Seal)

Secretary-treasurer.

(Sub-contractor) ..... (Seal)

Witness .... (Seal)

It is patent to me that there is no signature here, the very writing importing the requirement that execution thereof shall be in the one case by the president and general manager with the seal of the company and in the other the execution to be by the secretary-treasurer with the seal of the company, all of which is absent. Then there was evidence which, I think, was conclusive, that there should be a bond before contract, and that was admittedly not existent at the time.

In my opinion, quite apart from the insufficiency of signature under the Sales of Goods Act and its requirement upon the evidence, which I do not think it necessary to canvass in detail, considering the view at which I have arrived, there was no concluded contract, and in this connection it is instructive to read what Lord Loreburn said in *Love and Stewart* v. *S. Instone and Co.* (1917), as reported in 33 T.L.R. 475.

Again, and with great respect, the trial judge was in error in assuming to pass upon this further question of fact, which if an essential fact to be found, was the province of the jury, not that of the judge. See judgment of Lord Moulton in *Rickards* v. *Lothian*, [1913] A.C. 263, at p. 274.

See also *Hubert* v. *Treherne* (1842), 3 M. & G. 743, 133 E.R. 1338; *Saunderson* v. *Jackson* (1800), 2 Bos. & Pul. 238, 126 E.R. 1257.

These cases indicate in apt language, when the facts are considered in this case, that there was not "some note or memorandum in writing of the contract . . . signed by the party to be charged, or his agent in that behalf." I would particularly refer to that portion of the judgment which reads:—

> Applying one's common sense to the matter, it is impossible not to see not only that this instrument does not purport to be signed, but that it does purport to be intended to be signed by the contracting parties.

I do not propose to set forth here in detail a reference to the numerous cases referred to in the able argument delivered by counsel on behalf of the respective parties to this appeal, but it has been established to my satisfaction that the judgment appealed from, with great respect to the trial judge, is wrong and cannot be upheld. Even were I wrong in my view that the case is a proper one for entry of judgment for the defendants, and dismissal of the action, then, at best, all that could, in my opinion, be directed would be a new trial. Further, if that even should not be the necessary result, the evidence shews that the respondents contracted, recklessly undertaking to supply stone of which there is no evidence whatever, that it was in place, and capable of being quarried and delivered, so that if it can be said that there was a contract, the damages are excessive. In fact, no damages whatever have been proved, and upon this phase of matters, all that could be done by this court would be to direct that, for the

B. C.
C. A.
GIBBS v. NORTHERN CONSTRUCTION CO.
McPhillips, J.A.

breach thereof, nominal damages only be allowed. Parker, J. (afterwards Lord Parker of Waddington), I remember, in a case before him, allowed 20 shillings as nominal damages. Lord Atkinson in *United Shoe Manufacturing Co. of Canada* v. *Brunet*, [1909] A.C. 330, said at p. 345:—

> As the respondents have broken their contract, the appellants must, despite the finding of the jury that they sustained no damage, be entitled to nominal damages, but to nothing more.

In my opinion, the appeal should be allowed and the judgment of the court below set aside and the action dismissed with costs—the appellants to have the costs of the appeal, it being the statutory result.

Eberts, J.A.

EBERTS, J.A., concurred in granting a new trial.

New trial ordered.

ALTA.
S. C.

SUTHERLAND v. RUR. MUN. of SPRUCE GROVE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 25, 1918.

1. LAND TITLES (§ V—50)—ACTION TO ESTABLISH TITLE ONLY—NOT AN "ACTION FOR RECOVERY OF LAND"—CERTIFICATE OF TITLE NOT A BAR TO THE ACTION.

An action for the establishment of title only, not claiming possession, is not an "action for the recovery of land" and the certificates of title are not a bar to such action under sec. 104 of the Land Titles Act. (Alta).

2. TAXES (§ V D—205)—ARREARS OF—ADJUDICATION OF—NOT DATED—NO FOUNDATION FOR SUBSEQUENT PROCEEDINGS—COPY OF ADJUDICATION TO BE MAILED—MAILING OF NOTICE OF.

An adjudication as to arrears of taxes and confirmation of tax sales under s. 316 of the Rural Municipalities Act (Alta. stats. 1911-12, c.3) which bears no date on its face, has no date such as the Act contemplates and is not a foundation for the subsequent proceedings prescribed by the Act to enable the municipality to become the registered owner.

Sec. 316 (c) of the Act requiring a copy of the adjudication to be mailed . . . . . is not complied with by mailing a notice of such adjudication. [*Mun. of Bow Valley* v. *McLean*, 26 D.L.R. 716, distinguished.]

Statement.

APPEAL from the judgment of Ives, J., in an action for cancellation of a certificate of title. Judgment varied.

A. M. Sinclair, and *P. G. Thomson*, for appellants.

E. B. Edwards, K.C., for respondent.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The defendants took forfeiture proceedings for tax enforcement in respect of certain subdivided lands registered in the name of the plaintiff, and obtained an adjudication which was registered, and subsequently certificates of title in the name of the municipality.

This action was begun apparently before the issue of the certificates of title and the plaintiff alleges that he is the registered owner and claims: (1), a declaration that the assessments are illegal and the taxes not a charge, (2) a declaration that the tax enforcement proceedings are illegal, (3) a direction to the registrar to cancel the registration made in respect of the proceedings, (4) an injunction restraining the defendants from further proceeding, (5) other relief, (6) costs, and by later amendment after the certificates of title had been issued, (7) an order cancelling the certificates of title and vesting the land in the plaintiff and the other parties interested in accordance with their former estates and interests.

The trial judge gave judgment in the plaintiff's favour in accordance with the prayer of paragraphs (1), (2), (3), (7), and (6), and from that judgment the defendants now appeal.

The defendants contend that by virtue of s. 104 of the Land Titles Act their certificates of title are an absolute bar and estoppel to the plaintiff's action.

That section provides, under the caption "Ejectment," that

> No action of ejectment or other action for the recovery of any land for which a certificate of title has been granted shall lie or be sustained against the owner under this Act in respect thereof,

except in the specified cases. The exceptions include a mortgagee or encumbrancee or lessor upon default of the mortgagor, encumbrancer, or lessee; also the case of a certificate obtained by fraud, and the cases of mis-description and double registration. Sub-s. 2 provides that in any other case than these specified the production of the certificate of title "shall be an absolute bar and estoppel to any such action against the person named in such certificate of title as owner."

Is this an action for the recovery of land within the meaning of the section? I think not. It is to be noted that when it was begun the plaintiff supposed he was the registered owner, but even then he makes no claim for recovery of the land, but only for its discharge from taxes. Later, when it is found that the certificates of title have been issued to the defendants, he asks for their cancellation. If the certificate of title is to be a bar to any action to set it aside we would have a somewhat anomalous situation. Any one who had become registered as owner through any error

ALTA.

S. C.

SUTHERLAND v. RUR. MUN. OF SPRUCE GROVE.

Harvey, C.J.

in the office or otherwise, or in any of many other ways which occur to me, would thereby become entitled to hold land to which he has no right. The certificate of title is *primâ facie* evidence of ownership, and, generally, only the rightful owner is entitled to possession, therefore, usually only the holder of a certificate could maintain an action for possession.

The term "action for recovery of land" is a well-recognized term, and has been used in the English Judicature Act and Rules since they were passed nearly half a century ago, and over a generation ago Jessel, M.R., declared its meaning in *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492. At p. 495, he says: "In my opinion an action for the establishment of title only, not claiming possession, is not an action for the recovery of land under the rules," and again, at p. 500, he says: "Now, what does an 'action for the recovery of land' mean? It means the recovery of possession." I think it is clear, therefore, that this is not such an action as comes within the section, and that the certificates of title do not stand in the plaintiff's way.

Another objection taken by the defendants is that the plaintiff has no cause of action because he has given a transfer of the land. The answer I would make is that the evidence does not shew that he has no interest, and when the defendants became registered as owners it was by the cancellation of a certificate of title standing in the plaintiff's name. Even if he had given a transfer it may well be that he would be bound to give a title, and he may have, not merely a right, but a duty, to establish that title.

As I have already indicated, the trial judge found that the assessments were illegal and the taxes not a valid charge on the land. He came to this conclusion upon facts adduced before him which were not before the judge who made the adjudication under the Rural Municipalities Act (Alta. 1911-12, c. 3).

S. 311 of that Act provides that,

> The said return . . . shall for all purposes be *primâ facie* evidence of the validity of the assessment and imposition of the taxes as shewn therein, and that all steps and formalities prescribed by the Act have been taken and observed.

As far as appears from the evidence in this case, His Honour Judge Noel, who confirmed the return had no other evidence before him than the return on these points, and s. 316 provides that he shall hear any objecting parties and the evidence adduced

before him under oath and then adjudge and determine whether the taxes are wholly or in part in default.

I do not consider to what extent his adjudication would be conclusive because both at the trial and on the appeal it has been gone behind without objection.

The ground upon which the trial judge based his conclusion that the assessment was illegal was that each individual lot of the several hundred in the subdivision assessed to the plaintiff was assessed separately and a tax imposed upon it which he considered the decision of this division in *Mun. of Bow Valley* v. *McLean*, (1916) 26 D.L.R. 716, held to be improper and illegal.

In that case the section of the statute in question provided that "in the event of the tax payable on any lot or portion of land under this section for the purposes of the municipality being less than $1, the tax to be entered on the roll as payable for such purposes shall be $1."

The decision of the court in that case was that the word "lot" was to be interpreted as meaning the same as "portion of land," that is, any integral parcel owned by the party assessed, and not as a lot as shewn on a plan or paper subdivision. The court was helped to that conclusion by the fact that at the time of the decision the section in question had been changed to read:—

> In the event of the tax payable on any lot in any subdivision or plan . . . being less than twenty-five cents, the tax to be entered on the roll . . . shall be twenty-five cents.

The taxes in question here, though shewn on a return by a rural municipality, were in fact imposed by local improvement and school districts, the municipality having been formed only in the preceding year.

By s. 52 of the Local Improvement Act and s. 13 of the School Assessment Ordinance the minimum tax is in respect not of any lot or portion of land less than an acre but "any lot containing less than one acre in any subdivision or plan."

The trial judge's attention was apparently not drawn to this difference in the statutory provision, for there seems no room for argument questioning the view that on this reading each lot shewn on the plan of subdivision is liable for the minimum tax. No other ground is urged in support of that portion of the judgment declaring

ALTA.

S. C.

SUTHERLAND v. RUR. MUN. OF SPRUCE GROVE.

Harvey, C.J.

invalid the assessment and taxes and I am of opinion that as this ground cannot be supported the judgment is wrong in that respect.

The trial judge did not, however, base his conclusion that the certificates of title should be cancelled and the title re-vested in the former owners subject to the former charges upon the ground of the invalidity of the assessment alone, but he held that the proceedings for confirmation and consequent thereon were, in part at least, irregular and invalid.

As the Act stood at the time the confirmation proceedings were begun it was necessary for the treasurer to apply to the District Court Judge for an appointment of which 2 months' notice was required to be given (ss. 313-4). Before the 2 months had expired new provisions were substituted and the confirmation was required to be made at a sittings of the District Court. So far as appears, no attempt was made to apply the substituted provisions, and I do not find it necessary to consider the effect of the amendment upon these proceedings. Judge Noel, after giving the appointment, appeared at the time and place appointed and heard the evidence given to prove compliance with the statutory requirements, and said he would take all the papers with him to his chambers in Edmonton and check them over. Before leaving, counsel for the plaintiff and others appeared and asked to be heard. As they were Edmonton barristers he said he would hear them at his chambers in Edmonton. At some time later, apparently, he did hear their objections, though the evidence gives no indication of what they were.

Neither on the occasion of the date of the appointment, which was May 30, 1916, nor at any later time, so far as can be gathered from the evidence, did the judge make any declaration of his decision upon the application for confirmation. On July 7, however, he signed what has been treated as his adjudication.

S. 316 provides that a copy of the adjudication shall be sent to the registrar of land titles who shall register it, and that a copy shall also be sent to the persons who are interested. The section also provides that the owners may redeem the lands within 1 year from the date of the adjudication and that between 10 and 11 months after its date a notice shall be published, giving the date of the expiration of the period of redemption, and that a copy of such notice shall be sent to the persons interested not less than 30 days nor more than 60 days before the date of such expiration.

It is evident from these provisions and the very great particularity of them that the date of the adjudication is a most important matter.

It is also apparent that the adjudication referred to is not some mental decision or even some oral announcement of such decision, but some documentary declaration of such decision which can be copied and registered.

The document which was signed by Judge Noel bears no date, but states that he attended on May 30, at the time and place appointed, and recites the proof of compliance with the provisions of the Act and that no one appeared to object, except the barrister named "whose objections are dismissed." It then states that he "thereupon did adjust and determine the amount of taxes . . . in default and did confirm the said tax enforcement return."

The defendants treated this adjudication as being of the date of May 30, and the notices were published and sent in the month of March following, although the certificates of title were not actually issued until more than a year after July 7.

No copy of the adjudication was sent to the plaintiff or to any other interested person, but a notice was sent to the plaintiff on September 7, advising him that the return had been confirmed on May 30, 1916, and that unless the lands were redeemed before May 30, 1917, they would be absolutely forfeited.

It is urged that this is a substantial compliance with the provision requiring a copy of the adjudication.

As far as the time of sending the notice is concerned, it may be noted that when it was sent more than one-quarter of the period of redemption mentioned in the notice had expired. It is true the Act fixes no time within which the copy of adjudication shall be sent, but inasmuch as it is to give the person interested notice of how his rights are affected it seems reasonable to suppose that it is intended to be sent as soon as conveniently may be. Then I find nothing in the Act which even suggests that it intends that municipalities shall have the discretion to comply with its provisions or at their option do something else which they think as good. Moreover, the notice, in this case, certainly did not give the information which a copy of the adjudication would have given.

Then I quite agree with the trial judge when he says that the adjudication was certainly not made on May 30. The objections

ALTA.

S. C.

SUTHERLAND v. RUR. MUN. OF SPRUCE GROVE.

Harvey, C.J.

which were heard and are declared to have been dismissed were certainly not made till some time after that date.

The adjudication bears no date on its face and, in my opinion, it has no date such as the Act contemplates and, therefore, is not a foundation for the subsequent proceedings prescribed by the Act to enable the municipality to become the registered owner.

The certificates of title, therefore, should never have been issued to the defendants and ought to be set aside and the title restored to its former condition.

The trial judge dealt also with a question as to the correctness of the school taxes shewn on the return as the arrears for one of the years. There seems no necessity to consider this point or the doubt which was suggested in the argument of the municipality's right to collect any school taxes imposed by the school district, prior to the erection of the municipality.

I would, therefore, allow the appeal and vary the judgment by striking out the whole of the first two paragraphs declaring the illegality and invalidity of the assessment and taxes and the tax enforcement proceedings, part of which at least were legal.

While I have indicated that, in my opinion, part of the proceedings are invalid, no good purpose would be served by a declaration of the exact extent of the invalidity. The third paragraph of the judgment directs the cancellation by the registrar of the registration which gives the plaintiff the benefit he requires, and this should be, because, even if the registration was authorised, no proceedings could be taken consequent thereon to the benefit of the defendants, and the registration would be a cloud on the plaintiff's title, which he is entitled now at least to have removed.

As the defendants have succeeded on a very material point which was indeed the substance of the action as originally brought I would give them the costs of the appeal, which may be set off against the costs of the action. If they are greater, the defendants will be entitled to execution for the difference; if they are less, they should be entitled to apply the difference in reduction of the plaintiff's taxes. *Appeal allowed, judgment varied.*

WORSLEY v. CANADIAN NORTHERN R. Co.

SASK.

C. A.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

EVIDENCE (§ VII J—643)—SHUNTING TRAIN—SUDDEN STOP—BREAKING COUPLING PIN—INJURY TO EMPLOYEE—NEGLIGENCE.

The undisputed evidence that an employee of a railway company who was employed to heat the cars in the railway yard, while attending to his duties, was going from a second-class car to the baggage car for coal, that as he was reaching for the door of the baggage car the train suddenly stopped, the baggage car and the second class car parted from the breaking of a knuckle pin, the employee being thrown to the ground and injured by the wheels of the baggage car, is sufficient evidence to justify the jury in finding that the injuries were the result of the negligence of the company in stopping the train too suddenly, when air brakes and safety chains were not in use.

Statement.

APPEAL by defendant from the trial judgment in an action for damages for injuries received, due to the sudden stopping of a train, breaking a coupling pin and causing plaintiff to fall between the cars. Affirmed.

J. N. Fish, K.C., for appellant; *D. Campbell*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action brought by plaintiff against the defendants for negligence causing injury to him. The action was tried by a jury, who found that the plaintiff's injuries were caused by the negligence of the defendants, and that such negligence consisted

In the stopping of the train in question too suddenly causing the breaking of the knuckle pin between the baggage car and the second class coach, and in not exercising more care in stopping a train of this size and description when the air brakes and safety chains were not in operation or use.

The trial judge on this finding entered judgment for the plaintiff. From this judgment the defendants appeal on the ground that there is no evidence to support this finding.

The undisputed evidence is, that the plaintiff, who was employed by the defendants to heat their cars in the railway yard at North Battleford, while attending to his duties, was going from the second-class car to the baggage car for coal, that, as he was reaching for the door of the baggage car, the train suddenly stopped, the baggage car and the second class car parted from the breaking of a knuckle pin, the plaintiff was thrown to the ground and the wheels of the baggage car injured him.

I am of the opinion that this evidence is sufficient to support the finding of the jury. The negligence they find is the sudden stopping of a car. It is a well-known fact that the sudden stopping of a train, or any other vehicle in motion, will upset a person

SASK.

C. A.

WORSLEY v. CANADIAN NORTHERN R. CO.

Newlands, J.A.

who is standing unsupported, and particularly one taken by surprise, and where the stop is so sudden as to throw a person down, I think the jury is justified in finding it to be negligence. The plaintiff was on the platform of the baggage car, it was not, therefore, the parting of the cars from the breaking of the knuckle pin that threw him down, but the "stopping of the train too suddenly." The cars having parted, he fell farther than he otherwise would have done. If they had not parted just where they did he would have fallen to the floor of the car; having parted, he fell to the ground and was run over.

The negligence found by the jury "consists in the stopping of the train in question too suddenly"; the breaking of the pin, which they mention, is but an inference they draw from the sudden stopping, and, whether there is evidence or not to support that inference makes no difference, as the evidence shews that the train parted at that instant, and I think we are entitled to draw the inference that the parting of the train was caused by the sudden stoppage, whether it broke the pin in question or not.

The jury having found that the sudden stopping of the train was negligence, and the evidence shewing that this negligence threw the plaintiff down and that he was injured, I think sufficiently supports the finding of the jury that the plaintiff was injured by the negligence of the defendants.

Lamont, J.A.

LAMONT, J.A.:—This is an action for damages for personal injuries received by the plaintiff, by reason of the breaking in two of one of the defendants' trains.

The plaintiff was employed by the defendants in the capacity of coach heater. On the morning of November 27, 1916, while in the act of passing from the coach to the baggage car to get a supply of coal for the heater in the coach, the train, which was being shunted from the west end switch to the station at North Battleford, broke in two at the coupling between the coach and the baggage car, with the result that the plaintiff was violently precipitated to the ground between these two cars, and the truck of the baggage car ran over his right hand, crushing it so badly that it had to be amputated. The train, which consisted of 15 loaded box cars, 3 empty box cars, a baggage car and two coaches, was being shunted without the safety chains between the cars being coupled or the air being attached to the air brakes on the cars. The plaintiff alleges that the accident happened by reason of the

negligence of the defendants. One of the acts of negligence set out is as follows:—

(d) in carelessly and negligently operating the said train at the time and place of the said occurrence causing or permitting it to be stopped suddenly, and by a jerk whereby the coupling between the said baggage cars and the said coach was broken and the said cars thereby separated.

The jury found that the plaintiff's injuries were the result of negligence on the part of the defendants, and they set out such negligence as follows:—

It consisted in the stopping of the train in question too suddenly causing the breaking of the knuckle pin between the baggage car and the second class coach, and in not exercising more care in stopping a train of this size and description when the air brakes and safety chains were not in operation or use.

The jury awarded the plaintiff damages in the sum of $6,000, and judgment was entered for that amount. From that judgment, the defendants now appeal.

The only question argued before us was: Is there any evidence upon which the jury could reasonably find that the defendants were guilty of the negligence as set out in the jury's finding; that is, was there evidence from which a jury could reasonably infer that, in view of the fact that the train was being shunted without the safety chains between the cars being coupled and that the air was not attached to the brakes of any of the cars of the train, the engine was stopped too suddenly, and that the sudden stopping of the engine caused the cars at the end of the train farthest away from the engine to be stopped with a violent jerk, and was that jerk the cause of the parting of the train?

The jury had before them the fact that the accident was caused by reason of the parting of the train, and that the train parted because the knuckle-pin between the baggage car and the coach broke. The broken pin was produced. It was a steel pin one and a half inches in diameter. The break was a new, clean break. The pin did not have any crack or flaw in it that would indicate that it had been in a weakened condition previously. This evidence, standing by itself, would amply justify a jury in drawing a conclusion that it was a jerk of much greater violence than those ordinarily incident to shunting operations that broke the pin. Unless, therefore, there was produced evidence which a jury was bound to accept shewing that there had not been a jerk, or that no strain was placed upon the end coaches beyond that usually found in shunting operations, or the breaking of the pin was

SASK.

C. A.

WORSLEY v. CANADIAN NORTHERN R. CO.

Lamont, J.A.

shewn to have resulted from some other cause than that found by the jury, the verdict must stand.

As to there being no unusual jerk or strain placed upon the pin in question, the only direct evidence we have is that of the engineer in charge, who says that he handled the train properly. He was not, however, a duly qualified engineer, and he had operated an engine only two or three times before. He says that when he got the stop sign he put his brake over in the service position to make an ordinary stop; that, just as he did this, he got the emergency stop signal and he put the full braking power right on the drivers. He says he thinks he got the emergency signal because an accident had happened.

As between the evidence given by the engineer that he handled the train properly, and the inference to be drawn from the breaking of the pin as a result of his application of the brakes to the engine, it was the province of the jury to decide. Evidently they did not accept the statements of the engineer as to the care he exercised.

The defendants sought to account for the breaking of the pin by shewing that it bore evidence of crystallization, which would render it harder and, therefore, more brittle than ordinary. The only witness they produced upon this point was the locomotive foreman, who said that, looking at the two broken pieces of the pin, the metal looked to him to be hard metal instead of soft steel as it should have been. He admitted that he had not had any experience in the manufacture of pins or the metal parts of a car. Both parts of the pin were bent, which was some evidence to the jury as to whether or not the pin was of the brittle nature testified to by the locomotive foreman. Even assuming it to be hard metal, the foreman admitted that it would take quite a jar to break it, and Cunliffe, the defendants' superintendent, admitted that pins did not break without an unusual jerk.

On this evidence, the jury was, in my opinion, entitled to conclude that the breaking of the pin was caused by an unusually violent jerk due to the stopping of the engine too suddenly. In so stopping the engine, the engineer, under the circumstances, might well be found guilty of negligence.

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

Elwood, J.A.

ELWOOD, J.A., concurred with LAMONT, J.A.

Appeal dismissed.

CANADA & GULF TERMINAL R. Co. and CHARLES J. FLEET v. THE KING.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 25, 1918.

APPEAL (§ II A—35)—FROM COURT OF KING'S BENCH QUE.—FROM PUBLIC UTILITIES COMMISSION—JURISDICTION—SUPREME COURT ACT (R.S. C. 1906, c. 139.)

Under sec. 37 of the Supreme Court Act (R.S.C. 1906 c. 139) an appeal lies to the Supreme Court of Canada from a judgment of the Court of King's Bench, Que. in an appeal from an order of the Quebec Public Utilities Commission overruling an objection as to its jurisdiction to permit the Intercolonial Railway to run its engines and cars over the railway line of the Canada Gulf Terminal Railway Co. Fitzpatrick, C.J., and Idington J. (dissenting) held that the constitution of a Public Utilities Commission in Quebec did not create a Court in the sense of that word in the Supreme Court Act and sec. 37 of that Act could not be applied.

Statement.

APPEAL from a decision of the Court of King's Bench, appeal side, Province of Quebec, maintaining the jurisdiction of the Public Utilities Commission in this case.

The Public Utilities Commission granted a petition of C. J. Fleet and ordered the appellant to permit the Intercolonial Railway to run its engines and cars over the railway line of the appellant.

The appellant made an application for the cancellation of this order on the ground that the Commission had no jurisdiction in the case; but the application was refused. On appeal to the Court of King's Bench the jurisdiction of the Public Utilities Commission was affirmed.

The appellant then appealed to the Supreme Court of Canada and applied to the registrar to affirm the jurisdiction of the court and to have the security approved, which application was granted for the following reasons.

THE REGISTRAR.—This is an application to affirm the jurisdiction of the court coupled with a motion to allow a bond offered as security for the appeal. Mr. Walker appears for the motion, Mr. Darveau appears for the King. No exception is taken to the nature of the security offered if the court has jurisdiction.

The facts appear to be as follows:—

R.S.Q., art. 718, establishes the Quebec Public Utilities Commission and art. 742, as amended by 1 Geo. V., c. 14, s. 4, provides that the Commission should have general supervision over all public utilities subject to the legislative authority of the province,

CAN.

S. C.

CANADA & GULF TERMINAL R. CO. AND CHARLES J. FLEET v. THE KING.

and may make such orders regarding equipment, appliances, safety devices, extension of works or systems of reporting and other matters as were necessary for the safety or convenience of the public, or for the purpose of carrying out any contract, charter, or franchise involved in the use of public property or rights.

C. J. Fleet, Esq., K.C., residing in Montreal, on June 11, 1917, presented a petition to the Commission asking that an order should be made requiring the Canada & Gulf Terminal R. Co. to permit the Intercolonial Railway to run a train over the line of the former company from Mont Joli Junction to Little Metis; and thereupon the Commission made an *ex parte interim* order granting the petition and ordered the Canada & Gulf Terminal R. Co. to permit the Intercolonial Railway to run its engines and cars over the railway line of the Canada & Gulf Terminal from Mont Joli Junction to Little Metis. It also provided that the Intercolonial should furnish the necessary motive power and the crew for operating its trains and directed the Canada & Gulf Terminal and Intercolonial Railways to appear before it on June 26, 1917, for the purpose of determining the compensation to be paid by the latter company to the former. Both companies appeared before the Commission and the Canada & Gulf Terminal Co. confined its objection to the question of jurisdiction of the Commission and asked for the cancellation of this order on the ground that the Intercolonial Railway was not subject to the jurisdiction of the Commission, and because the Commission had no power to accord running rights to one railway company over another. This objection was overruled on July 10, following.

Art. 763 gives an appeal to the Court of King's Bench (appeal side) from any final decision of the Commission upon any question as to its jurisdiction or upon any question of law, but such an appeal can be taken only by permission of a judge of the said court, given upon a petition presented to him within 15 days from the rendering of the decision.

The appeal was apparently regularly taken to the Court of King's Bench, which pronounced judgment on April 3, 1918, affirming the jurisdiction of the court below (two judges, Carroll and Pelletier, JJ., dissenting). The present application is based on the right of appeal conferred by s. 37 of the Supreme Court Act, which provides as follows:—

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases;

(*a*) In the Province of Quebec if the matter in controversy involves the question of or relates to any fee of office, duty, rent, revenue, sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or amounts to or exceeds the sum or value of two thousand dollars;

The applicants contend, first, that the matter involved exceeds the sum or value of $2,000 and in any event his case falls within the words "matter in controversy involves the question of, or relates to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound."

With respect to the amount involved, an affidavit is filed by the vice-president of the applicant company in which he says that the amount involved exceeds the sum of $2,000, while the traffic manager of the Canadian Government Railways files an affidavit in which he says that the compensation which should be allowed to the applicant for the use of the railway for the season of 1917 should be materially under $2,000. The only other evidence bearing on the amount involved is the petition of Fleet presented to the Commission, in which it is said that the Intercolonial Railway had offered $2,000 for the running rights during the year and that the applicant company had demanded $5,000. The Commission never determined the compensation owing to the objection taken to its jurisdiction. If I had to determine the application solely on the question of the amount involved for the privilege of using the applicant's railway, I should have little hesitation in holding that it must exceed $2,000 as the order which has been made is not limited to one year. I am, however, of the opinion that there is jurisdiction because titles to lands or tenements, annual rents and other matters or things where rights in future might be bound are involved. This provision of s. 37 is substantially the same as s. 46 (*b*) which has been the subject of consideration by the court in a number of cases. The right conferred upon the Intercolonial to use the roadbed and rails of the applicant company is quite as much an interest in lands under this section

CAN.

S. C.

CANADA & GULF TERMINAL R. CO. AND CHARLES J. FLEET v. THE KING.

as are the servitudes which have been declared to confer jurisdiction in the cases of *Macdonald* v. *Ferdais* (1893), 22 Can. S.C.R. 260, and the other cases to be found collected in Cameron's Supreme Court Practice, at pp. 225-228.

I am therefore of the opinion that the court has jurisdiction and grant the motion. Costs in the cause.

(Sgd.) E. R. CAMERON.

The respondent then made a motion, by way of appeal to the Supreme Court, to reverse the decision of the registrar.

C. V. Darveau, K.C., for the motion.

H. N. Chauvin, K.C., *contra*.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—In my opinion this appeal should be allowed. The case does not come within s. 36 of the Supreme Court Act, and I cannot quite understand how s. 37 can be applied. The Public Utilities Commission is not a court (*vide* s. 740, R.S.Q.) and the statute which creates the Commission provides for an appeal to the Court of King's Bench subject to limitations which shew that it was the intention of the legislature to limit appeals to certain specified questions and to the Court of King's Bench in an advisory rather than a judicial capacity (*vide* ss. 763 *et seq.* of the R.S.Q.). Moreover, in the present instance, the Commission exercised the jurisdiction formerly vested in the Railway Committee of the Provincial Executive Council.

The appeal should be allowed.

Davies, J.

DAVIES, J.:—I am to dismiss the appeal from the registrar with costs and to affirm our jurisdiction to hear this appeal.

Idington, J.

IDINGTON, J. (dissenting):—The constitution of a Public Utilities Commission in Quebec does not create a court in the sense of that word in the Supreme Court Act, and hence, there does not seem to be any place in that Act for appeals from the Court of King's Bench (appeal side) rendering a judgment pursuant to the provisions of art. 763 R.S.Q. It is manifest that such a proceeding as in question herein did not originate in any superior court and hence the jurisdiction given by s. 36 of the Supreme Court Act cannot be invoked to support an appeal here.

No more can s. 37 of same Act which in the first part thereof, giving jurisdiction in cases originating in other courts, reads as follows:—

CAN.

S. C.

CANADA & GULF TERMINAL R. CO. AND CHARLES J. FLEET v. THE KING.

Idington, J.

Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases:

It is to be observed that this section relates only to judicial proceedings which the exercise of power given the Utilities Commission is not. The nature of the powers given are purely administrative and not judicial.

The power conferred upon the King's Bench to determine whether or not the Commission has acted within its jurisdiction, and according to law is of course a judicial jurisdiction, but that did not originate in any other court as contemplated by the section I have just quoted.

The proposed appeal should be quashed with costs of the motion.

Anglin, J.

ANGLIN, J.:—Although at first of the opinion that the appeal from the registrar's order affirming jurisdiction should succeed, further consideration has led me to the contrary conclusion. Admittedly not within s. 36 of the Supreme Court Act because the proceeding did not originate in a superior court, the appellant maintains that this appeal is within our jurisdiction under s. 37 (*a*), on the grounds: (*a*) that the matter in controversy involves a question of, or relating to title to lands or tenements, and (*b*) amounts to, or exceeds the sum or value of $2,000.

As the registrar points out, it has been established by affidavit that the value of the running rights granted by the order of the Public Utilities Commission exceeds $2,000. Their annual value is said to be over $1,000 and the order is for an indefinite term. While the matter in controversy on the proposed appeal is merely the jurisdiction of the Public Utilities Commission to make the order which it did, the matter in controversy in the proceeding is the running rights; and it has been determined in a number of cases that the words "the matter in controversy" in s. 37 (*a*) mean not the matter in controversy on the appeal but the matter in controversy in the proceeding. While I cannot think that it was ever intended that an appeal should lie from these provincial boards to this court, s. 37 (*a*) in terms covers this case.

I would dismiss the appeal with costs.

CAN.

S. C.

CANADA & GULF TERMINAL R. CO. AND CHARLES J. FLEET v. THE KING.

Brodeur, J.

BRODEUR, J.:—This is a question of an appeal by the defendant, from a decision of the registrar of this court who decided that we had jurisdiction to hear this case.

The appellant company is a railway company incorporated by the legislature of the Province of Quebec. Its line joins the Intercolonial Railway at Mont Joli. Application has been made to the Quebec Public Utilities Commission, under the authority of the provisions of arts. 740 *et seq.* of the R.S.Q., that the appellant company be required to give running rights over its line to certain trains of the Intercolonial Railway. The appellant company opposed the application on the ground that the Public Utilities Commission had no power or jurisdiction to grant the application.

The Commission, on July 10, 1917, upheld the application, under the provisions of art. 763 of the R.S.Q., an appeal was taken by the appellant company to the Court of King's Bench from this decision of the Public Utilities Commission. The judgment of the Commission was confirmed and the Canada & Gulf Terminal Co. brings the present appeal.

S. 36 of the Supreme Court Act states that an appeal shall lie to this court from any final judgment of the highest court of final resort established in any province of Canada, whether such court is a court of appeal or of original jurisdiction in a case in which the court of original jurisdiction is a superior court.

S. 37 of the Supreme Court Act states, however, that an appeal will lié from any final judgment of the Court of King's Bench of Quebec even where the proceeding was not originated in a Superior court if the matter in controversy

> relates to the title to any lands or tenements, annual rents, and other matters or things where rights in future might be bound; or amounts to or exceeds the sum or value of $2,000.

This court has been called upon, on several occasions, to interpret a similar provision found in s. 46 of the Supreme Court Act and it has been declared that proceedings respecting rights of way affect the owner's title, and consequently, can give a right of appeal to this court. See *Macdonald* v. *Ferdais*, 22 Can. S.C.R. 260, and the other cases mentioned in Cameron's Supreme Court Practice, pp. 225 and 228.

But it is said that the Court of Appeal, by virtue of the Act, can intervene, in cases which have originated before the Public

Utilities Commission, only in questions of law or of jurisdiction, and the matter which is in dispute before us is not a question of right of way that is asked for over the property of the appellant, but simply a question of ascertaining whether the Public Utilities Commission has or has not jurisdiction.

I believe that by adopting this point of view one would reach somewhat strange results. The amounts in dispute which are usually asked for in proceedings almost always involve the decision of questions of law, and is it necessary to say then, that we have no jurisdiction because the basis of the dispute rests only upon a question of law? Evidently not; we must go back to the beginning; we must examine the nature of the application made before the lower tribunals and if this application has for its object a sum of money exceeding $2,000, or a right of servitude, and if this application can only be granted in a case where the superior court would have jurisdiction, or that a point of law would be decided in such or such manner, it remains no less true that the matter in dispute, once such question is before this court, would be to ascertain if such sum is due or if such servitude should be granted or refused.

The judgment which we will have to give in this case is, following the provisions of s. 51 of the Supreme Court Act, that which should have been given by the Public Utilities Commission, namely, to refuse to grant the application which was made to it for a right of way over the property of the appellant company.

I have, therefore, come to the conclusion that we have jurisdiction to hear this appeal, and that the judgment given by the registrar should be confirmed with costs.

Motion dismissed with costs.

SIERICHS v. HUGHES.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Maclaren and Hodgins, JJ.A., Latchford and Sutherland, JJ., and Ferguson, J.A. April 16, 1918.

CONTRACTS (§ IV—351)—DELIVERY BY INSTALMENTS—ORDER OR REQUEST BEFORE OBLIGATION TO DELIVER—MUTUAL TERMINATION OF RIGHTS.

A written contract should receive that construction which its language will admit and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard should be had to the clear intent of the parties than to any particular words which they have used in the expression of that intent.

ONT.
S. C.
SIERICHS v. HUGHES.

The court held that, under a contract for "1,560 bags H. Queen $2.45. Delivery as required—30 bags week is to be taken out by Nov. 1st", neither party was entitled to make or have delivery otherwise than in weekly instalments, not exceeding 30 bags a week, that the time fixed for delivery and request for delivery were of the essence of the contract, that on the lapse of time fixed for each delivery there was a mutual termination of rights in reference to that delivery. The plaintiff was not entitled to ask for or receive delivery in any other manner.

[*Doner* v. *Western Canada Flour Mills Co*, 41 D.L.R. 476, followed. See *Gerow* v. *Hughes post* p. 307.]

Statement. APPEAL by defendant from the judgment of KELLY, J. Reversed.

W. B. Northrup, K.C., for respondent.

Ferguson, J.A. FERGUSON, J.A.:—This is an appeal by the defendant from a judgment dated the 24th August, 1917, directed to be entered by Kelly, J., after the trial of the action before him, without a jury, at Belleville. The plaintiff's claim in the action is for damages for breach of contract arising out of a written agreement between the parties for the purchase and sale of flour. On the argument of the appeal it was stated that, if the plaintiff was entitled to succeed, the damages had been satisfactorily assessed.

The plaintiff is a baker, and the defendant a flour and feed merchant, both carrying on business at Belleville, Ontario

The written contract referred to in the statement of claim, reads:—

"Bought of L.P. Hughes, Dealer in Flour and Feed etc.
"Terms Cash.

"Mr. J. F. Sierichs, "Belleville, October 14, 1915.
"1,560 bags H. Queen $2.45.
"Delivery as required—30 bags week is to be taken out by November 1st, 1916.

"L. P. Hughes.
"J. F. Sierichs."

Under the contract the plaintiff was originally entitled to ask for and receive 1,560 bags, but as a matter of fact he only asked for and received for use in his business 1,077, leaving a balance undelivered of 483; and, in respect of the non-delivery of the 483 bags, the trial Judge assessed the plaintiff's damages at the sum of $1,038.45.

About the middle of October, 1916, the plaintiff, realising, no doubt, that flour had advanced considerably above the contract price, requested the defendant to make delivery of this balance.

The plaintiff's account of the request and the resulting conversation is to be found in the evidence (p. 3). In this conversation the defendant took the position that, the plaintiff not having from time to time asked for 30 bags a week, he, the defendant, had considered the plaintiff as abandoning his right to the flour not asked for, and had from time to time sold the bags which had not been so asked for, and that he was not then in a position to deliver the unclaimed bags, and was not bound to do so. The plaintiff did not, in his pleadings, seek to vary the contract; and, if he had, I am of the opinion that, as the contract is one required under the Statute of Frauds to be in writing, he could not in law establish such a variation except by a written memorandum complying with the requirements of that statute.

This, I think, also applies to any variation set up by the defendant: *Plevins* v. *Downing* (1876), 1 C.P.D. 220, 225, in which it is pointed out that in the case of *Tyers* v. *Rosedale and Ferryhill Iron Co. Limited* (1875), L.R. 10 Ex. 195, relied upon by the trial Judge, the contract under consideration was in writing. See also Benjamin on Sale, 5th ed., p. 691.

The parties are, therefore, left to their rights under the written contract, and we must look carefully at that contract and study its provisions to ascertain the intention of the parties and the true meaning of the document, and thus arrive at a conclusion as to whether or not the time fixed for delivery, the manner of delivery, and the time of payment were of the essence of the contract.

"The question whether in a contract of sale time for delivery of the goods, or payment of the price, or performance of any other term, is of the essence of the contract . . . is, like all such questions, one of the intention of the parties:" Addison on Contracts, 10th ed., p. 503.

The circumstances surrounding the making of the contract and the position of the parties, and their subsequent course of conduct, may, I think, be looked at, not to add to or vary the terms of the document, but to arrive at a conclusion as to the true intent and meaning of the words used in the document.

"The Court it is which, when once it is in possession of the circumstances surrounding the contract . . . has to place the construction upon the contract:" Lord Cairns in *Bowes* v. *Shand* (1877), 2 App. Cas. 455, 462.

ONT.

S. C.

SIERICHS v. HUGHES.

Ferguson, J.A.

It is established in evidence that the plaintiff is a baker, and that he, in entering into the contract, was entering into it for the purpose of enabling him to carry on his bakery business; that the defendant is a jobber in flour, who, after obtaining orders from his customers, contracted with a milling company for a supply of flour to cover his contracts and supply his customers in their business; and that it was his practice, on a customer not requiring the whole of any instalment, immediately to sell the surplus. It is clear that neither party was speculating in flour.

The plaintiff at p. 8 of the evidence says:—

"Q. Did you tell Mr. Hughes, when he made this contract with you, that you might want to go out of business? A. I told him that I might not be able to stay in business; I said people were baking bread.

"Q. A lot of your customers were baking bread, baking their own bread? A. Baking their own bread.

"Q. I see the contract says, '30 bags a week'—did you tell him you might not want that much? A. I told him I might not want that much.

"Q. Was any arrangement made with you about that? A. He said I could use whatever I required.

"Q. If you did not require the whole of it, you need not use it? A. No.

"Q. Then did you give an order from week to week as you wanted it? A. Yes.

"Q. And did you always get what you wanted in that way? A. Yes.

"Q. To the end? A. Not quite to the end.

"Q. And you had 50 bags left over when you went out of business? A. I went out of business on the 21st of October.

"Q. And at the time you went out of business, you still had 50 bags left? A. I had 50 bags."

The defendant Hughes, in his cross-examination by Mr. Northrup, at p. 22, says:—

"Q. You received a letter from my firm dated the 23rd of October? A. Yes.

"Q. The letter reads, 'Mr. J. F. Sierichs has instructed us to write you' (reads letter). Did you receive that letter? A. Yes.

"Q. Did you do anything in consequence? A. I answered it I guess.

"Q. Did you do anything? A. I delivered his flour, the weekly allowance, just the same right on up to the end of his time.

"Q. The weekly? A. His weekly requirements, all he asked for.

"Q. And no more than that? A. No more.

"Q. And at the end of the time you did nothing towards delivering the balance? A. No, sir.

"Q. Between 1,077 and 1,560? A. No.

"Q. And you contend you were not liable? A. That is right. . . . . .

"Q. And you remember telling me to make it as short as possible, that the flour that was not taken by Sierichs was sold by you to——"

This unanswered question is followed up by the trial Judge, at p. 28 of the evidence, Hughes, the defendant, being still the witness:—

"His Lordship: Let me ask you this. Supposing there was a week the plaintiff only took 15 bags of flour, then what would you do with reference to the remaining part of what he was entitled to take that week? A. I went right on the market and sold it.

"His Lordship: And sold it to some one else? A. Yes.

"Q. Was that on the assumption that, that week having gone by, he had exhausted his privilege of buying for that week? A. Yes.

"Mr. Tilley: You thought, having regard to the condition of the market, you should have to keep cleaned up? A. Yes.

"His Lordship: You regarded what they did not take any week, they were not entitled to?

"Mr. Tilley: That is the whole question, my Lord.

"His Lordship: He regarded it as not under their contract."

The plaintiff does not seek damages on the basis that the defendant made default in delivery of the plaintiff's weekly requirements, but damages because the defendant refused, at the end of the contract period, to deliver bags which the plaintiff had neglected from week to week, during the term of the contract, to request delivery of in instalments. If the plaintiff had the right to request delivery, otherwise than in instalments of 30 bags per week, it seems to me his right must depend: (1) on the terms of

ONT.
S. C.
SIERICHS v. HUGHES.
Ferguson, J.A.

the contract; or (2) on a request of the defendant to the plaintiff to forbear his right to demand such delivery, and his forbearance without an enforceable contract: *Ogle* v. *Vane* (1868), L.R. 3 Q.B. 272; *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598, 606; or (3) on a substituted contract, proved by writing within the Statute of Frauds: *Plevins* v. *Downing* (*supra*). These cases are considered and discussed in Benjamin on Sale, 5th ed., pp. 688 to 691. See also *Williams* v. *Moss' Empires Limited*, [1915] 3 K.B. 242.

On the first question, the plaintiff contends that the contract should be read to mean that the defendant was bound to deliver or tender to the plaintiff 30 bags a week, even if the plaintiff did not in any one week specify any amount, or a less amount, and that the time of demand, delivery, and payment were not of the essence of the contract. The defendant's position, as I understand it, is that time and manner of request, delivery, and payment were of the essence; that he was not bound to deliver the whole 1,560 bags if the plaintiff failed to request such delivery in weekly instalments, not exceeding 30 bags per week; that, unless and until the plaintiff did so specify his weekly requirements and manner of delivery, the contract did not require the defendant to make a delivery or tender; that, in so far as the plaintiff failed from week to week to request delivery or specify the time and manner of delivery of an instalment, he failed to prove the allegation in his statement of claim "that he was ready and willing to accept and pay for the flour according to the terms of the agreement;" and that, in so far as he failed to require such delivery, he must be taken to have abandoned or exhausted his rights in reference to the flour which he did not request or take in such weekly instalments.

The plaintiff urges, in answer to this proposition, that failure to specify the time and manner of the delivery or to require the full weekly delivery was not an abandonment of his right to purchase, but an abandonment only of his right to delivery in that manner, and that he still had the right to call for delivery at any time up to the 1st November, 1916.

In the recent case of *Doner* v. *Western Canada Flour Mills Co. Limited* (1917), 41 D.L.R. 476, 41 O.L.R. 503, an action to recover damages on a similar contract and under similar circumstances, the authorities were reviewed and considered, and the Court

came to the conclusion that each delivery stipulated for should be treated like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties should be assumed to have contemplated a payment in damages rather than a rescission of the whole contract, and that the buyers, upon whom was the obligation to order, lost their right to require delivery to be made of the instalments which they had not ordered in due time. I am unable to distinguish this case from the case at bar: the flour was to be asked for and delivered in instalments, and paid for on delivery; it was material to the plaintiff to have flour for his business, and that it should be delivered at such times and from time to time as his business required it, and also delivered in such manner and in such lots as he could conveniently receive and pay for; it was material to the defendant in the carrying on of his jobbing business to contract ahead for the requirements of his customers, and from time to time to know what flour he might be called upon to deliver. I am of opinion that such was, at the time of the making of the contract, the true intent and purpose of the parties, and that it was never in the contemplation of the parties that the defendant should be required to keep on hand flour to answer a demand from the plaintiff for more than 30 bags in any one week, or that he should carry the surplus over the plaintiff's specified requirements for months, and at the end of the contract the plaintiff should be in a position to demand that the defendant deliver such accumulations, or that the defendant could, at the end of the time, if it suited his convenience, and the market, demand that the plaintiff should then accept and pay for such accumulations.

I am, therefore, of the opinion that, on the wording of the contract itself, read in the light of these circumstances, neither party was entitled to make or have delivery otherwise than in weekly instalments, not exceeding 30 bags a week, and that the terms providing for the time and manner of delivery and request for delivery and payment were of the essence of the contract, so far as the contract affects the sale and purchase of the flour covered by each instalment.

See *Coddington* v. *Paleologo* (1867), L.R. 2 Ex. 193, 198, where Pigott, B., says:—

"Between these conflicting views we have to decide, and to say

ONT.
S. C.
SIERICHS v. HUGHES.
Ferguson, J.A.

what is the true meaning to be attached to the language of the contracting parties as understood by both of them. There is a canon for construing a contract laid down by Parke, B., which I think applicable to the present case. He says: 'It ought to receive that construction which its language will admit and which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they have used in the expression of their intent:' *Ford* v. *Beech* (1848), 11 Q.B. 852, at p. 866; 116 E.R. 693."

See also *Bowes* v. *Shand*, (1877) 2 App. Cas. 455 at pp. 462, 463.

If I be right in my conclusion that the time fixed for delivery was of the essence of the contract, it was also of the essence of the plaintiff's right to require delivery; and if, on the interpretation of the contract, it was necessary for the plaintiff to make request for delivery by specifying his requirements before the defendant was called upon to make delivery or tender — and I think such to be the real meaning of the writing—then the plaintiff lost his right to delivery unless he proved a request within the time, or a waiver of the stipulation as to time; but, as it is conceded that he did not, from time to time, make such demands, it seems to me that on that view of the case he has failed to prove an allegation essential to his cause of action.

Were the defendant seeking damages for non-acceptance, proof of a readiness and willingness to deliver in the time specified would, it seems to me, be a necessary part of his case, and it would not do for him to prove a readiness or willingness to deliver after the time specified in the contract: Halsbury's Laws of England, vol. 25, para. 377; *Doner* v. *Western Canada Flour Mills Co. Limited*, 41 D.L.R. 476, 41 O.L.R. at p. 520.

For these reasons, I consider that, on the lapse of time fixed for each delivery, there was a mutual termination of rights in reference to that delivery, and of so much of the flour as might have been asked for or delivered in that instalment; and it matters not whether this loss be called a termination, exhaustion, or lapse of the respective rights of the parties, or a mutual abandonment thereof, as it was termed in the *Doner* case (*supra*). The result is the same. I prefer to regard it as a termination contracted for in the agreement sued upon.

ONT.

S. C.

SIERICHS v. HUGHES.

Ferguson, J.A.

In the *Doner* case, and in *Gerow* v. *Hughes*, *post*, p. 307 the contracts were for the purchase and sale of two different kinds of flour to be delivered in instalments, which circumstances alone made it plain that the plaintiff in each of these cases should of necessity from time to time specify his requirements, before the defendant could be called upon to deliver or tender delivery of the instalment.

In this case, the purchase is of only one kind of flour, and to that extent the circumstances differ in favour of the plaintiff Sierichs, but I do not think that the difference is, in light of the evidence as to the position of the parties and the conditions and representations under which and on which the contract was entered into, material. In the ordinary contract of sale, "the chief and immediate duty of the seller, in the absence of contrary stipulation, is to deliver the goods to the buyer as soon as the latter has complied with the conditions precedent, if any, incumbent on him:" Benjamin on Sale, 5th ed., p. 677; and, had it not been for the provisions in this contract requiring the plaintiff's specification of the time, manner, and quantities of the deliveries he desired, the plaintiff's case would have been made out by proof of non-delivery. It is this condition as to the notification of the plaintiff's requirements that, to my mind, relieves the defendant in this case, and also relieved the defendants in the *Doner* case, from proving delivery, or excusing non-delivery.

For these reasons, I am of the opinion that the plaintiff has failed to make out a right to succeed on the contract, without evidence of a subsequent request for a postponement or an agreement to postpone, and it is therefore necessary to consider the second question: Was there a request from the defendant to the plaintiff to forbear making his demand?

The learned trial Judge refers to a conversation between the parties in September, 1916, in which they were discussing a proposed sale of the plaintiff's business, and he draws an inference from such conversation, not that the defendant requested a postponement, but that the plaintiff requested a postponement, and that the defendant acquiesced therein. If it were necessary to the decision of the case, I would not take that to be the effect of the conversation; but, as I read *Plevins* v. *Downing* (*supra*), such an agreement, in order to be effective, must be in writing. The conversation took place near the end of the contract-period, and

ONT.

S. C.

SIERICHS v. HUGHES.

Ferguson, J.A.

after the rights of the parties in reference to instalments deliverable prior thereto had accrued, and such an agreement would necessarily be a variation of the contract materially affecting the defendant's right; and his assent thereto could not, I think, be proved by parol evidence, and it is conceded that there is no writing evidencing such an agreement.

On the whole, I am of the opinion that the plaintiff has not made out that he was ready and willing to accept and pay for the flour in the manner and at the time provided for in the contract, and that it was not necessary for the defendant, in default of the plaintiff's request, to make tender of the 30 bags per week; and that, therefore, the rights of the parties terminated as to each 30 bags on the expiration of the week in which they should have been delivered; or that, in any event, the proper inference from the contract and the evidence as to the position of the parties and the circumstances surrounding the making of the contract, and from conduct of the parties during the term of the contract, is, that their rights were mutually abandoned, and that the plaintiff, himself, was of that opinion; and that intent continued down to about the last month of the contract, when he saw an opportunity, by reason of the changed market conditions, of making a profit at the defendant's expense.

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

Maclaren, J.A. Sutherland, J.

MACLAREN, J.A., and SUTHERLAND, J., agreed with FERGUSON, J.A.

Hodgins, J.A.

HODGINS, J.A.:—I think the proper construction of the contract is that, while the respondent bought 1,560 bags of flour he was to take them by the 1st November, 1916, at the rate of about 30 bags a week, as his business might require. He did take 1,077 bags during the stipulated time, stating what he wanted and getting it from time to time. This left 483 undelivered, and not asked for until just before the end of the period mentioned. The verbal arrangement of October, 1916, under which the time would be extended for the delivery in weekly shipments, is unenforceable (*Williams* v. *Moss' Empires Limited*, [1915] 3 K.B. 242).

I think the case differs from the *Doner* case, in that the system-

ONT.

S. C.

SIERICHS v. HUGHES.

Hodgins, J.A.

atic and regular request, week by week, for smaller lots than 30 bags, enables an inference of abandonment to be drawn in regard to the difference. Such an inference, I did not think, and so expressed myself in the *Doner* case, followed inevitably from mere silence. But, making that deduction from the entire course of dealing, the respondent fails. I should add that much of the evidence as to conversations before the contract and views of its effect afterwards was clearly inadmissible and should be disregarded.

I may perhaps draw attention to the case of *Jones* v. *Gibbons* (1853), 8 Exch. 920, 155 E.R. 1626, as to the relative rights of vendor and vendee where the delivery is to be "as required." That case is treated as still an authority for the twofold proposition that, while the vendee, if he requires delivery, must ask for it within a reasonable time, yet the vendor cannot cancel the contract without himself offering to deliver or inquiring of the buyer whether he would take the goods.

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

LATCHFORD, J., agreed with HODGINS, J.A. Latchford, J.

Appeal allowed.

GEROW v. HUGHES.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Maclaren and Hodgins, JJ.A., Latchford and Sutherland, JJ., and Ferguson, J.A. April 16, 1918.

CONTRACTS (§ IV—351)—DELIVERY BY INSTALMENTS—TIME AND MANNER—ESSENCE OF—FAILURE TO REQUEST DELIVERY—MUTUAL TERMINATION OF RIGHTS.

In a contract for the sale of flour for 1,000 bags of one kind of flour and 1,000 bags of another kind to be "Delivered as required up to Nov. 1, 35 bags week" the court held that this must be read to mean that the flour was to be delivered as required, in instalments of about 35 bags per week, and that it was incumbent upon the purchaser to specify his requirements and accept delivery in instalments of about 35 bags a week, that if he failed to prove such specifications and requests, time and manner being of the essence of the contract, he was not entitled to ask or demand delivery at any other time or in any other manner.

[*Doner* v. *Western Canada Flour Mills Co. Ltd.* (1917), 41 D.L.R. 476, 41 O.L.R. 503, followed. See also *Sierichs* v. *Hughes*, *ante* p. 297.]

APPEAL by defendant from the judgment of KELLY, J. Reversed. Statement.

R. McKay, K.C., for respondent.

FERGUSON, J.A.:—This is an appeal by the defendant from a judgment dated the 23rd August, 1917, directed to be entered by Kelly, J., after the trial of the action before him without a jury at Belleville, whereby he directed that the plaintiff should Ferguson, J.A.

ONT.
S. C.
GEROW
v.
HUGHES.
Ferguson, J.A.

recover against the defendant the sum of $1,737.80 as damages for breach of contract arising out of an agreement for the purchase and sale of flour.

This case was tried with the case of *Sierichs* v. *Hughes*, (1918), 43 D.L.R. 297, 42 O.L.R. 608, and in appeal was argued with that case. The defendant in both cases is the same, and the facts and circumstances and the contract between the parties do not materially differ from the facts and circumstances and contract in the *Sierichs* case, except in that in this case the plaintiff agreed to purchase and the defendant agreed to sell two kinds of flour instead of one, from which it should be plain that the obligation was on the plaintiff to specify his requirements before the defendant was called upon to make delivery, and except that the document is on its face incomplete, thereby necessitating the taking of evidence in order to explain its meaning and to arrive at the true intention of the parties. The contract reads:—

"Bought of L. P. Hughes, Dealer in Flour and Feed etc.
"Terms Cash.

"Belleville, Oct. 14, 1915.

"Mr. J. L. Gerow,
"1,000 Bgs. Rose.....$2.70
"1,000 " Queen..... 2.45
"Delivered as required up to Nov. 1, 1916, 35 bgs. week.
"L. P. Hughes.
"J. L. Gerow.'

The plaintiff's interpretation of the document is best set out in paragraph 2 of his reply, which reads:—

"2. And for a reply to the said statement of defence the plaintiff says that the contract alleged in the plaintiff's statement of claim was and is the only contract between the plaintiff and defendant, and that there was no new contract or variation of the original contract, as the defendant alleges; but the said flour, in and by the said contract, was all to be delivered by the 1st day of November, 1916, which the plaintiff estimated would be about 35 bags per week, but such weekly delivery was not in any manner to affect and did not affect the delivery of the full amount within the time aforesaid, to which the plaintiff was entitled, *and the plaintiff, in no way admitting the said new contract, or variation thereof, set forth in paragraph 3 of the defendant's statement of defence, sets up and*

ONT.

S. C.

GEROW v. HUGHES.

pleads, as a further reply thereto, the Statute of Frauds, R.S.O. 1914, chapter 102, section 12."

I am of the opinion that the document must be read to mean that the flour was to be delivered as required *in instalments of about* 35 bags per week; that it was, under the contract, incumbent upon the plaintiff to specify his requirements and accept delivery in instalments of about 35 bags a week, so as to receive and accept, by such instalment demands, the whole 2,000 bags before the 1st November, 1916; that he failed to prove such specifications and requests, and thereby his readiness and willingness to accept and receive the said flour at the time and in the manner specified in the contract; that, as in the *Sierichs* case, the time and manner of specifying and requesting and accepting delivery were of the essence of the contract; that the plaintiff is not entitled, under the words of the contract itself, to ask or demand delivery at any other time or in any other manner; and that, he not having attempted to prove any variation of the contract or request by the defendant to forbear, except in so far as that may be inferred from silence (see *Doner* v. *Western Canada Flour Mills Co. Limited* (1917), 41 D.L.R. 476, 41 O.L.R. 503), his action fails.

Ferguson, J.A.

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

MACLAREN, J.A., and SUTHERLAND, J., agreed with FERGUSON, J.A.

Maclaren, J.A. Sutherland, J.

HODGINS, J.A.:—I have given in the *Sierichs* case my view as to the interpretation of the contract in question there. It is identical in legal effect with that in this case.

Hodgins, J.A.

I concur in allowing the appeal and dismissing the action, but adhere to my dissent on the points mentioned in the *Doner* and *Sierichs* cases.

LATCHFORD, J., agreed with HODGINS, J.A. *Appea allowed.*

Latchford, J.

DRAPEAU v. RECORDER'S COURT.

QUE.

K. B.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Lavergne, Cross, Carroll and Pelletier, JJ. January 12, 1918.

MUNICIPAL CORPORATIONS (§ II C—60)—MUNICIPAL BY-LAW—CRIMINAL MATTER ALREADY DEALT WITH BY DOMINION STATUTE—ULTRA VIRES. When the Parliament of Canada in exercise of its power to legislate in regard to criminal matters has prohibited the doing of a certain act, a municipal by-law attempting to prohibit the same act is ultra vires.

QUE.

K. B.

DRAPEAU v. RECORDER'S COURT.

CROSS, J.

APPEAL from the judgment of the Superior Court of the District of Quebec. Reversed.

Laferté & Pouliot, for appellant.

Chapleau & Morin, for respondents.

CROSS, J.:—The appellant (plaintiff) by this action prays that by-law No. 435, enacted in the year 1909 by the council of the City of Quebec, be declared null, and that the respondents be prohibited from executing 3 convictions pronounced against him in the Recorder's Court for contraventions of the by-law.

The ordinance in question has the title: "*Règlement concernant l'observance du dimanche*," and the material enactments of it are the following:

1. Tout théâtre, toute salle de spectacles, ou de vues animées, ou d'autres spectacles ou amusements, où le public a accès moyennant un prix d'entrée, dans la cité de Québec, doit être fermé pendant toute la journée du dimanche, de manière à ce que l'entrée en soit interdite aux spectateurs.

2. Dans la cité de Québec, pendant la journée du dimanche, il est défendu de donner ou ouvrir des représentations théâtrales, où de vues animées, jeux scéniques, spectacles ou amusements, où le public a accès moyennant un prix d'entrée, et il est aussi défendu de prendre part ou d'assister à ces spectacles, jeux, représentations théâtrales ou de vues animées.

The appellant, who operated a theatre, had three convictions pronounced against him for having contravened the by-law by having neglected to close his theatre on three Sundays. His ground of action is that the subject-matter of the ordinance is criminal law, a matter upon which the City of Quebec had no power to make by-laws and upon which the legislature of this province could not give such power to the city council.

The Superior Court has dismissed the action on the ground that the same acts may be the subject of penal enactments and of municipal regulation, provided that the dispositions of one kind do not conflict with those of the other kind; and that, though the Parliament of Canada has exclusive power to define penal offences and to legislate in respect of them that does not deprive provincial legislatures of the right to legislate upon municipal affairs, or of power to authorize municipal authorities to regulate or restrain certain acts for objects of local administration, for police regulation and local well-being, having regard to local conditions.

In support of his appeal, the appellant takes the ground that it must now be considered to have been authoritatively

settled that Sunday-observance enactments fall within the subject of criminal law, and, that being so, the provincial legislature and municipal councils are without power to legislate upon that subject-matter.

On their part, the respondents, besides relying upon the reasons adopted by the Superior Court, invoke a statutory power to enact by-law No. 435, said to have been conferred upon the city council by the late Province of Canada by 29 Viet., c. 57, s. 29, consisting in power to make by-laws

pour le bon ordre, la paix, la sécurité, le confort, l'amélioration, l'économie intérieure et le gouvernement local de ladite cité; pour la prévention, la suppression de toutes nuisances, de tous actes, matières ou choses dans ladite cité, contraires ou préjudiciables au bon ordre, à la paix, à la sécurité, au confort, à la morale ou à la santé, à l'amélioration, à la propreté, l'économie intérieure ou au gouvernement local de ladite cité.

It is to be observed that, if provincial legislation enacted since March 1, 1907, could suffice to authorize the enactment of such an ordinance as No. 435, such authorization was, in fact, given in specific terms by the Act, 9 Edw. VII. c. 80, s.7.

I take it to be well established that, when once the Parliament of Canada, in exercise of its power to legislate upon the subject of criminal law, has declared an act to be a penal offence, there is no longer any power—whether any had previously existed or not—in a provincial legislature or municipal council to make enactments of prohibitory and penal nature in respect of that act.

In the matter of Sabbath observance, the Dominion Parliament by the Act, R.S.C., c. 153, s.7, enacted that it should not be lawful for any person, on the Lord's Day,

except as provided in any provincial Act or law now or hereinafter in force . . . to provide, engage in, or to be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly . . .

The effect of that was to make the provision, for gain, of a performance or public meeting on Sunday a penal offence, or, in other words, to bring it within the sphere of criminal law.

It is true that power was left to provincial authority to exclude acts from the prohibition, but not to enact prohibitions.

Now, by-law No. 435 does assume to prohibit the opening of theatres, on Sunday. It is, in that respect, an assumption of power to create a criminal offence. It makes an offence of an act which is already punishable under the Dominion enactment,

QUE.
K. B.
DRAPEAU v. RECORDER'S COURT.
Cross, J.

and both the Dominion enactment and the city ordinance have been made to secure Sabbath observance.

In *Ouimet* v. *Bazin* (1912), 46 Can. S.C.R. 502, 3 D.L.R. 593, I expressed the view that the wide prohibition of the provincial enactment there in question could be classed only as a penal legislation, but that it was nevertheless competent for municipal councils, in the exercise of police power or for local well-being, to make ordinances such, for example, as would prohibit fast driving on Sunday near places of public worship, and there are expressions of a like view on the part of some of their lordships who decided that case in the Supreme Court.

Such ordinances, and, indeed, the ordinance No. 435 here in question, would have been valid and effective so long and in so far as parliament did not, by legislating upon the same subject-matter in effect withdraw it from provincial or municipal jurisdiction. *L'Association St-Jean-Baptiste de Montréal* v. *Brault* (1900), 30 Can. S.C.R. 598.

The learned judge who decided the present action in the Superior Court has held, as we have already said, that an act may be treated and legislated upon at one and the same time by parliament, as a criminal offence, and by the municipal council, as a matter of police regulation or local well-being.

Is that a sound view? It is familiar to us that liquor traffic legislation by parliament can and does co-exist with provincial enactments which have certain relations to the same subject matter, and that the provincial enactments include some of such a purely penal character as hours of closing, prohibition of billiard playing in saloons and such like. But I consider that the intoxicating liquor cases do not establish that the same act can simultaneously be made punishable as a penal offence under Act of Parliament and under the municipal ordinance.

In *Poulin* v. *Corporation of Quebec* (1883), 9 Can. S.C.R. 185, it was said by the Chief Justice:—

> When in the case of *Regina* v. *Justices of Kings* (1875), 15 N.B.R. (2 Pugs.) 535, I was called upon to adjudicate on the right of the provincial legislatures to prohibit absolutely the sale of spirituous liquors, and I arrived at the conclusion that the legislative power to do this rested with the Dominion Parliament, I advisedly and carefully guarded the enunciation of that conclusion in these words: "We by no means wish to be understood that the local legislatures have not the power of making such regulations for the government of saloons, licensed taverns, etc., and sale of spirituous liquors in public places,

as would tend to the preservation of good order and prevention of disorderly conduct, rioting or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate.

I still think, as I did then, that a provision such as s. 1 of 42-43 Vict., c. 4 (Quebec Act) is within the legislative authority of the provincial legislature as, being simply a local police regulation, and which the local legislature has, as incident to its power to legislate on matters in relation to municipal institutions, a right to enact.

As at the time of the passing of this Act and at the time of the committing of and conviction for the alleged breach of the law, there was no Dominion legislation contravening in any way the provisions of this provincial law, it is not necessary, for the purposes of deciding this case, to inquire or determine if, and in what particulars and to what extent, the legislation of either will prevail over that of the other, when the Dominion Parliament is legislating for the peace, good order, etc., of the Dominion—or on the subject of trade and commerce in connection with the traffic in intoxicating liquors—should the Dominion legislation conflict with the provincial.

Those observations were made in a case in which it was not necessary to consider the effect of conflicting or co-existing enactments.

Here we have presented co-existing enactments proceeding from different bodies.

Their lordships who decided *Ouimet* v. *Bazin*, *supra*, in the Supreme Court dwelt upon the wide and sweeping terms of the provincial enactment there under criticism and guarded themselves against expressing an opinion as to the decision at which they might arrive if the enactment in question were expressed in less general language or any view of "how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday, and enacted solely with a view to promote some object having no relation to the religious character of the day, would constitute an invasion of the jurisdiction reserved to the Dominion Parliament."

In that respect, the decision in *Ouimet* v. *Bazin*, *supra*, falls short of being a precedent in the full sense contended for by the appellant.

Nevertheless, I consider that it is a precedent, because, notwithstanding the character of by-law No. 435 as a police regulation of local application; its expressed object—indeed its only object—is Sunday observance, the very same subject-matter as that of the Lord's Day Act.

QUE.

K. B.

DRAPEAU v. RECORDER'S COURT.

Cross, J.

It appears to me that there is a conflict in exercise of legislative power when two legislative bodies make enactments on the same subject-matter with the same end in view, and that it is none the less a conflict, even if both enactments are to the same effect. And I consider that, when there is such conflict, one enactment must prevail.

It cannot well be that this appellant is exposed, at one and the same time, to be prosecuted penally and punished for the same act in virtue of an Act of Parliament and of an ordinance of the City of Quebec, and I would, therefore, say, with deference, that, in that respect, there is an error in the judgment appealed from.

The argument based on the ante-Confederation enactment of 29 Vict., ch. 57, sec. 29, is also not well founded. That enactment conferred upon the city council a power to make by-laws upon the subjects above enumerated.

Before that power was availed of to make the by-law now in question, legislative power was apportioned between parliament and the legislature by the B.N.A. Act (1867), and the Lord's Day Act was passed.

We have seen that the Lord's Day Act left to the provincial authority power to make exceptions to the prohibitions therein set forth. It results that power to enact prohibitions upon the subject-matters legislated upon in the Lord's Day Act cannot be considered to have continued to exist under the charter of the City of Quebec. It ought perhaps to be added that we have not been referred to any enactment relating to observance of the Lord's Day in force in this province before March 1, 1907 (such as those referred to in s. 16 of the Lord's Day Act), as supporting the by-law here in question.

It was argued that, if the legislature could competently give to a municipal council power to require by by-law that shops should be closed even on parts of week-days—as is now admitted (*City of Montréal* v. *Beauvais* (1909), 42 Can. S.C.R. 211)—the same authority must have power to legislate so far as to require theatres to be closed on Sundays.

That reasoning will be seen to be inapplicable when regard is had to the consideration that the by-law in question is ineffective, because parliament has made Sunday observance a matter

of criminal law legislation, whereas, if that had not been done, it would have remained—like early closing of shops—a matter of local regulation.

Upon the whole, the appeal should be maintained, and prohibition should go against the respondents.

PELLETIER, J. dissented.

Judgment: "Seeing that, by c. 153 of the R.S.C. (The Lord's Day Act), it is enacted, in substance, that it shall not be lawful, except as therein mentioned, for any person, on the Lord's Day, to provide any performance or public meeting, elsewhere than in church, at which any fee is charged, and that person who violates the said enactment shall be liable, on summary conviction, to be fined;

Seeing that it appears from the said by-law No. 435 that the same is an ordinance upon the subject of Sunday observance, and that it purports thereby to be ordained, amongst other things, that theatres for admission to which a charge is made shall be closed on and throughout Sundays, and that contravention thereof is made punishable by fine;

Considering that the subject-matter of the said by-law is matter which, in view of the Lord's Day Act, falls within criminal law; that the council of the said city of Quebec was, therefore, without power to enact the same and that the same is null and void;

Considering that the respondent, the Recorder's Court of the City of Quebec, exceeded its jurisdiction in making each of the said 3 convictions;

Considering, therefore, that there is error in the judgment appealed from whereby the appellant's action was dismissed;

Doth maintain the appeal; doth reverse the judgment appealed from, to wit, the judgment pronounced by the Superior Court in the District of Quebec on July 12, 1917, and now giving the judgment which the said Superior Court ought to have pronounced, doth maintain the action of the plaintiff, doth declare the said by-law No. 435 null and void in so far as the same purports to ordain that theatres shall be kept closed on Sundays, doth order that, by peremptory writ to be issued out of the said Superior Court, the said Recorder's Court of the City of Quebec and the said City of Quebec be commanded to discontinue all proceedings in the matter of the said 3 convictions—and, finally, doth condemn

QUE.
K. B.

the respondent, the City of Quebec, to pay the costs of the action in the Superior Court and of the present appeal, Carroll and Pelletier, JJ. dissenting. *Appeal allowed.*

N. B.
S. C.

Re McLEAN; Ex parte the ASSESSORS of the PARISH OF ROTHESAY.

New Brunswick Supreme Court, Appeal Division, Sir J.D. Hazen, C.J., White and Grimmer, JJ. September 20, 1918.

TAXES (§ VI—220)—TAX ON PERSONAL PROPERTY—PETITION TO REDUCE—S. 77, 3 GEO. V. c. 21, N.B.—COMPLIANCE WITH.

A petition presented to the County Court for a reduction of taxes on the ground that the petitioner is a non-resident of the county is a sufficient compliance with s. 77 of 3 Geo. V. c. 21, N.B., to give the judge jurisdiction if the facts stated in the petition exclude the possibility of the petitioner being a resident or domiciled in such county.

Statement.

APPLICATION for a writ of *certiorari* to remove proceedings taken before a County Court Judge, and an order made by the said court ordering an assessment made on personal property set aside, with a view of quashing the said proceedings and order.

D. Mullin, K.C., for applicant.

Grimmer, J.

GRIMMER, J.:—The application was based chiefly upon the ground that the petition presented to the County Court did not shew on its face that the applicant was a non-resident of the County of Kings, and that, therefore, the Judge of the County Court had no jurisdiction to hear the application to set aside the assessment which had been made. In support of the application, s. 77 (1) of the Act 3 Geo. V., c. 21, was cited. This section provides that:—

> If any person assessed in any parish, for county, parish or school rates, being a non-resident of the county in which such assessment is made, considers himself over-rated, or otherwise unjustly assessed, he may, at any time within one month of the notice of such assessment, by or from the officers whose duty it may be to give such notice, or within a like period from the time when such assessed person shall first learn or know of such assessment, apply by petition under oath to the Judge of the County Court of the county in which the assessment is made, who shall not be disqualified from hearing the matter, unless by reason of affinity to any of the parties, in which latter case the application may be made to any other County Court Judge. Such petition shall set forth the matter complained of, and shall either state that the petitioner was unable to make application to the valuators, or shall shew that the matters complained of were such as could not be remedied by valuators on appeal under the provisions of this Act; and the Judge may investigate the matter set forth in the said petition by evidence taken *viva voce* before him or by affidavit at his discretion, or by both methods, first giving the assessors of the parish, in which the contested assessment has been made, a reasonable opportunity of being heard in the premises, and may thereupon

make such order of relief or otherwise as to the said judge shall seem right and just in the premises, by dismissing the application or by altering, amending, varying or altogether striking out the said contested assessment; and the said judge, according to the equities arising out of, and the facts and circumstances of the case, may order that costs be paid by the petitioner or assessors, or as in his judgment he may consider right and just, and if assessors be ordered to pay costs, the county council shall reimburse such assessors out of the county contingency fund.

The petitioner, Hugh H. McLean, on April 27 last applied by petition to the County Court Judge to have the assessment on his personal property in the Parish of Rothesay in the County of Kings set aside on the ground that he was a non-resident of the county. The petition stated that he, McLean, was a non-resident of the Parish of Rothesay, but that he was domiciled in the City of Saint John, and for 40 years had been a resident thereof and domiciled therein, and that he had not changed his domicile or permanently taken up his residence at any new place of abode. The fact of residence in the City of Saint John was not disputed, but evidence was taken before the said County Court Judge for the purpose of determining the question of domicile, and having heard all the evidence presented to him the said judge decided that the petitioner, McLean, was not a resident of or domiciled in the said Parish of Rothesay.

I am of opinion that the petition was sufficient under the terms of the Act to give the County Court jurisdiction, and that while it did not expressly state that the petitioner was a non-resident of the county, it did distinctly state he was a non-resident of the Parish of Rothesay, and that he was domiciled in the City of Saint John and had been so domiciled for the period of upwards of 40 years. This, I think, fully meets the provisions of the Act so far as the statement of residence is concerned, and the application must fail on this ground.

The only other question then is that as to the jurisdiction of the court. This is clearly and distinctly conferred upon the court by the section of the Act which has been quoted, and as there has been no excess of jurisdiction there is no reason why the writ of *certiorari* should issue. It has been expressly laid down in many cases of recent date that where the presiding judge has jurisdiction over the subject-matter before him, and there is no excess of jurisdiction or extraordinary reason why his finding should be disturbed, it will not be interfered with. In this case, as I have stated, the

N. B.

S. C.

RE McLEAN; EX PARTE THE ASSESSORS OF THE PARISH OF ROTHESAY.

Judge of the County Court has, by statute, jurisdiction over the subject-matter. And as there is no want or excess of jurisdiction, there is, therefore, no reason why there should be any interference by this court with the order which he has made. The rule will be refused.

HAZEN, C.J., took no part.

WHITE, J., agreed with Grimmer, J. *Application refused.*

SASK.

C. A.

LAWRENCE v. TRUSTEES OF BEAVER VALLEY SCHOOL DISTRICT.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

INJUNCTION (§ I B—26)—ERECTION OF SCHOOL BUILDING—PROPER AUTHORITY GIVEN—BUILDING COMPLETED—INJUNCTION TO RESTRAIN PAYMENT FOR—JURISDICTION.

The expenditure of money for the erection of a school building having received the sanction of the Local Government Board and a majority of the ratepayers, and the erection of the building having been completed under a contract entered into by the trustees of the school district, and the contractors, the court has no power to restrain the trustees from proceeding to obtain, if necessary, further authority from the ratepayers to borrow and expend on the contract such further sum as may be necessary to pay the contractor the balance due him on the building.

Statement.

APPEAL by defendant from an order granting an injunction restraining the defendants from borrowing any more money for a school, or paying therefor more than an amount already paid. Reversed.

D. Buckles, for appellants; *F. L. Bastedo*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff, who is a resident ratepayer of the defendant school district, brought this action for an injunction restraining the erection of a school house on the site chosen by the defendants. At the trial, it was shewn that the school building had been erected before the service of the writ, and the trial judge amended the claim for relief and granted an injunction against the defendants borrowing any more money and from paying any more money for the school than $1,200.

The school house in question was built under a contract under seal made between the trustees of the school district and the Waterman-Waterbury Manufacturing Co., Ltd. This contract the trial judge finds to have been completed by the building of the school house. The effect of the injunction, therefore, is that the defendants have a school house built under contract by the Water-

man-Waterbury Manufacturing Co. Ltd. for the sum of $2,397.55, and that they are restrained from borrowing any more money and from paying the contractors more than $1,200 for building the school house.

The only parties who suffer from this injunction are the contractors who built the school house, and they are not parties to the action. As the amendment asked for at the trial affected the rights of persons other than the parties to the action, it should not have been granted, but the action should have been dismissed when it was found that the relief asked for in the statement could not be given.

Newlands, J.A.

I am, therefore, of the opinion that the appeal should be allowed with costs.

LAMONT, J.A.:—In his statement of claim the plaintiff sought the following relief:—(*a*) An order declaring the meetings of the said trustees held in the year 1917 illegal. (*b*) An injunction restraining the erection of the school house on the site chosen by the above named defendants.

Lamont, J.A.

As to the first of these, the trial judge held that the legality of Miller's election could be tested only on *quo warranto* proceedings, and no appeal has been taken from this ruling.

As to the second; it was shewn at the trial that the Minister of Education had approved of the site and that the erection of the school house had been completed. Under these circumstances, the trial judge held, and rightly so, that he could not grant the injunction asked for.

During the trial, the plaintiff applied to amend his statement of claim by asking for an injunction restraining the defendants from paying for the school or borrowing any more money in connection therewith. The application was opposed by the defendants, but was granted.

The contract price of the school was $2,397.55. $1,200 had already been paid over to the contractors. The evidence disclosed that, prior to the trial, the ratepayers had approved of a by-law for the borrowing of an additional $1,000 to be applied in payment of the school house. The by-law itself was not in evidence, because the defendants had no notice that it would be required and did not have it with them. Notwithstanding this evidence, the trial judge granted an injunction restraining the

SASK.

C. A.

LAWRENCE v. TRUSTEES OF BEAVER VALLEY SCHOOL DISTRICT.

Lamont, J.A.

defendants from borrowing any more money for the school or paying therefor more than the $1,200 already paid.

In granting this injunction the trial judge, in my opinion, erred. Had the building not been erected, an injunction might have been granted restraining its erection until proper authority therefor had been obtained. *Smith* v. *Fort William School Board* (1893), 24 O.R. 366. But, after the school house had been erected on a site approved of by the proper authorities, I know of no authority which prevents the ratepayers with the sanction of the Local Government Board from paying for the same and taking it over for their own.

The appeal should, therefore, be allowed with costs, the judgment below set aside and judgment entered for the defendants with costs.

Elwood, J.A.

ELWOOD, J.A.:—On August 15, 1917, the trustees of the defendant school district entered into a contract for the erection of a school in the district for the sum of $2,397.55. Prior to this, ineffectual attempts had been made to receive the assent of the ratepayers to a by-law authorizing the expenditure of money for the erection of a school, but no by-law had been authorized by the ratepayers. On September 28, 1917, this action was commenced, in which the plaintiff claimed:—(*a*) an order declaring the meetings of the trustees held in the year 1917 illegal; (*b*) an injunction restraining the erection of the school house on the site chosen by the defendants; (*c*) the costs of the action.

On December 14, 1917, authority to borrow $1,200 for the erection of a school was given by the Local Government Board, in consequence of a by-law passed by the trustees, and the money so authorized to be borrowed has, apparently, been borrowed and paid by the trustees to the contractor under the contract for the erection of the school.

This action was tried in June, 1918. At the time of the commencement of the action, the school had practically been completed, and was fully completed at the time of the trial.

At the trial, the evidence shews that a further by-law authorizing the expenditure of $1,000 in addition to the $1,200 had been passed, received the assent of a majority of the ratepayers, and also the assent of the Local Government Board. At the trial, an amendment to the statement of claim was allowed, asking for an

injunction restraining the defendants from borrowing any more to pay for the school or to pay money for the school other than the $1,200 already paid. Judgment was given for the defendants in the issue as to the legality of the meetings of the trustees, and refusing an injunction restraining the erection of the school but granting an injunction restraining the defendants from borrowing any more money for the school and from paying any more money than the $1,200. From this judgment the defendants have appealed.

For the respondent, a number of cases were cited, which went to shew that an injunction will be granted restraining the erection of a school where the school is not erected and proper authority for the erection of the school or for the expenditure of the money has not been first obtained. Those cases, however, do not assist the present case, because, at the time of the trial, the school had been completed and an injunction restraining the erection of the school had been refused. The whole question before us is, whether or not an injunction should be granted restraining the trustees from expending the money that they have been authorized by the Local Government Board to borrow, and whether they should be restrained from borrowing and expending any further sum of money? I am of the opinion that the trustees having received authority from the Local Government Board to borrow the $1,000 and to expend it on the erection of the school, they cannot now be restrained from doing what they have been so authorized to do. The sums of $1,200 and $1,000 do not amount to the total of the contract price for the school, but I am of the opinion that the court has not power to restrain the trustees from proceeding to obtain, if necessary, further authority from the ratepayers to borrow and expend on the contract such further sum as may be necessary to pay the contractor the balance due him on the building. The effect of the judgment appealed from is to so restrain the trustees. I am, therefore, of the opinion that this appeal should be allowed with costs, and the plaintiff's action dismissed with costs. *Appeal allowed.*

QUE.

K. B.

SAN MARTIN MINING Co. of CANADA v. INGENIERA IMPORTADORA Y. CONTRATISTA Co.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Désy ad hoc, JJ. June 21, 1918

1. JUDGMENT (§II B—71)—INTERLOCUTORY—JUDGMENT OF SUPERIOR COURT—REJECTION OF POWER OF ATTORNEY—APPEAL.

A judgment of the Superior Court dismissing a motion for the rejection of a power of attorney from a foreign plaintiff is an interlocutory judgment from which an appeal lies under art 46, C.P. Que.

2. POWERS (§II—8)—OF ATTORNEY—EXECUTED IN FOREIGN COUNTRY—NOT COMPLYING WITH LAWS OF THAT COUNTRY—VALIDITY IN CANADIAN COURTS.

A power of attorney executed in a foreign country to be acted upon in Quebec, is not invalid because of non-observance of the forms required by the law of the place of execution if it is valid under the Quebec law.

Statement.

APPEAL from the interlocutory judgment of the Superior Court, Lamothe, J. Affirmed.

The action was for $24,671.75, on two promissory notes. The plaintiff, having its head office in Mexico, was ordered to fyle a power of attorney. On February 4, 1918, the respondent fyled a power of attorney signed and executed in Mexico City, together with a copy of the minutes of the directors' meeting appointing the attorneys. The power of attorney was signed by the president and delivered in presence of two witnesses, and duly authenticated before the British Consulate-General in Mexico City.

The appellant presented a motion demanding that the 2 above documents be declared irregular, null and void, and rejected from the record.

This motion was dismissed by the Superior Court.

McKeown & Choquette, for appellant; *Mitchell, Casgrain & Co.*, for respondent.

Cross, J.

CROSS, J.:—The respondent has moved to quash the appeal. The parties have been heard both upon that motion and upon the merits of the appeal.

By the interlocutory judgment appealed from, the Superior Court dismissed a motion made by the appellants (defendants) for rejection of a power of attorney produced by the respondent (plaintiff), a Mexican corporation. Leave to appeal was given by a judge in chambers, but the respondent contends that the judgment does not fall within any of the classes of interlocutory judgments which are made appealable by art. 46, C.P., and also says that it is a mere order made in the exercise of a discretion vested in the Judge of the Superior Court.

QUE.

K. B.

SAN MARTIN MINING CO. OF CANADA v. INGENIERA IMPORTADORA Y. CONTRATISTA CO.

Cross, J.

These contentions are not well-founded. If there has been error in holding that a sufficient power of attorney from the plaintiff has been produced, the effect would be, if the judgment stands, that the defendants will be obliged to submit to have the action proceed to trial on the merits, though the action may turn out not to have been authorized, and the plaintiff may not be properly before the Court.

It is true that the judgment does not affirmatively order anything to be done, but, having regard to the effect of it, I consider, nevertheless, that it falls within clause 2 of art. 46 as being one of those interlocutory judgments which are made appealable "when they order the doing of anything which cannot be remedied by the final judgment."

As regards discretion, it cannot be in the discretion of a judge to declare an instrument null, if it is valid or to hold it valid, if it is void. The motion should be dismissed.

The merits: The single ground persisted in at the hearing, and upon which counsel for the appellants say that the Superior Court should have granted their motion and rejected the power of attorney and accompanying copy of directors' minute, is that, by the law of Mexico, minutes of meetings and powers of attorney—as well as many other written instruments—are null, unless they have been drawn up in the Spanish language.

The copy of directors' minute authorizing the power of attorney and the original power of attorney of record before us are in English.

The Superior Court has held, not only that the power of attorney is not void or illegal, but that powers of attorney *ad litem* must be made and authenticated in accordance with the laws of the Province of Quebec, even when they are signed in a foreign country.

It is to be observed that, though the courts have regard to rules of what is called private international law, their authority to decide and adjudicate proceeds from the local law, that is, the law of the place where they are established. To express the same proposition in other words, one may say that private international law is ineffective apart from the law of the land.

In the matter before us, counsel for the appellants rely upon the rule that "Acts and deeds made and passed out of Lower

QUE.

K. B.

SAN MARTIN MINING CO. OF CANADA v. INGENIERA IMPORTADORA v. CONTRATISTA CO.

Cross, J.

Canada are valid, if made according to the forms required by the laws of the country where they were passed or made. Art. 7, C.C.

The regard which courts have for foreign law would lead them to hold as valid deeds which might not have the forms required to make them valid here if they had been executed in the form required by the local law of the place of execution.

It does not follow that the deed will be held void because of non-observance of the forms required by the law of the place of execution, if it would be valid under the law of the *forum*.

It can be seen by reference to art. 8, C.C., that a wide power of interpretation, and of something more than mere strict interpretation, is left with the court. The article reads:

> Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place, in any of which cases effect is given to such law or such intention expressed or presumed.

That article not merely affords a rule for interpretation of the covenants of deeds, but also avails as authority to give effect to the intention of parties to have their deeds tested by the law of the place where the covenants were intended to be executed as to whether they have been validly made or not.

In the remarkable decision of la Cour de Cassation in *Gisling* v. *Viditz, Clunet, Journal du Droit International Prive*, [1909] p. 1097, that Court, reversing the jurisprudence of half a century, sustained a will made in France by an Englishman before witnesses in the English form, notwithstanding that an instrument in that form could have no validity as a will according to the law of France.

That *arret* is said to have definitely established the principle of the dominance of "la facultativité de la règle *locus regit actum* sur celle de l'impérativité.

No doubt, to the legal mind, there is something unattractive and illogical in the notion that it can be optional or facultative with a judge to apply or not to apply an admitted rule of law, but the complexity of questions which can arise in conflict of laws appears to have brought about that result. As indicated by Dicey: "the application of foreign laws . . . flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice."

It has come to be recognized in England that, to give effect to the maxim *ut magis valeat*, a court will apply the law of a country which it would not apply, if the result were to be that the deed would be void or that the intention of the parties would fail of realization. Reference may be made to Westlake International Law, 5th ed., secs. 211 and 212, the decision in *P. & O. Steam Navigation Co.* v. *Shand* (1865), 3 Moo. P.C.N.S. 272, 290, 16 E.R. 103, "The law which would make the contract valid in all particulars was the law to regulate the conduct of the parties:" *Re Missouri S.S.Co.* (1888), 42 Ch. D. 321, *per* Fry, L.J., p. 340.

A bill or cheque drawn abroad and payable in England is governed, so far as its essential validity is concerned, by the law of England: *Robinson* v. *Bland* (1760), 2 Burr. 1077, 97 E.R. 717; *Moulis* v. *Owen*, [1907] 1 K.B. 746.

In the matter before us, the instrument is a power of attorney executed in Mexico and to be acted upon in the Province of Quebec. The constituent worded it in English for reasons of obvious utility. The purpose of the writing is to supply evidence of consent to the creation of the power. The courts of a country apply their own rules of evidence. A distinction must sometimes be made between matters of form and matters of evidence: *Leroux* v. *Brown* (1852), 12 C.B. 801, 138 E.R. 1119. If the legislators of Mexico had enacted that a power of attorney could be proved by verbal hearsay evidence, the courts of other countries would not give effect to such legislation just as they do not give effect to the penal or revenue laws of other countries. The entire object of the power of attorney is to be accomplished here and not in Mexico.

The Superior Court was right in applying our law of evidence to ascertain whether the plaintiff had authorized the taking of the action or not. The appeal should be dismissed.

Judgment: Considering that the interlocutory judgment appealed from is a judgment from which an appeal to this Court could be validly allowed and taken;

Doth dismiss the said motion with costs thereof against the respondent and in favour of the appellants;

And, adjudicating, secondly, upon the merits of the appeal:

Considering that, in order to decide whether or not an action instituted by a non-resident person is authorized by the non-resident plaintiff in whose name it is taken, the courts of this

QUE.

K. B.

SAN MARTIN MINING CO. OF CANADA v. INGENIERA IMPORTADORA v. CONTRATISTA CO.

province will apply the rules of the law of evidence which are recognized and in force in the Province of Quebec;

Considering that, for the reason aforesaid, there is no error in the adjudication (*dispositif*) made by the interlocutory judgment appealed from, to wit, the judgment pronounced by the Superior Court at Montreal, on March 15, 1918, whereby the defendant's motion for rejection of the power of attorney and copy of minutes fyled on February 4, 1918, was dismissed;

CROSS, J.

Doth dismiss the appeal and confirm the said adjudication with costs of the motion in the Superior Court and costs of the appeal (except costs of the respondent's motion otherwise hereinabove adjudged) against the appellants and in favour of the respondent. *Appeal dismissed.*

MAN.

C. A.

BARTLETT v. WINNIPEG ELECTRIC R. Co. and CANADIAN NORTHERN R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., and Haggart and Fullerton, JJ.A. October 21, 1918.

CARRIERS (§ II G—96)—STREET CAR APPROACHING RAILWAY CROSSING—NEGLIGENCE OF MOTORMAN IN CROSSING TRACK—COLLISION WITH WORK TRAIN—INJURY TO PASSENGER FALLING OFF CAR—DAMAGES.

An electric railway company which by the inexcusable negligence and breach of rules of one of its motormen, places the passengers of a car in a position of great peril from imminent danger of collision with a railway work train, is liable in damages for the death of one of the passengers who becoming terrified jumps or falls off the car and is killed by the train. The trainmen being suddenly faced with a new situation of danger which gave them little, if any time to think and act, even if they could have done anything more than was done to avoid the accident are not required to possess the presence of mind which would enable them to do the best thing possible. A work train is not required to be equipped with air brakes.

Statement.

APPEAL from the judgment of Galt, J., in an action for damages for death of passenger on street car by being run over by railway work train. Affirmed.

R. D. Guy, for appellant, defendant, Winnipeg Electric R. Co.

O. H. Clark, K.C., for respondent, C.N.R. Co.

The judgment of the court was delivered by

Perdue, C.J.M.

PERDUE, C.J.M.:—The facts in this case are fully set out in the judgment of Galt, J., from whom this appeal is brought. Briefly they are as follows:—

The plaintiff's wife was coming into Winnipeg from Headingly on a car operated by the Winnipeg Electric Railway Co. (referred to as the Electric Railway Co.). As the car approached the level

crossing over the line of the Canadian Northern R. Co. (referred to as the Steam Railway) at St. James, the car was stopped and the conductor went forward to the steam railway tracks to see if the way was clear. This he was bound to do under the regulations of the Electric R. Co., r. 18, ex. 4, and the directions of the Railway Committee, dated September 10, 1906. Under the above r. 18, the motorman must not proceed until the conductor has given him the signal to do so. When the car was stopped, a freight train of the steam railway was slowly coming north towards the crossing. When it was about 75 or 100 ft., as the trial judge finds, from the crossing the motorman of the electric car, without having any signal from the conductor, started the car forward to get over the crossing in front of the approaching train. The time was shortly before 10 o'clock in the morning of October 2, 1914, the approaching train was plainly in view slowly approaching the crossing. The electric car reached the diamond crossing when the freight train was 30 or 40 ft. from it. There was a brakeman stationed on the front car of the train, the engine being placed in the train with 4 cars in front of it and 12 behind it. The brakeman signalled the engine driver to stop the train, but the latter did not perceive the signal. The brakeman shouted to the motorman, whose car was then in front of the train, to go ahead, and urgently repeated his signals to stop the train. The electric car then went ahead with a jerk and 3 people, one of whom was the plaintiff's wife, jumped off, or fell off the car in front of the approaching train and the front trucks of the leading car of the train passed over her and caused her death. The passengers in the car saw the approaching train, became alarmed, and some of them rushed to the rear end of the car in an endeavour to get out. There were some 10 or 12 persons in all upon the car at the time. The car itself got across the tracks safely, clearing the approaching train by about 15 feet. The train came to a stop when the front car was about half its length over the diamond crossing.

The Electric R. Co. did not deny that it had been guilty of negligence, but contended that the accident might have been avoided by the Steam R. Co. and that at most the two companies should be held jointly liable. It was arranged before the trial that the plaintiff, who sues as administrator of his deceased wife's estate, was entitled to a judgment for $6,300, but the question as

MAN.

C. A.

BARTLETT v. WINNIPEG ELECTRIC R. CO. AND CANADIAN NORTHERN R. CO.

Perdue, C.J.M.

to which defendant should be held liable, or whether both should be liable, was reserved to be tried.

The trial judge after a most careful consideration of the evidence of the many witnesses called came to the conclusion that the Electric R. Co. was wholly responsible for the accident which resulted in the death of the plaintiff's wife.

One ground taken by counsel for the Electric R. Co. is that the Steam R. Co. failed to comply with certain statutory requirements such as blowing the whistle and ringing the bell before approaching the crossing. But, as the judge points out, such failure, if there was such, would not have affected the situation in the present case. The train, as it moved slowly towards the crossing, was in full view of the motorman, who, unquestionably, saw it and knew it was approaching. Besides, whether there was a train in the vicinity or not, he had no right under the rules to attempt to cross the tracks without receiving a signal to do so from the conductor of his car. I agree with the finding of the trial judge that the Steam R. Co. had the right of way at the point in question. I can find no justification for the conduct of the motorman, which was contrary to the dictates of ordinary prudence.

Counsel for the appellants raises the further objection that the train was not furnished with air brakes. The train in question consisted wholly of an engine and freight cars and was engaged in what was practically a shunting operation.

It was held by the Ontario Court of Appeal that s. 211 of the Railway Act, 3 Edw. VII., c. 58, now s. 264 of the present Act, providing for equipment with air brakes, does not apply to a mere work train not carrying passengers: See *Muma* v. *Canadian Pacific R. Co.*, (1907) 14 O.L.R. 147, 155.

At all events, the evidence does not establish that even if the train had been furnished with air brakes it could have been stopped in time to avoid the accident.

The present case involves some unusual features. By the admitted and inexcusable negligence and breach of rules on the part of the servant of the Electric R. Co., the passengers on the car were placed in a position of great peril. They saw the approaching car, became terrified at the imminent danger of a collision, and did what might be expected in such a case, the

majority of them, including the deceased, rushed to the door and tried to leave the car. The deceased then either fell off or jumped off the car and fell in front of the train and was run over by the steam railway car. When the deceased fell upon the track in front of the approaching train, she was placed in that dangerous situation wholly by the negligence of the motorman of the Electric R. Co. At the time when the deceased fell on the track, the front end of the train was very close to the electric car, about 15 feet according to the evidence of Holmes and Cammell put in by the Electric R. Co. The attention of the brakeman and the other persons in charge of the steam railway train was at the moment concentrated upon avoiding a collision with the electric car. The electric car had time to get across safely and did so. But a new situation was created in an instant by the deceased and another woman falling off the car in front of the train. It was impossible then to stop the train before it came upon them. The trial judge, after a most careful consideration of the evidence, came to the conclusion that the Electric R. Co. was wholly responsible for the accident and that the Steam R. Co. was not guilty of negligence conducive to it. I agree with this conclusion.

The accident was a natural sequence of the negligent conduct of the motorman: See *Prescott* v. *Connell*, (1893) 22 Can. S.C.R. 147. The brakeman on the front of the train had urgently signalled the engine driver to stop and had repeated his signals. There was not sufficient time to do anything further after the deceased fell on the track. The train was stopped as soon as possible. The trainmen were suddenly faced with a new situation of danger which gave them little, if any, time to think and act. Even if they could have done anything more than was done to avoid the accident, the court ought not to require of them, in the new situation that was created, perfect nerve and presence of mind enabling them to do the best thing possible. See *The Bywell Castle* (1878), 4 P.D 219, 223, 227; *The Tasmania*, per Lord Herschell (1890), 15 App. Cas. 223, 226; *Weir* v. *Colmore-Williams* (1917), 36 N.Z.L.R. 930.

I think the appeal should be dismissed with costs.

Appeal dismissed.

MAN.

C. A.

NEWTON v. BOTSFORD.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. November 11, 1918.

APPEAL (§ VII E.—323)—FINDING OF FACT BY TRIAL JUDGE—DOCUMENTARY EVIDENCE—WITNESS UNWORTHY OF BELIEF—REVERSING FINDING.

A finding of fact made by a trial judge, depending on the credibility of the witnesses examined before him will not be disturbed by a Court of Appeal. When however, there are other circumstances in the case for example, documentary evidence, which show that the story of any particular witness is unworthy of belief a court may be justified, in reversing the finding of the trial Judge.

Statement.

APPEAL from the judgment of the trial judge in an action for specific performance of an agreement to purchase land. Reversed.

O. H. Clark, K.C., for appellants.

W. H. Trueman, for respondent.

Perdue, C.J.M.

PERDUE, C.J.M.:—With great respect, I cannot arrive at the same conclusion as the judge before whom this case was tried. It appears to me that sufficient weight was not attached to the plans that were produced. I think these had a most important bearing upon the rest of the evidence. The evidence of the defendant does not by any means impress me either as to his candour or his recollection of the facts. It is no doubt difficult to narrate a conversation which took place 6 or 7 years ago, and a witness may be honestly mistaken in his recollection of it. But the defendant in this case sets up misrepresentation as an answer to a suit for specific performance of an agreement, and by his counterclaim he seeks to set aside the agreement, also on the ground of misrepresentation on the part of the plaintiff's agent. He must, in either case, prove the misrepresentation alleged. This alleged misrepresentation is set out in par. 12 of the statement of defence which is repeated in the counterclaim. The pith of the misrepresentation alleged was that the lands in question were stated by plaintiff's agent to be on a street connecting Springfield Highway and Nairn Ave., and "were situate east of and opposite to the G.T.P. railway shops in said Transcona;" that the agent suggested to defendant the purchase of 5 lots near the south end of the said land, "so that they would be adjacent to said Springfield Road and close to a car-line proposed to be placed upon the said Springfield Road."

I have no doubt that the two maps or plans, exs. 2 and 3. were produced to the defendant at the time of the sale. Ex. 3 is a map of the surrounding district extending from the cities of Winnipeg and St. Boniface on the west to a line some distance

east of Transcona. It shows the Dominion government survey of the territory covered by the map. Springfield Road is shown running east and west past the shops of the G.T.P.R. Co. King St. is shown running north from that road and Plessis Road running south from Springfield road and being almost a continuance of King St, there being a slight "jog" at Springfield Road. "Grand Trunk City," in which the lots in question were comprised, is coloured red on the map, has an arrow pointing to it and the name in distinct red letters. It extends for half a mile according to the map south from Springfield Road along Plessis Road. From the evidence, I have no doubt, whatever, that the defendant saw and examined this map at the time of the sale.

Ex. 2 is the subdivision of "Grand Trunk City." It has the name printed on it in large letters so that anyone glancing at the map could not fail to see the name. Springfield Road is very distinctly shown upon it as being the north boundary of the land. Plessis Road is shown as forming its eastern boundary. There is not the slightest question in my mind that this plan was shown to the defendant at the time of the sale. Thompson, the agent, had already sold lots to Kyle, the defendant's friend, and had marked them with Kyle's initials. Kyle telephoned to the defendant and advised him to buy some of the lots and sent Thompson to see him. The defendant asked for lots adjoining Kyle's with the result that the lots in question in this case were then and there sold to him and the defendant's initials entered by Thompson opposite to them.

The defendant admits in his evidence that he knew the lots he was buying were at the south end of the subdivision. Now Springfield Road was clearly shown at the north end of the subdivision and therefore plainly showed that they were some distance south of that road. The lots purchased by the defendant front upon Plessis Road, and the name of that highway, as it, appears on the plan, is printed in large and very distinct letters so that no one exercising the slightest care or intelligence could fail to see the name. The defendant admitted in his examination for discovery that Thompson tol l him he (defendant) was buying on Plessis Road. When faced with this at the trial he attempted to evade his admission by saying: "He told me I was buying in a certain location which I afterwards understood was Plessis St."

MAN.
C. A.
NEWTON
v.
BOTSFORD.
Perdue, C.J.M.

This does not help him. If the last statement is true then Thompson correctly pointed out the location of the lots and the defendant was informed of it.

The defendant appears to have been strangely confused in regard to the points of the compass. In par. 12 of his statement of defence, where he sets up the misrepresentation complained of, he speaks of the lots which he believed he was purchasing as situate east of and opposite to the G.T.P. railway shops at Transcona, and in the same paragraph he complains that the lots mentioned in the agreement for sale are not east of and opposite to the G.T.P. railway shops. This statement still appears upon the record and I know of no amendment made to it. At the trial, the defendant explained that instead of east he meant west.

Another thing which the defendant charges against Thompson is that "he pointed out the road coming in from the south, which I understood was Nairn Ave." Nairn Ave. comes in from the west and is not south, but is north of Springfield Road.

Defendant also says that Thompson marked the situation where the property was by putting his finger on the map. The defendant has marked the spot on the map (ex. 3) where Thompson placed his finger. This spot is close to the Springfield Road and just north of Grand Trunk City, but outside that subdivision. The whole subdivision covers only a small rectangle coloured red on the map. Anyone pointing out the situation of Grand Trunk City while standing at the opposite side of the map would place his finger in the exact spot which is marked as the spot where Thompson placed his finger. The defendant with his weakness as to the cardinal points might possibly have mistaken south for north.

I agree with my brother Fullerton in the view he takes of the evidence of the defendant.

There is one other point to which I would refer. The agreement is dated on the face of it, March 23, 1911. If this is the correct date of the agreement, and nothing to the contrary has been shown, then the first complaint made by the defendant to the plaintiffs was in a letter written by his solicitor to them on April 3, 1913, which would be more than 2 years after the date of sale. Even then, no particulars are given of the misrepresentation complained of.

I think the appeal should be allowed, the judgment in the Court of King's Bench set aside and the usual judgment entered for specific performance of the agreement. The plaintiffs will be entitled to the costs in the Court of King's Bench and in this Court.

FULLERTON, J. A.:—On March 23, 1911, the defendant entered into a written agreement to purchase from the plaintiffs 5 lots of land situate in a subdivision known as Grand Trunk City lying to the south of the Springfield Road. The sum of $150 was paid on the purchase-price in cash and the balance was to be paid in 4 equal semi-annual instalments of $150 each.

The plaintiff sues for specific performance of the agreement. The defence raised is that the agreement was procured by false representations on the part of the plaintiff as to the location of the property. Defendant also asks for the rescission of the agreement and the return of $150 paid on account of the price.

The trial judge found that "the representation alleged has been substantially proved by the defendant and that it was material to, and an inducing cause for the defendant entering into the purchase agreement sued upon," and dismissed the action. He also gave judgment in favour of the defendant on the counterclaim.

The result of the appeal depends solely upon a question of fact which the trial judge has found in favour of the defendant.

The rule undoubtedly is that where a finding of fact is made by a trial judge depending on the credibility of the witnesses examined before him, a court of appeal will not disturb the finding. When, however, there are other circumstances in the case, for example, documentary evidence, which shew that the story of any particular witness is unworthy of belief, a court may be justified, under the authorities, in reversing the finding of the trial judge.

I make the above observations because I think, in this case, the evidence of the defendant as to the representations alleged to have been made, when tested by an examination of the plans of the property, shows that his story is not credible.

The representations complained of were that the property was situate on a street connecting Springfield Highway and Nairn Ave., and was situate east of and opposite to the G.T.P. railway shops.

MAN.

C. A.

NEWTON v. BOTSFORD.

Fullerton, J.A.

The defendant's story is that Mr. Kyle, a friend of his, had telephoned him about certain property in Transcona that one Mr. Thompson, was selling and had suggested that he should buy some adjoining the property he himself was buying. Kyle said he knew this property and that it was good buying. Defendant further states that he had every confidence in Kyle's judgment as to the value of the property.

A few moments after the telephone conversation Thompson called on the defendant and the following is the latter's account of the interview:—

Q. When Mr. Thompson saw you what was said? A. He referred to the telephone conversation I had with Kyle and said he had come to see me about certain property; that Kyle had bought and he wanted to see if I wouldn't take some as well. Q. What did you say? A. He went on and explained the advantages of this property, explaining that it was situated facing the shops. Q. What shops? A. The G.T.P. shops, on the only cross street connecting Nairn Ave. with the Springfield Highway. Q. What else did he say? A. He produced a map showing the situation where he said the property was and putting his finger on a certain spot on the map where the property was supposed to be located; and he pointed out the road coming in from the south, which I understood was the Nairn Road. There was a road on the map which I understood him to say was the Nairn Road coming in from the south, and he said the proposed car line was to run down this road going back by the Springfield road so that we would be directly between two car lines. He pointed out a road which I understood was the Nairn Road and the cars were to go down this road and coming back by the Springfield Road and these lots would be directly between these roads. Q. And these lots would face on a street? A. Yes, they would face on a street facing the G.T.P shops. Q. Would this street lie between these two car routes? A. It would lie between the two car line routes; and he went on to mention the prices; that the south end was practically the same as they were a little farther up, and we took the southern end because they were closer to the Springfield Road where the car line would be. Q. What street would your lots be situate on? A. They were supposed to be situate on King St. Q. And what was the situation on King St. with respect to Springfield and Nairn Ave? A. Thompson explained that it was the only cross street for 2 miles either way connecting these roads, that is connecting the two roads that the car line would be on.

The agreement sued on was made on March 11, 1911 and the trial began on June 21, 1918.

Thompson, the agent of the plaintiffs, who made the sale, was called by the plaintiff, to prove the agreement. His recollection of the conversation between himself and the defendant was not at all clear. On cross-examination he stated that he didn't think he said anything about Nairn Ave., and to his knowledge

did not describe the lots as being between Springfield Road and Nairn Ave. On re-examination he stated that after a conversation with the defendant's solicitor he went home and hunted up the plan he shewed defendant when he sold him the lots. The plan was put in evidence as ex. 2. Thompson also had another plan which he used when selling property which was put in evidence as ex. 3. This was a general plan of the Transcona district. He cannot say positively whether he showed the latter plan to the defendant, but the evidence of the defendant satisfies me that he did.

The subdivision known as Grand Trunk City, in which the lots sold defendant were situate, lies south of the Springfield Road. These lots front on Plessis St., which runs north and south, and are almost at the extreme southern end of the subdivision. King St., on which defendant says the lots were supposed to be, runs northerly from Springfield Road from a point a short distance east of the junction of Plessis St. with Springfield Road. Nairn Road is not shewn on either ex. 2 or 3, and as a fact runs east and west and is a considerable distance north of the Springfield Road. There is no doubt whatever that ex. 2 was before the defendant when the sale was made. On this plan of Grand Trunk City, north, south and east are clearly indicated by the letters N. S. and E. The most casual examination of this plan could not fail to show that the lots were on the south of the Springfield Road and on Plessis St. With this plan before him, it is inconceivable that defendant could have thought that the lots were north of the Springfield Road, and it is also inconceivable that Thompson would have told defendant that the lots were north of the Springfield Road.

On this plan opposite the lots purchased by the defendant appear the defendant's initials W.N.B., which were placed there by Thompson in the presence of the defendant.

In his evidence, defendant states that he was told that the Springfield Road was at the south end of the subdivision, and that he looked at the plan to see whether the lots were south of the subdivision and close to the Springfield Road. His cross-examination on this point is as follows:—

Q. Tell me what you did see when he marked them off? A. I just saw him mark off certain lots, I don't know how many, but I presume he was

MAN.

C. A.

NEWTON v. BOTSFORD.

Fullerton, J.A.

marking off the five. Q. Did you look to see where the property was? A. No, he had told me where it was. Q. He told you they were nearest the Springfield Highway; did you look to see that when he was marking them off? A. No. I did not. Q. You have changed your mind since your cross-examination for discovery? A. I saw him mark off certain lots. Q. Did you look at the map on which he was marking off the lots? A. I just glanced at it, to see whether the lots were between Nairn and Springfield Roads? To see whether they were south of the subdivision and *close to Springfield*, that was all. He told me that Springfield was on the south end of the subdivision and I looked to see if they were shown at the south end. Q. To see whether they were south of the subdivision and close to Springfield? A. To see whether they were in the south end of the subdivision. Q. And close to Springfield? A. *I would not say that.* I saw that they were at the south end of the subdivision. Q. You knew the location of the lots when you saw him mark them off? A. I saw him mark off certain lots down *at the south end of the subdivision next to the Springfield Road.*

He looked at the subdivision plan to see if the lots were at the south of the subdivision and next to the Springfield Road and the plan shewed the lots at the opposite end of the subdivision from the Springfield Road. Moreover, if he had looked at the "Springfield Road" on the plan he could not fail to see the letter "N" immediately beside it.

Again the prices per foot of the lots in the subdivision are distinctly marked on the plan. "15 is the price marked on the plan for the lots in the block next the Springfield Road while the price marked for the lots in the southerly block in which the lots purchased by defendant are situate is $10. Could he imagine the lots next the Springfield Road, on which the car line was to be built, were cheaper than the lots nearly half a mile farther back?

Defendant states that the lots were supposed to be on King St, although King St. is not shown on the plan and Plessis St., on which the lots face, is clearly marked.

Plaintiff's counsel evidently saw this difficulty and on direct examination defendant stated there was some mention of Plessis St., but that Thompson told him it was a continuation of King St. The explanation is, to say the least, an exceedingly lame one, in fact it is not an explanation at all. If defendant was buying north of Springfield Road, there could be no reason for talking about Plessis St. at all.

The evidence further satisfies me that defendant saw ex. 3, the general plan of Transcona.

Ex. 2 is headed "Grand Trunk City" in large type. On ex. 3 "Grand Trunk City" subdivision is distinctly shown in red lying south of the Springfield Road. I think there can be no doubt but that defendant knew the name of the subdivision in which he was buying lots. If he did, it is unbelievable that he could look at ex. 3 and not know that "Grand Trunk City" was south of the Springfield Road.

Moreover, can anyone for a moment believe that any real estate agent would be idiot enough to show exs. 2 and 3 to an intelligent man and tell him that the lots in question were north of the Springfield Road.

On the whole I am clearly of opinion that the documents completely refute the story told by the defendant.

I would allow the appeal with costs, dismiss the counterclaim with costs, and enter judgment for the plaintiff for the relief prayed in the statement of claim.

Cameron, J.A.
Haggart, J.A.

CAMERON and HAGGART, JJ.A. concurred in the result.

Appeal allowed.

MITCHELL v. MORTGAGE COMPANY OF CANADA.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

LANDLORD AND TENANT (§ I—3)—LEASE—REQUISITES TO VALID—DEFINITE COMMENCEMENT AND ENDING OF TERM.

In order to satisfy the Statute of Frauds and create a valid lease there must appear either in express terms or by reference to some writing which would make it certain or by reasonable inference from the language used, on what day the term is to commence and when it is to end. A memorandum which has inserted alternative time for the commencement of the term does not satisfy these conditions and cannot be enforced.

[*Marshall* v. *Berridge*, (1881) 19 Ch.D. 233, referred to.]

Statement.

APPEAL from the trial judgment in an action for breach of contract to lease certain premises.

J. A. Allan, K.C., for appellant; *J. F. Frame*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Lamont, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—The respondent brought this action for breach of contract on the part of the appellant to lease him certain premises in Prince Albert. At the trial, judgment was given for the respondent. Several grounds were raised on the appeal why this judgment should be reversed, but I need only to con-

SASK.

C. A.

MITCHELL v. MORTGAGE CO. OF CANADA.

Newlands, J.A.

sider one of them, viz: that there is no memorandum in writing sufficient to satisfy the Statute of Frauds.

In *Marshall* v. *Berridge* (1881), 19 Ch.D. 233, it was held that in order to satisfy the Statute of Frauds the writing must fix a time from which the lease is to commence. Lush, L.J., at p. 244, said:—

> Now it is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements.

The memorandum in this case is in the following words:—

> Prince Albert, Sask.
>
> Received from Mr. John D. Mitchell the sum of fifty dollars, being deposit on rental of St. Regis ground floor, building taken at $100 per month, for a term of five years to start from completion of repairs or when handed over to Mitchell.
>
> $50. Sd. ROMERIL FOWLIE CO.
> A. ROMERIL.

This document was signed on the same day Mitchell gave his cheque for the $50. The cheque is dated February 8, 1917.

Now, the time given in this document for the commencement of the lease is "from the completion of repairs or when handed over to Mitchell." The trial judge held that the "or" should be read conjunctively. I cannot see why this interpretation should be given to it. I am rather of the opinion that the parties intended to provide for the handing over of the building before the completion of the repairs. It does not, however, matter which construction is put upon it, because, at the time of the signing of this document, no agreement had been come to as to what repairs were to be made, and, until such an agreement was come to, it could not be ascertained when the repairs would be completed and, therefore, when the lease would commence.

In his evidence, the respondent says:—

> So the next day (*i.e.*, the day after the signing of the above document) he called contractor Anderson here from town and he called me up to him and we went down to the St. Regis Hotel and he asked me what alterations I wanted and I showed him. Mr. Romeril says to the contractor, "Give us a rough figure of the cost." The contractor answered, "It will be about $820." He said, "All right, I am going to wire," or something like that. After two days Romeril called me up again and said the company agreed to pay $800 to go ahead with the work. I says, "all right, hop to it." So he called on the contractor Anderson and told him to start work. Contractor Anderson found it would cost $1,300 instead of $800. Then Romeril called

me up again and said, "What are we going to do, the contractor asks for $1,300." I said, "better write the company and see what they will say." He wrote the company and they answered that they would not pay the balance of $500, they would only pay the $800. I said, "all right, then go ahead with the $800 and I will pay the balance."

This last proposition was never accepted by the company.

There being, therefore, no agreement as to what repairs should be made, or who was to pay for them, it is impossible to ascertain when these repairs would be completed, and it cannot, therefore, be ascertained—either from the document itself or from the surrounding circumstances—when the lease would commence.

Newlands, J.A.

The Statute of Frauds has, therefore, not been complied with and the respondent must fail in his action.

The appeal should therefore be allowed with costs.

LAMONT, J.A.:—The plaintiff sues for specific performance of an agreement for a lease, or for damages.

Lamont, J.A.

The plaintiff, having seen in the window of a building which was formerly the St. Regis Hotel, Prince Albert, a notice that the building was for rent by Romeril & Fowlie, estate agents, Prince Albert, went on February 8, 1917, to the agents' office. He inquired who owned the hotel building, and was told that it belonged to the defendants. He asked the agents if they had authority to lease it, and they said they had. He asked what lease they would give, and they said 5 years. He asked the rent, and they said $100 per month. The plaintiff then said, "we will close the deal right here," and he gave them his cheque for $50 and received the following receipt therefor:—(See judgment of Newlands, J.A.)

The plaintiff intended to use the building as a restaurant and tea-room, and, after receiving the receipt on February 8, he proceeded to purchase fixtures therefor. He purchased some in Edmonton, and made a deposit thereon of $500; others he purchased at Melfort, paying $782 on the purchase price.

In March, the defendants' agents, Romeril & Fowlie, notified the plaintiff that the company would not give him possession, as they had leased it to other parties. On the refusal of the defendants to carry out their agreement with him, the plaintiff having, as he said, no use for the fixtures he had ordered, forfeited the amounts he had paid thereon rather than pay the balance of the price and then have fixtures on hand for which he had no use, and

SASK.

C. A.

MITCHELL v. MORTGAGE CO. OF CANADA.

Lamont, J.A.

he now seeks to compel the defendants to reimburse him for the loss which he has sustained by reason of their failure to give him possession of the premises.

The trial judge, before whom the matter came, held the receipt to be a valid agreement to grant a lease, and awarded the plaintiff damages for breach thereof. From that judgment this appeal is brought.

Among others, the following two grounds of appeal were taken: —(1) That the agents had no authority to conclude an agreement with the plaintiff without embodying in it a term that the defendants should have the right to cancel the lease at any time on giving 3 months' notice. (2) That the receipt of February 8 is not a good agreement for a lease because the commencement of the term is left uncertain.

The first of these grounds of appeal cannot, in my opinion, be given effect to. The authority of the agents to lease is given in a telegram from the defendants, dated December 21, 1916, which reads as follows:—

Messrs. Romeril, Fowlie & Co.
Prince Albert, Sask.

Re St. Regis Hotel. Will consent to rent the whole building at two hundred dollars per month for three years subject to three months' notice. Company to make repairs and put plumbing and heating in order, cost not to be over two thousand dollars, or will rent the ground floor for one hundred per month, company to repair the plumbing and heating, cost not to exceed one thousand dollars. Tenders for repairs and improvements must be first submitted to company.

(Sgd.) MORTGAGE COMPANY OF CANADA.

This was followed up next day by a letter, in which the defendants say: "However, we wish to confirm that you can rent the ground floor at $100 per month, we to do the repairing to the plumbing and heating, and any other repairs that are absolutely necessary."

In January, 1917, the agents appear to have got in touch with the plaintiff. On January 27 they wrote to the defendants that they had a prospective tenant for a term of 5 years, and on January 30 they wrote saying that their prospective tenant was John Mitchell, and that he would require a lease for 5 years. They then say:—

If you see your way clear to accept this proposition for the ground floor, we would be pleased if, on receipt, you would wire us to go ahead with the work.

The defendants agreed to this in a letter dated February 6, in which they say:—

In reply beg to say that the company are prepared to lease the ground floor to John D. Mitchell for the sum of $100 per month, payable in advance, the company to have the right to cancel the lease at any time on giving three months' notice.

The company also agree to make the alterations as requested, to cost not more than $800.

In my opinion, the defendants' telegram of December 21, and their letter of December 22, constituted authority to the agents to rent the ground floor at $100 per month and to pledge the defendants to make repairs up to $1,000, without any stipulation being made for a right to cancel the lease at three months' notice.

The question, therefore, is: Had the letter of February 6 reached the agents before they entered into the agreement with the plaintiff on February 8? There is no evidence that it had. In the ordinary course of the mail, a letter posted in Winnipeg on February 6 would not reach Prince Albert until some time on February 8. A revocation of authority by letter takes effect, not from the mailing of the letter, but from the time of its receipt. The agent's authority cannot be affected by a letter until he receives it. 2 Corpus Juris. 539. The defendants having given the agents authority to enter into an agreement for a lease without including the stipulation in question, the onus was upon them to shew a revocation of authority at the time the agreement was made with the plaintiff. As they have not done this, they cannot question the authority of their agents.

The other ground of appeal is: That the parties in their agreement have not made the commencement of the term certain.

In *Marshall* v. *Berridge*, 19 Ch.D. 233, Lush, L.J., at pp. 244 and 245, says:—(Extract reported in full in judgment of Newlands, J.A.)

The commencement of the term may be collected from the agreement read as a whole, and, where the agreement was that possession was to be given within thirty days from date of the agreement, possession was actually given within that time, and the term was held to commence when possession was given.

In *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.

In 18 Hals.' Laws of England, p. 374, the learned author says:—

As to the commencement of the term, it is sufficient if this appears by reasonable inference from the circumstances stated in the memorandum. If the date of commencement is not expressly fixed, but the rent is made payable

SASK.

C. A.

MITCHELL v. MORTGAGE CO. OF CANADA.

Lamont, J.A.

from a certain date, this is treated as the date for commencement of the term; and usually the date when possession is given is the date of commencement; and so, if possession is to be given on a future event, such as the payment of money, the occurrence of the event fixes the date of commencement. In the absence of circumstances shewing the date of commencement, it will not be presumed that the term is to commence at the date of the agreement.

The commencement of the term in the present case, according to the document relied on, was from "the completion of the repairs *or* when handed over to Mitchell." The trial judge held that "or" in this phrase was intended to be conjunctive, and that there was no difficulty in granting a term to commence from completion "*and*" delivery of possession.

With deference, I cannot concur in the conclusion that "or" should be read as "and." In my opinion it is more probable that the parties meant exactly what they said, and that they were providing, not merely for giving the plaintiff possession after the completion of the repairs, but also for giving him possession before the repairs were finished if he desired it. Some of the repairs required, as shewn by a statement of the contractor obtained afterwards, were to be made in the basement. In such a case, and even had that not been so, it is, in my opinion, not unreasonable that the plaintiff should stipulate for getting into the building before the repairs had been completed, in case they were not finished when he was ready to move in.

To my mind, the agreement the parties made, as disclosed by the document, was, that the term should commence when the repairs were finished, or before or after that time if it was agreed to hand the building over to the plaintiff. The date of the handing of the building over to the plaintiff would have to be agreed between them. It was, therefore, not fixed, nor is there anything in the agreement by which it can reasonably be determined.

The case of *Oxford* v. *Provand* (1868), L.R. 2 P.C. 135, 138, in my opinion, is clearly distinguishable. There the agreement was for the unexpired term of a certain lease, and was to cover 4 houses. The rent of the premises was to be £1,600 for the 2 houses, of which the defendants was to take possession, and this rent was to run from the date of possession. This rent was to be increased to £2,800, when the third house, then in course of construction, was finished, and to £4,000 when the fourth house, which had been destroyed by fire, should be rebuilt and delivered.

The defendant took possession of all the houses, but subsequently refused to execute the lease and gave notice that he would vacate the premises. The Privy Council held that the term of commencement of the rent was sufficiently expressed in each case and decreed specific performance of the lease. In that case, however, it will be observed that the time for the commencement of the rent was not in the alternative. It was, as to the first two houses, when possession was taken; as to the third, when it was completed, and, as to the fourth, when it was rebuilt and delivered. Each of these terms had been definitely fixed by the taking of possession. In the case at bar, had the agreement provided simply that the term should commence when the repairs should be completed and these repairs had been completed, the case might have come within the authority of *Oxford* v. *Provand*, *supra*. As it is, it seems to me that, by inserting alternative time for the commencement of the term, it is impossible to hold that such commencement is fixed or can, with reasonable certainty, be concluded from the document.

On this ground, I think, the appeal must be allowed. I regret being obliged to reach this conclusion, for I agree with the trial judge that the defendants' conduct showed a callous disregard for the damage they might occasion the plaintiff by refusing to carry out the contract into which their agents entered on their behalf. The conduct of the agents seems to have been all that one would expect from honest agents. On several occasions they called the attention of the defendants to the fact that the plaintiff had paid his money in good faith and was entitled to their first consideration. Their reason for not granting him the lease may be inferred from the fact that the present tenant pays an increased rental of $25 a month for the last 3 years. The defendants were evidently advised that, owing to the form in which the receipt was drawn, they could not be forced to grant the plaintiff a lease, and disregarding the expense to which he had gone in reliance upon the agreement and the moral obligation resting upon them as a result thereof, they allowed their avarice to prevail over their sense of business fairness and honesty.

The $50 which the plaintiff paid, the defendants still have, they have not pleaded a tender of it to the plaintiff nor have they brought it into court. The plaintiff is entitled to have it returned

SASK.

C. A.

MITCHELL v. MORTGAGE CO. OF CANADA.

Elwood, J.A.

to him, and under the circumstances is entitled to his costs without set-off.

The appeal, in my opinion, should be allowed, with costs, and the judgment reduced to $50.

ELWOOD, J.A., concurred with LAMONT, J.A.

Appeal allowed.

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S. C.

ATT'Y.-GEN'L. FOR ONTARIO v. RAILWAY PASSENGERS ASSUR. CO.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Middleton and Kelly, JJ. May 8, 1918.

COMPANIES (§ IV D—80)—DOMINION COMPANY—LICENSE UNDER PROVINCIAL ACT—BOND FOR DUE PERFORMANCE—RIGHT OF SURETY TO SET UP ULTRA VIRES AS DEFENCE AFTER WINDING UP.

A trust company incorporated by Dominion authority having applied for and obtained registry under the Ontario Act, and as a term of receiving its license having given a bond to the Attorney-General for Ontario for the due performance of the duties of any office to which it might be appointed, cannot, nor can its sureties, in an action on the bond—after the winding up of the company—for balances improperly advanced, set up that the provisions of the Act under which the bond was demanded and given were *ultra vires* the province so far as it was sought to apply them to a Dominion company.

[See also *John Deere Plow Co.* v. *Wharton* (annotated), 18 D.L.R. 353, [1915] A.C. 330.]

Statement.

AN appeal by the defendants from the judgment of Latchford, J., 41 O.L.R. 234.

H. T. Beck, for respondent.

The judgment of the Court was read by

Middleton, J.

MIDDLETON, J.:—This is an appeal by the defendants from a judgment of Latchford, J. of the 8th December, 1917, by which he directed judgment to be entered for $100,000 upon a bond entered into by the defendants as sureties for the Dominion Trust Company, upon the application of that company to be admitted to registry upon the 'trust companies' register, under the Loan and Trust Corporations Act of Ontario, R.S.O. 1914, ch. 184.

Under the bond, the defendants became sureties for the due performance by the Dominion Trust Company of the duties of any office to which it might be appointed under the terms of its charter and the license granted.

The bond was made in favour of the plaintiff, in trust for all persons who should become creditors of the trust company by reason of any business done in Ontario.

On the 14th June, 1914, letters probate were granted to the trust company and R. M. Dennistoun as executors of the late Geoffrey Strange Beck.

The Dominion Trust Company became insolvent, and on the 9th November, 1914, it was ordered to be wound up under the Dominion Winding-up Act.

On the 20th February, 1915, the liquidator of the company applied to the Supreme Court of Ontario for an order relieving it from the duties of office of executor under the will and for the passing of the accounts, and the Toronto General Trusts Corporation was appointed trustee in its stead, and it was referred to the Master to take accounts etc.

As the result of this reference and certain appeals, it was finally held that advances had been made of capital money of the estate in question to two ladies, Helen and Doris Beck, who were entitled only to income, to the amount of $2,200.89 each. Helen Beck was entitled to other money to the amount of $2,107.85, which, being set off, left a balance of $93.04 due by her. Doris Beck was entitled to set off $253.55, leaving a balance due by her of $2,064.

The trust company, being liable for these balances improperly advanced, was held to have a lien upon the income of these ladies accruing to them under the terms of the trust-deed, and this lien was declared to continue in favour of the liquidator.

This action having been brought upon the bond, the defendants contended that the provisions of the Act under which the bond was demanded and given were *ultra vires* of this Province, so far as it was sought to apply them to a Dominion company.

As the trust company applied for and obtained registry under the Provincial Act, and as a term of receiving its license gave the bond now sought to be repudiated, neither the trust company nor its sureties can now be permitted to discuss the question sought to be argued. The Province demanded the bond as the price of the license. The bond was given and the license obtained. It is quite beside the mark to say now that the company might have done business in Ontario without a license. Upon this branch of the case we agree with the trial Judge.

The judgment appealed from gives, by way of assessment, damages in excess of the liability of the trust company in respect

ONT.
S. C.
ATTORNEY-GENERAL FOR ONTARIO v. RAILWAY PASSENGERS ASSURANCE CO.

of these advances. The amount must be reduced, for the surety cannot be liable for any greater sum than the principal debtor. Upon payment of this sum the sureties will become subrogated to the lien against the accruing income. With this variation the judgment should be affirmed.

As the appellants had partial success only, there should be no costs of this appeal. *Appeal allowed in part.*

N. B.
S. C.

GIBBONS v. HATFIELD.

New Brunswick Supreme Court, Appeal Division, Sir J. D. Hazen, C.J., White and Grimmer, JJ. September 20, 1918.

NEW TRIAL (§ IV—31)—DISCOVERY OF NEW EVIDENCE AFTER TRIAL SUFFICIENT TO ALTER VERDICT.

The discovery, after the trial, of new evidence which satisfies the court that if the party had had it at the trial he must have had a verdict, is sufficient ground for a new trial in order to do justice between the parties.

The discovery of witnesses who can contradict those produced on the trial is no ground for a new trial.

Statement.

APPEAL by defendants from a verdict entered for plaintiffs before McKeown, C.J., K.B.D., and a jury, at Carleton County Circuit. New trial granted.

M. L. Hayward supports appeal; *W. P. Jones*, K.C., *contra*.

The judgment of the court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This is an application to set aside a verdict entered for the respondents at the Carleton County Circuit in April last, where it was tried before McKeown, C.J., and a jury, and to enter a verdict for appellants, or for a new trial. The application was made on the ground of newly discovered evidence. Certain other points are taken in the appellants' factum, but that is the only one that was relied upon at the argument. In support of this application, affidavits were read from Heber H. Hatfield, one of the appellants, Allen R. Kennedy, James C. McNeil and Caroline B. Williams, for the purpose of shewing that evidence that was not given at the trial, and concerning which the plaintiff had no knowledge at that time, would be available if a new trial was held, and that such evidence was of importance for a proper determination of the issues involved in the case.

This court has, on a number of occasions, been called upon to give judgment when applications have been made for a new trial,

on the same ground that has been urged by the appellants herein, and to some of these I will refer later. The practice as to this is stated in Archbold's Practice (1866), 12th ed., p. 1529, as follows:—

A new trial will seldom be granted, where a verdict has been given against a party, or a plaintiff has been nonsuited for want of evidence which might have been produced at the trial, because it would tend to introduce perjury; . . . unless the verdict is manifestly against the justice and equity of the case. But if new evidence, discovered after the trial, is such as to satisfy the court that, if the party had had it at the trial, he must have had a verdict, the court will grant a new trial upon payment of costs, in order to do justice between parties. The discovery of witnesses who can contradict those produced on the former trial seems to be no ground for a new trial.

In this case an important point arose as to the date at which the appellant Hatfield called at the Woodstock office of the New Brunswick Potato Exchange and told Webb, the Woodstock manager thereof, that the appellants would take 10 cars of potatoes, and Webb thereupon confirmed this acceptance to the respondents. The action was brought for alleged breach of the agreement to deliver these potatoes by the appellants, and in that connection it would appear that if Hatfield had not, on September 21, had the conversation with Webb that was sworn to by the respondents' witnesses, it would have an important bearing upon the case as affecting their credibility, and in other respects, for the order, it is alleged, was confirmed by the Potato Exchange, Ltd., on the date mentioned, and if it was not until a later date that Hatfield had the conversation with Webb, or if the conversation did not occur at all, it is obvious that it might have an important bearing upon the conclusion at which the jury would arrive. The appellants now state, and the affidavits which they have produced to the court certainly bear out this contention, that Hatfield was not in Woodstock on September 21, although the respondents' witnesses distinctly swore that it was on that date that he had the conversation with Webb, and testified to the conversation which then took place. In fact, the chief witnesses for the respondents, Webb and Jones, swore positively that Hatfield, on September 21, confirmed the order for potatoes from the respondents, for breach of which the suit was brought.

From the facts set forth in the affidavits, it appears that the appellant Hatfield attended during the trial but was not certain of the date on which he called at the N.B. Exchange and talked with Webb with reference to the Gibbons matter, and that he had

N. B.
S. C.
GIBBONS v. HATFIELD.
Hazen, C.J.

no data or memorandum or documents in his possession to which he could refer at that time in order to test the correctness of the statements made by respondents' witnesses as to the date; that, after the trial, Hatfield was able to refer to certain documents that were not available at the trial, and to correspond with different parties and to ascertain that he left Hartland or Woodstock on September 20, was in St. John that night, and from there drove by motor to Sussex, then to the River Glade Sanitorium, from there to Moncton, thence to Newcastle and across to Fredericton, and he states that he will be able to prove that, during the entire twenty-first day of September, he was in St. John or on the road from St. John to Moncton. The affidavits further allege that the appellants had no notice that the respondents were relying on the confirmation given by Hatfield on that particular day, and Hatfield at the trial had nothing to remind him of it, except his recollection of the events, and could not fix the date on which he had left Hartland or Woodstock, or positively contradict the witnesses of the respondents, but after the trial was over he was able to get the exact information as to the dates. In *Preston* v. *Appleby* (1888), 27 N.B.R. 92, King, J., after citing from Archbold's Practice the extract hereinbefore quoted, stated that, in that case, which was an action for unlawful distress and for excessive distress, the chief question was as to the amount of rent due on May 1, 1885; that the defendant distrained for $508.60, and realized $416.16, while the plaintiff claimed that $293 was the amount due. In support of his contention, the defendant, after the trial, produced a note made by plaintiff to defendant's order for $285.60 with interest, and King, J., says, at p. 98:—

> It can readily be seen how damaging this is to the accuracy of plaintiff's account of the transaction, unless it can be explained (and adds): As the questions involved in the case depended wholly upon the credibility of the parties, it seems clear that justice requires that there should be a new trial, which, however, on such ground would be only upon terms of defendant paying costs.

In the case of *Doe dem. Jones and wife* v. *Baker* (1857), 8 N.B.R. 591, the plaintiff, in ejectment, relied on adverse possession of 14 years in A., her father, and in possession of herself after his death in 1832, making altogether 20 years. The defendant held, under a lease from the Corporation of St. John, the grantees of the land. After a verdict for the plaintiff, the defendant's attor-

ney, in consequence of the evidence of one of the plaintiff's witnesses, searched the records and found a conveyance from A. of his interest in the land to R., dated in 1821, describing it as "corporation ground." He also, upon inquiry of B. (referred to by the plaintiffs' witnesses), claimed that B. had held the land under a lease of the Corporation of St. John which had since expired, and had let A. in as his tenant in 1818, and that he held as such until his death. Held, that this evidence was material, and, there being no reason to suppose that the defendant was before aware of its existence, a new trial was granted upon payment of costs. The reason for granting the new trial is the ground that the evidence was material, not as has been contended in some cases, that a new trial will only be granted when the newly-discovered evidence is of such a character as to satisfy the court that if the party had had it at the trial he must have had a verdict.

It was argued, in this case, that the defendant might have discovered the deed in question by searching the records, and that evidence of the conveyance by A. was not given at the trial in consequence of his own negligence. This argument, however, did not prevail, and a new trial was ordered on payment of costs. In delivering judgment, Parker, J., p. 594, after stating that while he quite agreed that the discretion of the court in granting a new trial on the ground of the discovery of new evidence should be exercised with great caution, continued:—

> But, in allowing full effect to this rule and what is laid down by Mr. Tidd, p. 937, "that a new trial is never granted for the default or omission of the parties in not coming prepared with evidence which they were apprised of, and might have produced at the former trial," we are not prepared to say that the facts stated in the several affidavits of Mr. Black, of the defendant and his attorney, do not fairly shew a discovery of new and material evidence.

This new evidence would, they believed, tend to the advancement of justice, and the court saw no good reason for supposing that the defendant would not have procured and produced it at the former trial if he had been aware of its existence. Under these circumstances, they were of opinion that the rule for a new trial should be made absolute upon payment of costs.

In *Magee* v. *Wetmore* (1861), 10 N.B.R. 230, the court held that it was no ground for a new trial that a witness, in giving his evidence, made a mistake as to the contents of a letter about which he was examined, the court being satisfied that the evidence,

N. B.

S. C.

GIBBONS v. HATFIELD.

Hasen, C.J.

as corrected, would not have altered the result of the trial. In delivering judgment, Carter, C.J., p. 231, said:—

> Though we consider it unquestionably true, that it is the duty of a witness who, in his examination, inadvertently makes an erroneous statement, to correct such mistake, when discovered, if an opportunity offers of doing so, more especially if he can do so before finally leaving the stand; still, in this case, we are of opinion, that, had the letter itself been produced, or its contents stated with the strictest accuracy, it could not have afforded, with the other evidence advanced by the defendant, any answer to the plaintiff's case, and, therefore, we think there is no ground for a new trial.

In the present case, the questions involved depend largely, if not wholly, upon the credibility of the parties, and, therefore, following the judgment of King, J., in *Preston* v. *Appleby*, *supra*, it seems clear that justice requires that there should be a new trial, which, however, would be only upon the terms of appellants paying costs of the trial and of this application.

New trial granted.

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S. C.

McLEOD v. McRAE.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ., and Ferguson, J.A. April 30, 1918.

ADVERSE POSSESSION (§ I J—59)—TITLE—CONTINUOUS POSSESSION NECESSARY—PAYMENT OF TAXES—FENCING—CUTTING AND REMOVING TIMBER NOT SUFFICIENT—STATUTE OF LIMITATIONS.

Open, visible, exclusive and continuous possession is necessary to acquire title to land under the Statute of Limitations (R.S.O. 1914, c. 75, ss. 5 & 6), payment of taxes, fencing, cutting and removing timber held in the circumstances not to be sufficient to show such possession, but to be mere acts of trespass.

Statement.

APPEAL by the plaintiff from the judgment (dated the 23rd January, 1918) of LENNOX, J., who tried the action without a jury at Ottawa, dismissing it without costs.

The action was brought to recover possession of a part of lot 9 in the 1st concession of the township of Cumberland, namely, that part lying north of the highway and bounded by the Ottawa river.

The defendant admitted the plaintiff's paper-title, and set up the Limitations Act, R.S.O. 1914, ch. 75.

C. J. Holman, K.C., for appellant.

G. F. Henderson, K.C., for respondent.

Clute, J.

CLUTE, J.:—The action is brought for possession of all that part of lot No. 9 in the 1st concession of the township of Cumberland, in the county of Russell, lying north of the highway and bounded by the Ottawa river.

The defendant admits the plaintiff's title, but says that the plaintiff's claim is barred by the Limitations Act, R.S.O. 1914, ch. 75.

It is important to refer to the facts and the circumstances under which the plaintiff received title and to the defendant's claim to possession.

Colin McRae, the father of the defendant, and grandfather of the plaintiff, owned the whole of lot No. 9, and lived upon and cultivated that portion thereof lying south of the highway.

The defendant resided with his father, Colin McRae, until 1867, when the father died, having devised the portion south of the highway to the defendant, and the portion north, between the highway and the river, to his son Farquhar McRae, who was unmarried, and who, until his death in 1872, resided with his brother, the defendant. The plaintiff, who is a nephew of the defendant, resided with his grandfather, and afterwards with the defendant, from early infancy until he left Canada in 1878. At the time of the father's death, the portion of the lot bequeathed to Farquhar, herein called "the north portion," was unenclosed and in a state of nature, being heavily wooded from the highway to the river and separated from the homestead by the highway. After the grandfather's death, and while the plaintiff was still residing with the defendant, certain timber and wood were cut and sold off the lot, from about 15 to 18 acres, during Farquhar's lifetime; but no portion of the land north of the road was ever cultivated. About 14 years ago the defendant partly chopped over 7 or 8 acres adjacent to the road, which was not cleared, and is now grown up to second growth; so that, according to the surveyor who made a thorough examination from one end to the other of the part lying north of the Montreal road, there were approximately 1½ acres partly cleared lying between the road and the Canadian Northern Railway, and about 8 acres (above mentioned) partly chopped north of the railway, with no cultivation, and the rest is described as heavily timbered.

Farquhar McRae made his will, dated the 4th April, 1872, whereby he devised to the plaintiff the north portion, subject to the payment of five legacies of $20 each, charged upon the land, "payable when the plaintiff arrives at the age of 25 years which will be in the year of our Lord 1879," and appointed by his said will the defendant as one of his executors.

ONT.
S. C.
McLEOD
v.
McRAE.
Clute, J.

The plaintiff, while residing with the defendant, worked upon the farm in the usual way of a farmer's son, from the time he was 14 years of age until he was 24 years old, with the exception of a few months when he returned to his father's home on the occasion of the death of his brother, and while he worked for 7 months and 2 months for neighbours, when he returned to the defendant; on each occasion he lived with him as before, until he left Canada in 1878. Before the plaintiff left, he cut a little wood, perhaps some 10 or 15 cords, upon the north portion, sold it and received the money. He never lived upon the land nor was it cultivated. At the time he left he had not received from the defendant the $80 willed to him by his grandfather. The defendant now contends that the plaintiff has forfeited this sum by not continuing to reside upon the farm; the fact being that he went home for two or three months on the occasion of his brother's death, but returned again to the defendant and lived there as formerly. The plaintiff alleges that after he left Canada he sent certain sums of money for taxes; on one occasion $25 and on others $100 and $50. The defendant admits that he received the $25 but no more. The plaintiff says he continued to send money to the defendant to pay taxes until the defendant wrote him not to send any more until the defendant had paid out what he owed to the plaintiff. The defendant denies this.

The evidence was directed largely to prove that the 18 acres near the river were chopped over and cleared for pasture. This I regard as immaterial on the question of possession, as that clearing was in fact done during Farquhar's lifetime.

The case that the defendant sets up is, that the grandfather (owning the whole lot) had used the portion north of the road for pasture, and that the defendant continued to do the same, and by clearing near the river extended the area of pasturage, and so continued to use the lot in connection with the portion south of the road as part of the farm from the time the plaintiff left Canada until his return in 1917, and that he (the defendant) subsequently enclosed it by a fence; and he asserts that he treated the property as his own and had such exclusive possession as to give him a title by possession under the statute.

The trial Judge refers to Mr. Edward Rainboth, surveyor, as "a gentleman of experience and undoubted reputation and no doubt an honest man," but thinks he is mistaken as to the quantity

of cutting done on the lot; the learned Judge says that he is satisfied that there was a large clearing along the river for the purpose of getting the wood off and for the purpose of improving the pasture, and as to the land lying along the railway there was also clearing; he also finds that there was a general cutting through the whole body of the bush, and that the land was fenced with the object and practically with the effect of obtaining exclusive possession; that acts of ownership were exercised upon it quite extensively by the defendant. He says: "I am very decidedly influenced by the evidence of Mr. Hayes . . . and also by the evidence of Mr. Norman Wilson."

After a careful perusal of the evidence, and giving full weight to the witnesses referred to by the learned trial Judge, I am unable to reach the conclusion arrived at by him. This is not a case where acts of ownership may be relied upon to give a title by possession, as where colour of title goes with possession. In the case of a man receiving, in a *bonâ fide* transaction, the conveyance of land by metes and bounds, the acts of ownership upon the land have relation to the whole, and may support a claim by possession under a defective title, where the same acts of ownership without colour of title would afford very slight, if any, evidence of possession. What in the one case may well be regarded as evidence of acts of ownership and possession of the whole would in the other be simply isolated acts of trespass.

In the present case, the defendant has no colour of title; it is a case where he must shew "open, obvious, exclusive, and continuous possession," to make title against the true owner.

The evidence upon the main facts is not, to my mind, contradictory, when read in the light of the surrounding circumstances, and shews, in my opinion, no such possession as is required to oust the plaintiff. No reference is made by the learned trial Judge to the credibility of the plaintiff or the defendant, or which he believed, if either, as against the other. The story of the plaintiff seems to me more credible than that of the defendant, whose evidence is to my mind unsatisfactory. The learned trial Judge informs me that he was satisfied with the honesty of the plaintiff's evidence. After careful reading of both, I accept that of the plaintiff as the more probable where they differ.

I have collected the evidence bearing upon the question of

ONT.
S. C.
McLEOD
v.
McRAE.
Clute, J.

possession in the appendix hereto, which may be summarised as follows:—

Colin McRae owned lot 9, which was divided by the "Montreal road," the part south of the road being the homestead, with sufficient wood for family use. The part north of the road was in a state of nature, and heavily wooded and unenclosed. The part north of the road, with other lots adjoining, was ranged over by stock of Colin McRae and other neighbours, and this continued until his death in 1867.

Colin McRae having willed the lot to his two sons—the part south of the road to the defendant and the part north of the road to Farquhar—they continued to reside together until Farquhar's death in 1872. During this period they continued to use the place as their father had done, except that they chopped over about 18 acres near the river and sold the timber. This land next the river was flooded until July or August in each year, and from flooding and chopping there was a small amount of pasture after the waters subsided. This chopping was nearly 50 years ago; and, when the surveyor examined the lot to give evidence at the trial, he found it so grown up that he did not recognise it as having been chopped over. Except the 7 or 8 acres near the road, which were chopped over about 13 years ago, and grown up with second growth, the part north of the road remains what is described as a beautiful and heavily timbered wood, one of the best in that section of the country. The defendant admits this and claims to have protected the wood. It is said that some seed was scattered where the chopping had been done, but there is no pretence that it was cultivated. Nothing has been done since. It is now grown up to second growth.

The fencing was partial—inadequate and incomplete. There never has been a fence along the river on the north side, although the lots to the west and east were so fenced. There was no fence on the east side until about a year after McNeilly and Shirkey bought the adjoining lot in 1898, when McNeilly built the fence between lots 8 and 9. The witness Shirkey was a partner of McNeilly in the purchase of the 100 acres east of the lot in question, and they fenced their lot, and he expressly states that "Mr. McNeilly put the fence up." They also fenced their lot on the river-front.

On the west, about the same time, the owners of the adjoining lot fenced it, as Wilson says, to keep their cattle in. The defendant claims that he was to keep up part of the side-line fences, but it does not appear what, if anything, he did in that regard. This lot has never been fenced along the river.

The defendant's sons in 1903 extended the side-line fence into the river at low water, but it was carried away by high water the next year. It was said that it was useless to fence along the river on account of high water each year, which would carry the fences away.

Some other farms were not so fenced, but others were—e.g., the Wilson and McNeilly farms. Duncan McRae, the defendant, said at first that the fences were put up in 1900—when McNeilly bought the farm. Later he said: "I did not give my statement correctly. I don't think the fence was there then; within the next two or three years they fenced their part."

Except for the short period of low water, in July and August, when part of the herd were turned below the road, the land in question was quite vacant in each year. Occasionally wood and timber from fallen trees were taken off. During the grandfather's lifetime, and afterwards in the same way, part of the herd was turned out in the "bush," and ran there after low water in July and August, with other cattle belonging to different neighbours.

Shirkey, the adjoining owner, says: "They put them down across the Montreal road; his cattle would get out of there and ours would get out sometimes, and we used to find the cattle of five or six neighbours all together;" "most of the grass is to east." It is uncertain just when the fence was put along the road.

The evidence of Hayes and Wilson, referred to by the trial Judge as trustworthy, falls far short of making out a case of possession by the defendant.

Hayes lived 2½ miles by road from this farm; was unacquainted with the defendant's father or Farquhar. He had seen cattle pasturing there, and had drawn wood off the lot for Duncan McRae.

"Q. How is it for summer pasture? A. When the high water goes down; sometimes it is July and sometimes August.

"Q. Is that the proper term? Summer pasture? A. Yes, it is used amongst the neighbours. It has been fenced along the road for 14 years.

ONT.
S. C.
McLEOD v. McRAE.
Clute, J.

"Q. On the sides? A. I would not give it a name. I don't know. The wire is in the trees now, it has grown into the trees. It has been there quite a while."

His evidence is very indefinite and inconclusive.

Norman Wilson, the other witness referred to by the trial Judge, is equally uncertain. He says he drew cordwood to the village in 1911 for Duncan McRae. The property to the west of this land was purchased somewhere in the nineties—1893 or 1894; saw McRae cutting wood, and has seen cattle he understood were McRae's pasturing there. When the property was first purchased there was a fence to be maintained in different proportions by the adjoining owners. At the time it was Colin McRae and McCallum. "We were given this same agreement." "We followed it out as near as we possibly could." He could not swear the cattle were the defendant's. One year he kept a good many steers; they broke out; McRae complained, "so we fixed the fence to keep our steers out."

Under the authorities, to which I shall now refer, I think this evidence falls very far short of shewing such possession as will defeat the admitted paper-title.

Section 5 of the Limitations Act, R.S.O. 1914, ch. 75, limits the time to bring an action to recover land to 10 years next after the time within which the right to bring such action first accrued.

Section 6, sub-sec. (4), declares that 10 years shall not be a bar, but no action shall be brought after 20 years, when the land is in a state of nature.

In *McConaghy* v. *Denmark* (1880), 4 Can. S.C.R. 609, at p. 632, Gwynne, J., says that, "by a long unbroken chain of decisions extending over a period of upwards of 40 years, it has been held by the Courts in Upper Canada that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation; (and (p. 633) that) payment of taxes, or the committing of acts of trespass, by cutting timber from time to time, by a person not in actual, visible possession, will avail nothing towards establishing the possession which the statute requires."

The authorities for these propositions are to be found in a long list of cases cited by Gwynne, J., at p. 633. Ritchie, C.J., Strong, Fournier, and Taschereau, JJ., concurred.

Sherren v. *Pearson* (1887), 14 Can. S.C.R. 581, was an appeal from

a judgment of the Supreme Court of Prince Edward Island. It was there held (head-note, p. 581), that "isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the Statute of Limitations, and there was no misdirection in the Judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute. To acquire such title there must be open, visible, and continuous possession, known or which might have been known to the owner, not a possession equivocal, occasional, or for a special or temporary purpose." The principal judgment was given by Ritchie, C.J., concurred in by Strong, J., and Fournier, J.; Henry and Taschereau, JJ., gave written opinions agreeing also with the Chief Justice.

Des Barres v. *White* (1842), 1 Kerr (3 N.B.) 595, is (14 Can. S.C.R. at p. 586) referred to and quoted by Ritchie, C.J., with approval, wherein it was said that the presumption is that the owner remains in possession of that which is not actually in possession of others until proof be given of acts of possession by the defendant. It is sufficient for the plaintiff, as owner of the fee, to shew that the land continued in its natural state, and unenclosed, within 20 years before action. Ritchie, C.J. (14 Can. S.C.R. at pp. 587, 588), quotes from that case some observations which are applicable to the present, where Parker, J., afterwards Chief Justice, says:—

"It is impossible not to perceive the different manner in which the rights of an owner of wilderness land are affected by a person entering, enclosing, and actually cultivating, who stands there in fact openly and notoriously excluding the owner from the possession, and against whom, as it was ably argued, he may immediately proceed to a legal adjudication of his title; and by another who enters, cuts down the trees here and there, taking them off the land for the purpose of using them, and often without the knowledge at the time of the owner, who may indeed remain in ignorance of the person by whom these acts are committed, and who cannot well be prepared to meet evidence of such acts, when they are brought forward as proofs of an adverse possession. If every intendment is to be made in favour of the lawful owner, in order to protect right and suppress wrong, why should the act of cutting

ONT.
S. C.
McLEOD
v.
McRAE.
Clute, J.

down a tree, and taking it away, be intended as an act of possession of the land? The intent to occupy the land is not indicated by that act; in general, no such intent accompanies it. It is the commission of a wrong, not the exercise of a right; and on what principle would you extend benefit to the wrong-doer, beyond the necessary consequence of the act? He may continue such acts for years, and yet never think of possessing himself of the land."

In the same case, Ritchie, C.J. (14 Can. S.C.R. at pp. 588, 589), quotes Carter, J., afterwards Chief Justice, as follows:—

"Now in the absence of any other evidence, what inference is to be drawn from the mere fact of a person going on the land of another, and cutting down a few trees, and carrying them away for firewood? Surely not that he intends to take possession of the land on which the trees grew, but that he intends merely to get the wood for his own purposes. Suppose he does this repeatedly, and that he ultimately cuts down all the trees, when is it that he can be said to manifest an intention to take possession of the land itself? Granting however that repeated acts of trespass of such a nature on land may constitute a possession of the land, still it is obvious that such possession cannot be said to commence until after the last act of trespass has been committed, which will make up the amount necessary to constitute such possession. In the case of land under cultivation, suppose a person who has no title takes possession by fencing; that he begins by erecting a small part of the fence, and does not completely fence the whole in until some years have passed; his possession of the whole could hardly be said to commence until the whole of this fence was completed."

Ritchie, C.J. (14 Can. S.C.R. at p. 589), after quoting from the *Des Barres* case, says: "I have cited this case at greater length than I otherwise should have done, because it has ever since been regarded and acted on as enunciating the correct principles in reference to the possession of wilderness lands."

In the Court below in the *Des Barres* case the trial Judge refused even to leave occasional acts of ownership exercised by the defendant to the jury as evidence of possession under the Statute of Limitations. Strong, J., referring to this, says (14 Can. S.C.R. at p. 591): "As I am clearly of opinion, for the reasons already stated by the Chief Justice and which I need not therefore repeat, that these trespasses were no evidence of possession, there is, in my opinion, no alternative but to dismiss the appeal."

The expression "state of nature" in sub-sec. (4) is used in contradistinction to the preceding expression "residing upon or cultivating;" and, unless the patentee of wild land, or some one claiming under him, has resided upon the land or has cultivated it or improved it or actually used it, the 20 years' limitation applies.

Clearing or cultivating by successive trespassers will not avail to shorten this limit: *Stovel* v. *Gregory* (1894), 21 A.R. (Ont.) 137, at pp. 142, 143, and, *per* Burton and Maclennan, JJ.A.: "Merely fencing in a lot without putting it to some actual, continuous use is not sufficient to make the statute run." Osler, J.A., gives no opinion on the question of fencing. Hagarty, C.J.O., was clearly of the opinion that the true construction of sub-sec. (4) of sec. 5 is to provide a limitation of 20 years, unless the grantee, or some one claiming under him, has actually resided upon the land in question or has cultivated it or improved it in some other way; and he did not think that the cutting of timber by trespassers could affect the rights given by this section, but the point as to fencing was more doubtful. He says: "I do not wish to give a definite opinion upon that point, though, as at present advised, I am against the defendant on that point also." Burton, J.A., says that the expression "state of nature" is used in contradistinction to "residing upon or cultivating." He was also of the opinion that to acquire title by possession it is not sufficient merely to fence the land; some actual use and occupation of the fenced-in portion must be shewn in addition; and isolated trespasses are not sufficient to cut out the title of the true owner.

The lands in question are separated from the south portion of the lot by what is called the Montreal road, and the evidence clearly establishes that during the lifetime of the patentee this portion north of the road was preserved in a state of nature. The southerly 125 acres was the portion of lot 9 partly cleared and occupied by the grandfather. His devisee, Farquhar McRae, never took possession by residing upon or by cultivating any portion thereof, as required by sub-sec. (4) of sec. 5; neither did the plaintiff before he left Canada; and, unless the occupation by the grandfather of the portion south of the road can be regarded as an occupation also of the portion north of the road, then it is clear the lands fall within sub-sec. (4); and in that case, from the evidence, it is quite clear that there was no such possession by the

ONT.
S. C.
McLEOD
v.
McRAE.
Clute, J.

defendant for over 20 years as would make out a title by possession and deprive the plaintiff of his land.

It appears from the abstract of title furnished by counsel on both sides that Colin McRae, the plaintiff's grandfather, received his deed of bargain and sale on the 21st March, 1843, as one parcel, and having settled upon a portion of this lot and occupied the whole as a farm, it is clear, in my opinion, that the 20 years' limit has no application to this case.

Assuming that the facts do not bring the case within sub-sec. (4) of sec. 5, the question remains: Has the defendant made out a title by 10 years' possession? The acts of ownership and care of the property, said to have been done and exercised by the defendant, are more consistent, regarding him as an honest man, and having regard to his relationship and position *in loco parentis* towards the plaintiff, with his intention to take charge and care of the premises for the plaintiff than to acquire title to the property; the plaintiff, having been brought up from infancy in the defendant's house, had worked for him without wages from the time he was 14 years of age until he was 24 years old; and, when the plaintiff returned after his long absence, and spoke to the defendant as to the land, he seemed at first to recognise the plaintiff's right, and the only ground he could suggest for saying that the land in question was his (the defendant's) was, that he had paid the taxes and that there was a small balance due him over and above the amount sent by the plaintiff.

None of the alleged acts of ownership, nor all of them together, are, in my opinion, sufficient.

The fencing was partial only, and not done with the object of taking possession, but to protect the pasture for a few months in summer, and it was not effective for that. For the rest of the year the lands were wholly vacant, except for occasional acts of trespass in taking some wood and timber.

In *Reynolds* v. *Trivett* (1904), 7 O.L.R. 623, it is said that "the building of the fence was of no significance as an act of ownership." It was also further held that cutting and removing wood and pasturing cattle, being intermittent and isolated acts, were merely acts of trespass, and insufficient to constitute possession of the kind required by the statute to bar the true owner.

In *Re Hewitt* (1912), 3 O.W.N. 902, 3 D.L.R. 156, Middleton, J.,

did not give effect to the fact that the land had been fenced for 30 years, and that the claimant had for 20 years off and on stored lumber and other stuff thereon; even when supplemented by a further statement that some material remained there continuously. There must, he said, be "actual, constant, and visible occupation;" although he held in *Campeau* v. *May* (1911), 2 O.W.N. 1420, that the statutory period was 10 years and that the land had been enclosed for that length of time.

In *Coffin* v. *North American Land Co.* (1891), 21 O.R. 80, it was held that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him. The acts done in the winter did not constitute an occupation of the property to the exclusion of the rights of the true owners, but were mere acts of trespass, covering necessarily but a very short portion of the winter, and, as the possession must be taken to have been vacant for the remainder of it, the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff: *per* Street, J.

It is clear that isolated acts of trespass by one man will not bar the true owner: *Allison* v. *Rednor* (1857), 14 U.C.Q.B. 459; see Armour on Titles, 3rd ed., p. 303 *et seq.*, and cases there cited, on the question of successive trespassers.

The cases first above quoted are as applicable to a 10 years' possession as to a 20 years' possession, where, as here, the defendant's claim is without colour of legal title.

In *Harris* v. *Mudie* (1882), 7 A.R. (Ont.) 414, it was held, that "the doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of, by fencing or cultivating, for the requisite period."

Burton, J.A., points out, at p. 421, that the rule "has always been to construe the Statutes of Limitations in the very strictest manner where it is shewn that the person invoking their aid is a mere trespasser, having no colour of title, and such a construction commends itself to one's sense of right. They were never in fact intended as a means of acquiring title, or as an encouragement to

ONT.
S. C.
McLEOD
v.
McRAE.
Clute, J.

dishonest people to enter on the land of others with a view to deprive them of it. See the remarks of the late very learned Chief Justice Robinson in *Doe dem. Shepherd* v. *Bayley* (1853), 10 U.C.Q.B. 310, 318; and *Doe Beckett* v. *Nightingale* (1849), 5 U.C.Q.B. 518. See also the observations of Kindersley, V.-C., in *Edmunds* v. *Waugh* (1866), L.R. 1 Eq. 418, 421."

The learned Judge (Burton, J.A., in 7 A.R. at p. 425) comments adversely on the case of *Davis* v. *Henderson* (1869), 29 U.C.Q.B. 344; and, while he does not quarrel with the decision, he takes exception to the generality of the language of one of the Judges. He also refers (p. 427) to *Mulholland* v. *Conklin* (1872), 22 U.C.C.P. 372, 376, where the language is broad enough to include the case of a mere trespasser. That was a case, however, in which the claimant was not a mere trespasser, but entered under an agreement to purchase.

At p. 427, Burton, J.A., says: "There ought, I think, to be no difficulty in confining a mere trespasser to the portions from which he excludes the true owner by his actual residence or occupation;" and at the close of his judgment (p. 430) he expresses his approval of the able and exhaustive judgment of Mr. Justice Armour in the case of *Shepherdson* v. *McCullough*, 46 U.C.Q.B. 573, and concurs in the opinion therein expressed "that the possession of a wrong-doer is not to be extended by any implication or constructive possession beyond the limits of his actual occupation," and refers to *Clark* v. *Elphinstone* (1880), 6 App. Cas. 164.

In *Wood* v. *LeBlanc* (1904), 34 Can. S.C.R. 627, the distinction is again pointed out between land claimed under colour of title and land claimed under a succession of trespasses. In the former case possession of part of the land under colour of title is constructive possession of the whole, which may ripen into an indefeasible title, if open, exclusive, and continuous for the whole statutory period. Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land continuously or at intervals, during any portion of such period.

Davies, J. (at p. 634), refers to *Sherren* v. *Pearson*, *supra*, and says that in that case Chief Justice Ritchie formally approved of the law as laid down in *Doe d. Des Barres* v. *White*, *supra*, and went on to say: "To enable the (trespasser) to recover he must shew an

actual possession, an occupation exclusive, continuous, open or visible, and notorious for 20 years. It must not be equivocal, occasional, or for a special or temporary purpose." And in another place he says: "The trespasser to gain title must, as it were, 'keep his flag flying over the land he claims.'"

Davies, J., after referring to the judgment of Henry, J., in *Sherren* v. *Pearson*, says (34 Can. S.C.R. at p. 635):—

"Now, in my judgment, the possession necessary under a colourable title to *oust* the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed *but only when and while there is that part occupation.*"

Killam, J., after a review of the cases, expressed his opinion at p. 647:—

"That the person relying upon this doctrine must enter under a real, *bonâ fide*, belief of title; that, while in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title; and that, in such cases, a jury is warranted in treating the party as in no better position than a mere trespasser, acquiring no possession of any land which he does not take into his actual and effective occupation."

The *Coffin* case was distinguished in *Piper* v. *Stevenson* (1913), 28 O.L.R. 379, 385, 12 D.L.R. 820. In that case there was an actual, continuous occupation in one enclosure, including the land in question.

Applying these authorities to the present case, I am satisfied there has been no such open, exclusive, and continuous possession for 10 years as to give the defendant a right to this land as against the plaintiff.

Mr. Holman also invoked the doctrine applicable to a bailiff or guardian in possession of property, and referred to *Morgan* v. *Morgan*, (1737) 1 Atk. 489; 26 E.R. 310, *Howard* v. *Earl of Shrewsbury*, L.R. 17 Eq. 378, at pp. 397-401; *Wall* v. *Stanwick*, 34 Ch. D. 763.

In *Morgan* v. *Morgan*, 1 Atk. at p. 489, the Lord Chancellor (Hardwicke) lays it down that: "Where any person, whether a

ONT.
S. C.
McLEOD.
v.
McRAE.
Clute, J.

father or a stranger, enters upon the estate of an infant, and continues the possession, this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined."

This principle was considered and applied in *Howard* v. *Earl of Shrewsbury* (1874), L.R. 17 Eq. 378 at p. 398, by Sir George Jessel, M.R. He refers to the decision of Lord Romilly in *Crowther* v. *Crowther* (1857), 23 Beav. 305, 309, 53 E.R. 120 at 121, where he says: "This Court will not allow an infant to be turned out of possession of an estate without legal process, and accordingly the cases cited are all instances of a person intruding on an infant in possession, either by himself or his guardian or bailiff; but if it is admitted that the infant never was in possession or in the enjoyment of the property, either by himself or his guardian, he stands in the same situation as any other person, and must first establish his legal title."

The Master of the Rolls declares that "that is not a correct statement of the law," and, after referring to *Morgan* v. *Morgan*, above quoted, and other cases, says (p. 401): "The result therefore is, adopting the language of Lord Hardwicke, that an infant is entitled to treat a stranger who takes possession of his estate as his 'bailiff' or agent, to get, if he likes, from him an account of the rents and profits, and a decree *for possession*."

The question is further considered in *Wall* v. *Stanwick* (1887), 34 Ch. D. 763, where it was held, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, or by leave of her children, or as a trespasser, and was therefore a trustee and liable to account. Kekewich, J., after referring to *Howard* v. *Earl of Shrewsbury* and other cases says (p. 767): "Such a bailiff occupies a fiduciary position, so that he may properly be styled a trustee, as a testamentary guardian may be (see *Mathew* v. *Brise* (1851), 14 Beav. 341, 51 E.R. 317, where the Statute of Limitations was held inapplicable on this ground)." Kekewich, J., further says (p. 768): "In *Thomas* v. *Thomas* (1855), 2 K. & J. 79, 69 E.R. 701, . . . Vice-Chancellor Wood distinctly held that where a man had entered as guardian (meaning bailiff), the Court would never allow him to set up any other title to the estate."

See also *Blomfield* v. *Eyre* (1845), 8 Beav. 250, 50 E.R. 99,

where it was held: "An infant is entitled to treat a person who enters on his estate during his infancy as his bailiff, who is accountable as such," and "The jurisdiction which this Court has, to decree accounts of the estates of infants, against persons entering thereon during their minority, is not taken away by the fact, that at the time when the bill was filed the infant had attained 21."

In *Mathew* v. *Brise*, 14 Beav. 341, it was held: "A testamentary guardian is a trustee, and therefore the Statute of Limitations is inapplicable to accounts as between him and his ward." And Sir John Romilly, M.R., at p. 345, said, "that of all the property which he gets into his possession in the character of guardian, he is trustee for the benefit of the infant ward."

In *Hickey* v. *Stover* (1885), 11 O.R. 106, it was held, "that J. L. having been appointed by the Surrogate Court guardian of her son, T.L., she thereby became an express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet that the guardianship ended and the trust ceased with T. L.'s minority, and as after that J.L. dealt with the land in question as her own for some 22 years, she had acquired a good title to it by possession as against T. L."

Hickey v. *Stover* was followed in *Clarke* v. *Macdonell* (1891), 20 O.R. 564. In that case, Mary Kelly, the mother, was appointed guardian of her son David Kelly, to whom the lands had been devised. It was contended that the Statute of Limitations began to run against David Kelly immediately upon his attaining his majority. Armour, C.J., said (p. 568): "But I do not think so. He was, and continued to be, in possession of the lands in question until his death, for his guardian's possession was his possession, and his guardian was no more than a caretaker for him, and although her authority as guardian ceased when he attained his majority, yet, as she was in possession as his guardian at the time he attained his majority, she must be taken to have continued in possession in the same character unless something was done to change the character of her possession; and no such change was proved; and her possession continued to be his possession as it was before he attained his majority." He referred to *In re Taylor* (1881), 28 Gr. 640, as distinguishable, for there it was a stranger. The judgment of Armour, C.J., was, however, reversed by a Divisional Court: see pp. 570 to 573.

ONT.
S. C.
McLEOD.
v.
McRAE.
Clute, J.

In *Kent* v. *Kent* (1891), 20 O.R. 445, referring to cases cited, including *Wall* v. *Stanwick, supra, Thomas* v. *Thomas, supra, In re Hobbs* (1887), 36 Ch. D. 553, and *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437, Armour, C.J., and Street, J., sitting as a Divisional Court, declined to follow *Hickey* v. *Stover* and *Clarke* v. *Macdonell*, and reversed upon this point the judgment of Boyd, C., in *Kent* v. *Kent* (1890), 20 O.R. 158.

Armour, C.J., said (20 O.R. at p. 463) that the cases to which he referred "establish the principle that if a person as bailiff, servant, agent, attorney, caretaker, guardian (whether natural or statutory) or in any other fiduciary character, enters into the possession of lands, or into the receipt of the rents and profits thereof, for and on behalf of the owner, the possession or receipt of such person is the possession or receipt of the owner and of those claiming under him; and the possession or receipt of such person, so long as he continues in such possession or receipt, is to be ascribed to the character under which he entered into such possession or receipt, and he cannot denude or divest himself of such character except by going out of such possession or receipt and delivering up such possession or receipt to the owner or to those claiming under him. There are two cases, however, opposed to the principle so laid down: *Hickey* v. *Stover*, 11 O.R. 106, a decision of the Chancery Divisional Court; and *Clarke* v. *Macdonell*, a decision of the Common Pleas Divisional Court. The former case was decided before the decisions in *Wall* v. *Stanwick*, *In re Hobbs*, and *Lyell* v. *Kennedy*, and the latter after them. These cases were wrongly decided if the cases to which I have referred were rightly decided, and I am of opinion that they were."

This decision was affirmed by the Court of Appeal: *Kent* v. *Kent* (1892), 19 A.R. (Ont.) 352. Osler, J.A., said (p. 360): "Upon the other point argued, viz., the effect of the Statute of Limitations, I have nothing to add to what has been said in the Court below. The authorities referred to appear to me fully to support the conclusion that the Statute of Limitations forms no bar to the action." Maclennan, J.A. (p. 371), also agreed with the Judges of the Divisional Court on the question of the Statute of Limitations. Hagarty, C.J.O., concurred. Burton, J.A., dissenting, expressed no opinion upon this question.

In *Fry and Moore* v. *Speare* (1915), 34 O.L.R. 632, 26 D.L.R. 796, affirmed (1916) 36 O.L.R. 301, 30 D.L.R. 723, it was held by

Meredith, C.J.C.P., that there is no irrebuttable presumption that the parent in possession holds as "bailiff" in respect to the share of the child out of possession. The question is one of fact, though ordinarily the finding should be that the possession of the parent is that of the child.

Sir William Meredith, C.J.O., in appeal (36 O.L.R. at pp. 304, 305, 30 D.L.R. at p. 726), accepts as a correct statement of the law the observation of Sir Samuel Walker, C., in *In re Maguire and McClelland's Contract*, [1907] 1 I.R. 393, that the cases shew that the relationship of principal and agent will be dissolved by circumstances; the attaining of twenty-one years of age by the children is not enough in itself to dissolve the relationship, provided there is no break. The Chief Justice of Ontario also pointed out (p. 305) that in the *Fry* case the judgment could be supported on another ground, viz., that the right to treat the respondent as bailiff rested upon equitable principles, and, in the circumstances of the case, the plaintiffs were precluded by their acts and conduct from invoking the equitable doctrine upon which they relied.

The facts in the *Fry* case shewed a clear break in the relationship of guardian and bailiff. The whole family left the premises and went to the States, and after some time the stepmother left her stepchildren with their grandmother at Dubuque, and returned with her husband and her own child and retook possession; and it was held that this circumstance made a break which terminated her position of bailiff, and the statute then began to run and ripened her title into a title by possession. And, in the light of the facts in that case, it clearly supports the principle of law here rested on, and declares that the possession of the stepmother after her first husband's death, as bailiff for her children, under which the statute would not run, cannot be denied; but that relationship came to an end when she returned to Canada, leaving there all the children except her own daughter, and re-entered into possession.

After Farquhar's death, the defendant did not do anything to cause a break in their relationship up to the time he sold the land for right of way to the Canadian Northern Railway Company.

The defendant is asked by his own counsel:—

"Q. Was there any change after Farquhar's death in the method of using the property? A. Not a bit, just went on the same. (The plaintiff had no cattle.)

ONT.

S. C.

MCLEOD v. MCRAE.

Clute, J.

"Q. During the five years after Farquhar's death was there any kind of change in the way of using the property? A. No, I can't say there was any change—just acted just the same.

"Q. Just the same—turned your cattle into it just the same? A. Yes.

"Q. Did the plaintiff at any time ever even assume to run things about there at all? A. No, sir, not much.

"Q. Did he ever have anything to do with the management of the farm? A. Nothing at all.

"Q. You say he was at no time in possession of the lot? A. No, sir.

"Q. Did he go after the cattle sometimes? A. Yes.

"Q. Just as if he were your son? A. Yes."

Being notified by John S. Cameron, his co-executor, the defendant paid the legacies in 1879 after the plaintiff had left. He had in his hands more than sufficient to pay them.

Referring to the time after the plaintiff left, the defendant was asked:—

"Q. How have you used the property? A. I just used it as we always did. We cut a piece of wood towards the Montreal road.

"Q. What have you done with the bush on this property? A. We have taken stuff all over it, what we needed—dry stuff or anything like that; and we preserved the other pretty good; not cutting it or slashing it or wasting it.

His Lordship: "Q. You used the bush to the best advantage in taking out what you wanted, timber and so, sparing the green trees? A. Yes."

In my opinion, the present case should be treated in the same way as one between father and son, as the defendant was undoubtedly *in loco parentis* to the plaintiff until he in fact left Canada. See Simpson's Law of Infants, 3rd ed., pp. 99-101. Also see the late case of *McMahon* v. *Hastings*, [1913] 1 I.R. 395, following *Quinton* v. *Frith* (1868), I.R. 2 Eq. 396. It was held in the *McMahon* case that a person entering upon an infant's estate, with notice of the infant's rights, becomes his bailiff, and he continues to be such bailiff, notwithstanding the infant's coming of age, until the relationship is dissolved by some other circumstance or combination of circumstances. A demand of possession by an infant would be such a circumstance.

When once it is shewn that possession is taken by a person as bailiff, he continues to hold possession in the same character unless something is done to change the character of his possession.

In *Tinker* v. *Rodwell* (1893), 69 L.T. 591, an infant 12 years of age became entitled in 1840. His father entered into possession and so remained until his death in 1866. The father's widow then entered into possession. The infant attained the age of 21 years in 1857. The action was not brought until 1893. Romer, J., held that the plaintiff was not barred by the Statute of Limitations; he limited the account of rents to six years from the date of the writ. He refers to *Thomas* v. *Thomas*, 2 K. & J. 79, 69 E.R. 701 and points out that there is an error in the head-note in that case, which is so framed as to lead to the supposition that the Vice-Chancellor had decided that the Statute of Limitations would run as of course in favour of the father as from the date of the son attaining 21, and says (p. 592): "But the Vice-Chancellor decided no such thing. . . . The Vice-Chancellor's opinion . . . was that, if the father retained possession after his child attained 21, his possession continued to be as guardian of his child, and this is made free from all doubt by his express decision on the point at p. 86, where he held that in the case before him the father remained in possession as guardian until his death, which was nearly sixteen years after the son attained 21 (see pp. 80 and 81). And I think that this view is one which, in the interests of justice, ought to be rigidly upheld as between father and son." And he refers to *Wall* v. *Stanwick* and *In re Hobbs*, above cited.

I am of opinion that the defendant's claim by possession fails.

I am also of opinion, having regard to the circumstances of the case, that the defendant's position was that of bailiff of the plaintiff in respect of the premises, and that such relationship was not changed at least until the 15th July, 1908, when the defendant conveyed $3\frac{4.6}{10}$ acres to the Canadian Northern Railway Company, and received $346 therefor.

This may have amounted to a repudiation of his position as bailiff, and so constituted a break, so that the statute would begin to run. This it is unnecessary to decide, as it is in any event ineffective from lack of time to complete title by possession. The statute could never in fact until then have commenced to run against the plaintiff, and the case falls within the principles enunci-

ONT.

S. C.

McLEOD v. McRAE.

Clute, J.

ated by Armour, C.J., and approved by the Court of Appeal in *Kent* v. *Kent*.

In the present case the defendant, according to his own evidence, continued the use of the property as had been done during the life of Farquhar and until the plaintiff left. Up to that time, during the infancy of the plaintiff, he stood *in loco parentis* to the plaintiff; it was by virtue of that position and the residence of the plaintiff with him that he enjoyed the use of the property to the extent that he did; he never pretended at any time, to the knowledge of the plaintiff, to have changed his position in regard to the property, and his conversation with the plaintiff on his return confirms the view that he treated the property as belonging to the plaintiff.

Since the above was written I have had the opportunity of reading the judgment of Meredith, C.J.O., in *Taylor* v. *Davies*, not yet reported,* in which he points out the cases in which a constructive trustee has for the purpose of the Statute of Limitations been held to stand in the same situation as an express trustee. These cases are classified by Bowen, L.J., in *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, 396, 397.

The judgment given at the trial should be reversed, and judgment entered for possession for the plaintiff, with costs of the action and of this appeal.

Mulock, C.J.Ex.

MULOCK, C.J.Ex.:—I have read the able and exhaustive judgment of my brother Clute, and agree in the result which he has reached. I do not think the acts relied upon by the defendant were such as to give him a title to the land under the Statute of Limitations. Those acts are: payment of taxes, fencing, cutting and removing timber from and pasturing cattle on the lands in question. In order to acquire title under the statute, open, visible, and continuous possession is necessary. The cutting and removal of timber and the pasturing of cattle in this case were but intermittent acts of trespass and do not constitute possession as against the true owner. As each act of trespass ceased, the possession *quoad* the defendant became vacant, and the law presumes that the real owner then resumed possession. Thus, even if such acts

*Now reported, (1917) 41 D.L.R. 510, 41 O.L.R. 403.

constituted possession, the Statute of Limitations ceased to run at the moment when each act of trespass ceased, and therefore there was no continuous possession.

As to the fencing, only three sides of the land were fenced, and none of it by the defendant, but by neighbours for the purpose of fencing in their own lands. The fourth side bordered on the Ottawa river, and was unfenced. Mere fencing, or payment of taxes, unaccompanied by actual, visible, and continuous possession, could not give a title.

For these reasons, I am of opinion that the defendant did not acquire title under the statute, and the appeal should be allowed with costs here and below.

Riddell, J.
Sutherland, J.

RIDDELL and SUTHERLAND, JJ., agreed with CLUTE, J.

Ferguson, J.A

FERGUSON, J.A.:—I cannot agree in the argument of counsel for the plaintiff that the defendant may, in the circumstances of this case, be considered as having at any time held possession under colour of right, either as bailiff for or as a person standing *in loco parentis* to the plaintiff.

In my opinion, the acts of entry made during the infancy of the plaintiff were in their nature and effect wasteful, and not such as to justify us, even with the assistance of the presumption referred to in the cases, in finding that these acts were entries made with the intention or for the purpose of benefiting or protecting the infant's property: see *Fry and Moore* v. *Speare*, 34 O.L.R. 63, 26 D.L.R. 796, 36 O.L.R. 301, 30 D.L.R. 723. Where, however, intention cannot be found as a fact but fiduciary relationship is imposed simply by construction or operation of law only. See *Taylor* v. *Davies*, 41 D.L.R. 510, 41 O.L.R. 493.

There is no doubt that the defendant, while the plaintiff was an infant and after he became of age, with his knowledge and acquiescence, did enter upon the lands in question and cut timber and firewood and pasture his cattle. In my opinion, such entries should, however, in their effect, be limited to the purposes for which they were made and not be treated as entries made or permitted for the purpose or with the effect of putting the defendant in possession of the whole property. If such be their legal effect, then in my opinion the subsequent entries made without knowledge were mere acts of trespass; and, for the reasons given by my brother Clute, I agree with him that these trespass entries, coupled

ONT.

S. C.

McLEOD v. McRAE.

Ferguson, J.A.

with the subsequent acts, use and occupation, sworn to on behalf of the defendant, do not make out that open, exclusive, and continuous possession necessary under the authorities cited to extinguish, in favour of a trespasser, the plaintiff's paper title.

I would allow the appeal with costs.

Appeal allowed.

SASK.

C. A.

EDGAR v. BAHRS and CHAPMAN.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

SALE (§ I A—11)—PURCHASE OF COLT—PROPERTY IN NOT TO PASS TILL NOTE PAID—DEATH OF COLT—AGREEMENT AVOIDED—PROMISSORY NOTE—TRANSFER TO THIRD PARTIES WITHOUT NOTICE—RIGHTS OF PARTIES.

The defendants having purchased a colt at an auction sale, gave therefor the following document, dated March 21, 1917:—"November 1st, 1917, after date, for value received we promise to pay David Ebel or order, the sum of one hundred fifty-one xx/100 dollars, at the Standard Bank of Canada, Prussia, Sask., with interest at 10 per cent. per annum until due, and 12 per cent. per annum after due until paid. Given for one roan colt, 2 years old, white star on forehead. The title, ownership and right to possession of the property for which this note is given shall remain in until this note or any renewal or renewals thereof, together with all interest, is fully paid; and if we make default in payment of this note or any renewal or renewals thereof or any other note in his favour, or should we sell or dispose of, or mortgage our landed property, or if he should consider this note insecure (of which he shall be sole judge) he has full power to declare this note and any renewal or renewals thereof, and all other notes made by us in his favour, due and payable forthwith and may immediately take possession of the said property and hold it until such notes are paid, or sell the said property at public or private sale, the proceeds thereof to be applied in reducing the amount with interest unpaid thereon, and the holder hereof, notwithstanding such taking possession or sale, shall have thereafter the right to proceed against us and recover, and we hereby agree to pay the balance and interest then found to be due thereon, and we hereby as to this date waive all and any right to exemption from seizure and sale under execution of any lands or goods." The court held on the evidence and the circumstances of the case that the agreement between the parties was that the property in the colt should remain in the vendor until the note was paid, and being in the vendor when the colt died, the agreement to buy as between the parties was avoided by s. 9 of the Sale of Goods Act. But the document being a promissory note and the transfer being sufficiently endorsed to the plaintiff under s. 63 of the Bills of Exchange Act, and having been taken by the plaintiff in good faith for value before maturity, and without notice of existing equities, the plaintiff holds the note freed from such equities and can recover against the defendant.

[*Robert Bell Engine & Thresher Co.* v. *Topolo*, 32 D.L.R. 77, 9 S.L.R. 384; *Richards* v. *Frankum*, 9 C. & P. 220, considered.]

Statement.

APPEAL from the trial judgment in an action to recover the purchase-price of a colt, sold under an agreement subsequently transferred by the vendor to a third party, for value. Affirmed.

P. H. Gordon, for appellants; *C. M. Johnston*, for respondent.

The judgment of the court was delivered by

LAMONT, J.A.:—The facts of this case are as follows: On March 21, 1917, one David Ebel held an auction sale at which the defendants bought a colt and gave therefor the following document (see headnote).

The defendant Bahrs started home with the colt, but when he was a quarter-of-a-mile from Ebel's place the colt dropped dead, without negligence—so far as the evidence shews—on the part of either of the defendants. Ebel registered the document as a lien note, and afterwards, but before maturity thereof, transferred it to the plaintiff and endorsed on the back of the document the following:—

> For value received I hereby transfer the within note and all my right, title and interest in the goods and chattels for which the said note was given, unto J. G. Edgar. D. EBEL.

The defendants failing to pay the price of the colt, the plaintiff brought this action.

The defendants dispute liability, on the ground that as the property in the colt was, at the time of its death, in the vendor, and as there was no agreement that the colt should be at the defendants' risk, the loss must fall upon the person having the property in the colt.

The District Court Judge, before whom the matter came, gave judgment for the plaintiff. From that judgment, this appeal is brought.

Two questions present themselves for determination: (1) Did the risk of loss remain with the vendor, and (2) If so, is the plaintiff in a better position than the vendor as regards collecting from the defendants?

The document in question does not shew any agreement that the property in the colt should remain in the vendor. This, however, is not conclusive; there is other evidence upon the point. David Ebel testified that the document was supposed to be a joint promissory lien note, and that it was registered.

In their defence, the defendants allege that the property in the colt was to remain in the vendor until the note, or agreement in writing, was paid in full. The plaintiff does not deny the correctness of this allegation, but in reply thereto, sets up that the death of the colt was due to the negligence of the defendants.

The above evidence and circumstances, in my opinion, sufficiently establish that the agreement between Ebel and the

SASK.

C. A.

EDGAR v. BAHRS AND CHAPMAN.

Lamont, J.A.

defendants at the time of the sale was that the property in the colt should remain in the vendor until the note was paid. The property in the colt being in the vendor when it died, without fault on the part of the purchaser, on whom does the loss fall?

S. 9 of the Sale of Goods Act reads as follows:—

9. Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer the agreement is thereby avoided.

Unless, therefore, the risk passed to the defendants when the colt died, the agreement to buy was at an end.

S. 22 of the Act deals with the passing of the risk. It is as follows:—

22. Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not:

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault;

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Under this section the risk *primâ facie* follows the property. The language, however, imports that the ownership and the risk are severable. The property in the article sold may be retained in the vendor while the risk passes to the purchaser, and this will be the position where the parties so agree, but not otherwise. That is why the great majority of vendors in selling articles on lien notes take care to use forms which provide that the risk is to be that of the purchaser. Unfortunately for the vendor in this case, the form used did not contain any agreement to that effect. The defendants not having agreed to assume the risk of loss, and the vendor having retained the property in the colt in himself, and the animal having died before the defendants were in default under the agreement, and without fault on their part, the risk was in the vendor and he must bear the loss, as, under s. 9 above quoted, the agreement to buy was avoided.

The vendor not being in a position to collect from the defendants, is the plaintiff in any better position?

This depends, in my opinion, upon two considerations: (1) Is the document sued on a promissory note, and (2) If so, does the writing on the back transferring it to the plaintiff constitute it an

endorsement by Ebel within the meaning of the Bills of Exchange Act, or is it merely an assignment of Ebel's interest?

In my opinion the document is a promissory note.

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of a specified person or to bearer.—Bills of Exchange Act, R.S.C. c. 119, s. 176.

The document in question complies with that definition. To the unconditional promise to pay, which it contains, the parties intended to add an agreement by which the property in the colt was to remain in the vendor, and that, upon default by the defendants, the vendor could take possession of it and deal with it, but, by omitting to fill in the blanks in the printed form, they did not carry out their intention, and no claim has been made to have the document rectified. Under these circumstances, the court must give effect to the document as the parties left it, and not as they intended it should be.

A somewhat similar document was considered by the court *en banc* in *Robert Bell Engine & Thresher Co.* v. *Topolo*, (1916) 32 D.L.R. 77, 9 S.L.R. 384. It was held to be a promissory note, and, therefore, negotiable by endorsement.

The document in question being a promissory note, is the transfer endorsed on the back thereof an endorsement within the Bills of Exchange Act, or is it merely an assignment of Ebel's interest therein? The difference between the two, so far as the plaintiff is concerned, is this: If it is an endorsement under the Act, he, having taken the note in good faith for value before maturity and without notice that the risk of loss was in Ebel, can hold the note freed from any equities existing between Ebel and the defendants; whereas, if the writing constitutes simply an assignment of Ebel's interest, the plaintiff holds it subject to these equities, and, therefore, cannot succeed as against the defendants.

S. 63 of the Act is as follows:—

63. The simple signature of the endorser on the bill without additional words is a sufficient endorsement.

This is the usual way of endorsing notes. Such signature, with delivery, imports the assignment or transfer of the note to bearer, and also that, if the note is dishonoured, the endorser on receiving due notice thereof will indemnify the bearer. Falconbridge, 2nd ed. 593.

SASK.

C. A.

EDGAR v. BAHRS AND CHAPMAN.

Lamont, J.A.

In *Richards* v. *Frankum*, (1840) 9 C. & P. 221, the note was endorsed as follows, p. 225:—

> I hereby assign this draft and all benefit of the money secured thereby to J. G. of etc. . . . and order the within named T. F. H. (the maker of the note) to pay him the amount thereof and all interest in respect thereof.

Baron Gurney, in reference to this endorsement, said:—

> It amounts to nothing more than an ordinary endorsement of the note, but it is in a very elaborate form.

It will be observed that the endorsement in that case goes further than the one in the present case, for it contains an order to pay in addition to the words of assignment.

The author of Chalmers on Bills of Exchange, however, does not seem to consider that the order to pay in that case was necessary, for, at p. 108 of his book, 6th ed., he gives as an illustration of a valid endorsement the following:—

> I hereby assign this draft and all money secured thereby to D.

and cites as authority therefor the case above mentioned.

In 8 Corpus Juris 354, the author states the law as follows:—

> The general rule is, that a writing on the back of a bill or note with the intention of transferring title is an endorsement, although it is in terms an assignment, and that it makes the transferor liable as transferee and confers title on the transferee free from antecedent equities.

He then points out that in certain of the United States such an assignment is not considered as an endorsement.

Mr. Daniel in his book on Negotiable Instruments, 5th ed., at pp. 650-1, after referring to the conflict of authority on this point in the various States of the Union, arrives at the conclusion that, as the mere signature of the payee on the back of the note imports an executed contract of assignment with its implications and also an executory contract of conditional liability with its implications, words of assignment written above the signature, which are no more than a statement of the rights which would belong to the endorsee by virtue of the signature itself, should not affect the validity of the endorsement.

I am, therefore, of opinion that words of assignment or transfer written above the signature endorsed on a note will not prevent such signature being an endorsement under the Act unless such words, expressly or impliedly, negative some right which would accrue to the endorsee by the signature alone, and then only where the negativing of such right is not provided for in the Act. In the

words written above Ebel's signature on the back of the note I cannot find anything negativing any right which would have passed to the plaintiff had those words not appeared above Ebel's signature. In my opinion, the writing on the back of the note is the valid endorsement thereof by Ebel.

The plaintiff is, therefore, entitled to collect the amount of the note from the defendants. Lamont, J.A.

The appeal should be dismissed with costs, but the judgment below should be varied so as to give plaintiff his costs of action.

Appeal dismissed.

DOWSON v. TORONTO and YORK RADIAL R. Co.

Ontario Supreme Court, Appellate Division, Maclaren and Magee, JJ.A., Kelly, J., and Ferguson, J.A. May 17, 1918.

TRIAL (§ V C—280)—JUDGE'S CHARGE—POINT NOT MADE CLEAR TO JURY—RECONSIDERATION—SUBSTITUTED ANSWER—JUDGMENT.

When it appears to the trial judge from the answers brought in by the jury that a point has not been made clear to them, the judge may further instruct the jury and send them back to reconsider their answer to one of the questions, and upon the return of the jury with a substituted answer to such question may properly receive and act on the substituted answer.

Statement. AN appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiffs, for the recovery of $2,901.55 and costs in an action for damages for personal injuries sustained by the plaintiff G. G. Dowson in alighting from a car of the defendants at the corner of Heath and Yonge streets, in the city of Toronto, by reason, as the plaintiffs alleged, of the negligence of the defendants' servants in charge of the car, and for moneys necessarily expended and loss suffered by the plaintiff E. C. H. Dowson, husband of the plaintiff G. G. Dowson, in consequence of her injuries. Affirmed.

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

R. H. Parmenter, for respondents.

The judgment of the Court was read by

Ferguson, J.A. FERGUSON, J.A.:—This is an appeal by the defendants from a judgment pronounced by Latchford, J., on the 23rd January, 1918, whereby, on the findings of the jury, judgment was directed to be entered for the plaintiff G. G. Dowson for $2,500 and for the plaintiff E. C. H. Dowson for $401.55 with costs. The plaintiffs are husband and wife.

ONT.

S. C.

DOWSON v. TORONTO AND YORK RADIAL R.W. CO.

Ferguson, J.A.

The action is for damages for injuries sustained by Mrs. G. G. Dowson in alighting from the defendants' street-car on Yonge street, near Heath street. The accident occurred on the 1st November, 1916, about 7 o'clock in the evening, and it is alleged that the accident was caused by the defendants inviting the female plaintiff to alight from their car at a place known to them to be dangerous and unsafe, and where the step of the car was more than 30 inches above the ground; and that the plaintiff, without negligence on her part, in attempting to alight at this place, fell and sustained the injuries complained of.

The grounds of appeal are: that the learned trial Judge erred in not accepting the first answer of the jury to question 2; that the learned trial Judge should not have sent the jury back to reconsider their answer to that question; and that their substituted answer should not have been given effect to by the trial Judge, and should not affect this Court's decision on the appeal.

The result of the appeal turns on the effect to be given to the answers of the jury, and on the propriety of the conduct of the learned trial Judge in asking the jury to explain their first answer to the second question, and instructing them to retire and reconsider it. I quote, therefore, the answers and discussions from pp. 141 to 144 of the evidence:—

At the opening of Court the jury brought in the following answers to the questions:—

1. Was the accident to Mrs. Dowson caused by the negligence of the defendants? A. Yes.

2. If so, in what did such negligence consist? A. In not furnishing proper platform accommodation for the purpose of getting on and off their cars.

3. Could Mrs. Dowson, by the exercise of reasonable care, have avoided the accident? A. No.

4. If so, in what did the want of reasonable care consist? (No answer.)

5. By reason of the accident, what damages were sustained: (*a*) by Mrs. Dowson? A. $2,500. (*b*) By her husband? A. $401.55.

His Lordship: Coming back to your answer to question 2, it may be that I did not make that matter clear to you in my address. You may have forgotten that during Mr. McCarthy's address to

you, when he was dwelling on the point that you have here referred to, I stated to him, and, as I thought, to you, that that was not a matter with which he need concern himself, as the platform, if by platform is meant the little plank construction that has been made across the ditch, was not made by these defendants. It was put there by the City of Toronto; and, if your answer had reference to that, I would ask you to reconsider the matter, because that is not a matter for which these defendants are in any way chargeable, in my view of the case. They have not provided that platform, if by platform you mean the little gangway.

Juror: We took that into consideration, that they had not furnished even footing of any kind, that is, reasonable footing, whether it be a platform or whether it be the ground. We thought if they had furnished, we will say, a space of any kind that was level, we did not consider that they had done that. As we see it, the step projecting——

His Lordship: You have not said so. There was an important issue about that between the plaintiff and the defendants, to which I thought I addressed myself in speaking to you, but you have not made any finding upon that.

Juror: We decided that, had the platform been long enough to extend as far as their step that was on the car, which we found that it did not, that there would not have been any chance for a person to get their foot off the step.

His Lordship: That is quite true, but that is not the point of negligence to which I directed your attention, but rather as to whether it was or was not the fact that that car-step projected as far beyond the existing platform as Mr. Dowson alleged, or whether the step projected only so far as the defendants allege, that is, but from 7 to 9 or 11 inches. That is an important matter, and I should ask you to reconsider these questions, and retire if necessary.

Juror: Their step was longer than any level place to get off the car.

His Lordship: What I should like you to find as nearly as you can is, whether the car-step, when the car was stopped, projected so far that it was dangerous, or whether it merely projected but the short distance which the defendants say it projected.

Juror: Well, we will retire.

ONT.

S. C.

DOWSON v. TORONTO AND YORK RADIAL R.W. CO.

Ferguson, J.A.

His Lordship: Then you have no answer in regard to the height of the step, whether that had anything to do with the matter or not. I direct your attention to that.

The jury retired again at 10.10 a.m.

Mr. Parmenter: Would your Lordship allow me to mention one feature in connection with the step, and that is: Should the jury not be directed, if the defendants stopped at an improper place, or rather they invited Mrs. Dowson to alight at an improper place, that would be negligence?

His Lordship: It is manifest if the car had been stopped with the step directly opposite there could be no negligence on the part of the defendants, unless the height of their step contributed to the injury.

Mr. Parmenter: The railway company claim that they have nothing to do with the platform. I submit, even if that is so, if there is a defective platform they had no right to stop opposite it.

His Lordship: Well, you have that finding for whatever it is worth already.

Mr. Parmenter: It is not a question of furnishing a platform; it is stopping at an improper place.

His Lordship: I understand that. I do not think I shall say anything to them about that.

The jury returned again at 11.45 a.m., with the previous answer to question 2 struck out, and the following answer substituted:—

"We find that the north end of the car-step was sufficiently shot past the north end of the platform to render it positively dangerous to passengers alighting. We also find that the height of the car-steps did not comply with the regulations of the Ontario Railway and Municipal Board, and that those circumstances caused the accident."

His Lordship: Upon your findings I have directed that judgment be entered in favour of the plaintiff G. G. Dowson for $2,500 and in favour of the plaintiff E. C. H. Dowson for $401.55 with costs. Stay of 30 days.

The right of the trial Judge to ask the jury to explain their answer and the effect to be given to an answer by the foreman of the jury, or to an answer made by the jury, without retiring to consider their answer, are discussed in *Lowry* v. *Thompson* (1913),

29 O.L.R. 478, 15 D.L.R. 463; *Gray* v. *Wabash R. Co.* (1916), 35 O.L.R. 510, 28 D.L.R. 244, 20 Can. Ry. Cas. 391 and in *Townsend's Auto Livery* v. *Thornton* (1917), 13 O.W.N. 237; with the result that, in my opinion, the learned trial Judge in the case at bar adopted and followed the course found in *Townsend's Auto Livery* v. *Thornton* to be the proper course.

For these reasons, I think the learned Judge properly accepted and acted upon the substituted answer to question 2, and that it is therefore on the substituted answer that this appeal must be disposed of.

It is admitted that the order of the Ontario Railway and Municipal Board, dated the 25th January, 1909, exhibit 7, referred to in the substituted answer of the jury, has, as against these defendants, the force of a statute. By that order it is directed as follows: "On closed double truck cars the height of the first step above the ground shall be not less than 14 inches nor more than 16 inches." The car in question in this action was a double truck car, and it is conceded that the step was 21 inches above the crossing or platform at which the car purported to stop, and it is further conceded that the step was 33 inches above the ground at the place where the car overshot the crossing or platform and where the female plaintiff alighted.

Mr. McCarthy argued that the statute under which the defendant company operated required it to stop when and where directed by the Corporation of the City of Toronto, and that this stopping place was one fixed by the city corporation under the Act; and that, there being no power given the defendants to erect on the highway a platform for their passengers to alight upon, it was not the defendants' duty, but the city's duty, to see that the proper facilities for passengers to alight were there provided. But the order does not so provide. By force of the statute and order, this duty and obligation is, to my mind, put upon the defendants, and the erection or equipment which it was necessary to provide thereunder was not a platform erected by the city, but a step on the defendants' car, meeting the requirements of the order of the Railway Board, i.e., a step not less than 14 inches nor more than 16 inches above the ground. The defendants did not furnish such a step, and it must have been apparent to the defendants that, without such a step or platform, the place

ONT.

S. C.

DOWSON v. TORONTO AND YORK RADIAL R.W. CO.

Ferguson, J.A.

where it is admitted the injured plaintiff was invited to alight was dangerous. The jury have found both the danger and the neglect to provide the step required by the statute, also that the danger and neglect were the proximate cause of the accident.

The question discussed on the argument as to whether or not the order of the Railway Board was unreasonable or impossible to comply with is not, in my opinion, open for consideration by us.

Appeal dismissed.

QUE.

S. C.

MARCONI WIRELESS TELEGRAPH Co. v. CANADIAN CAR & FOUNDRY Co.

Quebec Superior Court, Bruneau, J. October 25, 1918.

INJUNCTION (§ I M—116)—AGAINST USE OF PATENT—MISCHIEF COMPLAINED OF COMPENSATED BY PECUNIARY SUM—NO PRACTICAL GOOD GAINED BY GRANTING.

The court will not issue an injunction when the mischief complained of can be fully and adequately compensated by a pecuniary sum, or where the granting of the injunction would not do the petitioner any practical good.

Statement.

Injunction to restrain the respondent from making use of any of the petitioner's apparatus for wireless telegraphy, for the purpose of receiving or transmitting messages.

Greenshields & Co., for petitioner.

Davidson, Wainwright & Co., for respondents.

Bruneau, J.

BRUNEAU, J.:—The petitioner company alleges that it is the owner of a patent for improvements in apparatus for wireless telegraphy, issued on February 18, 1902, by the Commissioner of Patents for the Dominion of Canada; that the respondent, the Canadian Car and Foundry Co., is constructing vessels at its shipyards, at Port Arthur, and elsewhere, in Canada, and is installing upon and equipping the said vessels with certain apparatus for wireless telegraphy, supplied by the other respondent, Emile J. Simon; that in making, constructing and using such wireless apparatus in Canada, the respondents are both guilty of an infringement of the rights of the petitioner under the said patent; that the said petitioner will suffer irreparable damage, unless the respondents are restrained by means of an interlocutory injunction from continuing the acts of which the petitioner complains. The petitioner prays accordingly that it may be accorded an interlocutory injunction, restraining the respondents and their servants,

agents, employees and representatives, under all legal penalties, from making, constructing, vending in Canada, purchasing, accepting, using, installing or placing upon any of the said vessels, the whole or any part of any of the apparatus for wireless telegraphy referred to in the present petition, or for the purpose of receiving or transmitting messages by means of wireless telegraphy.

A motion was made by the petitioner to amend its petition by inserting the fact that proceedings have been taken in the United States by the said petitioner against the said respondent Simon, and the latter has been, by judgment of the Supreme Court, permanently restrained from making, constructing, using or vending in the United States, any apparatus for wireless telegraphy similar to that supplied by him to the respondent, the Canadian Car and Foundry Co.

The respondent, the Canadian Car and Foundry Co., for answer to the said petition, says, specially, that on or about February 1, 1918, the respondent, the Canadian Car and Foundry Co., Ltd., entered into a contract with the Republic of France whereby the respondent agreed to build 12 mine-sweepers for the Republic of France, and to make delivery to the Republic of France, at Fort William, Ont., or at salt water, at the option of the builder of same, at divers dates prior to end of the month of November, 1918; that the respondent has completed three of the said vessels, and the remaining nine are now in course of construction at Fort William, Ont., and it has become a matter of great urgency for the French Government and the respondent to complete the same prior to the end of November next, to enable them to proceed to sea prior to the close of navigation; that the said vessels will form part of the French navy, as soon as delivered by the respondent to the French Government, and will be immediately thereafter used for war purposes; that at the request of the Republic of France, respondent has agreed to instal, on said French war vessels, at Fort William, aforesaid, certain wireless apparatus, the property of, and to be supplied by the said Republic of France, at its expense, and for its account; that a wireless apparatus is a necessary and vital part of the equipment of all sea-going vessels, and particularly of war vessels, at the present time; that during the months of August, September, and October, the Republic of

QUE.

S. C.

MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR & FOUNDRY CO.

Bruneau, J.

France has shipped, from the United States to Canada, in bond, certain parts of wireless apparatus for such installation, some of which has already been installed by respondent on said ships, and the remaining portion whereof is now at the respondent's plant at Fort William, aforesaid, awaiting installation upon said ships; that upon installation of said wireless apparatus, as aforesaid, upon said ships, and upon delivery of said ships to the Republic of France being accomplished, the same become, by international law, situate on French territory, never having passed Canadian Customs, and never having been used in Canada; that, when said ships are taken delivery of by the Republic of France, as aforesaid, they at once leave the limits of Canadian waters and jurisdiction; that the Canadian patent set forth in the petition is illegal, null, and void; that the said patent has never received judicial confirmation in Canada; that the respondent is informed, and has reason to believe, that the apparatus which constitutes a wireless system of telegraphy, when installed on the said ships, is covered and fully protected by Canadian patent number 148131, the property of the General Transmission Co., of New York, dated May 27, 1913, which patent is, respondent is informed, now in full force and effect; that the wireless system being installed on the said ships is not, in any manner, an infringement of the Canadian patent relied upon by the petitioner; that in the case of the *Marconi Wireless Telegraph Co.* v. *Kilbourne and Clark Mfg. Co.*, (1916), 235 Fed. 719, in the United States District Court for the Western District of Washington, Northern Division, it was, on December, 1916, held that a wireless installation, similar in principle and function and substantially the same apparatus as that now being installed on said French ships by respondent, was not an infringement of a United States Marconi patent, similar in substance to the patent relied upon by the petitioner herein; that, moreover, the Government of the United States of America has purchased, and is purchasing, a large quantity of said apparatus, exactly similar to that being installed by respondent in said French ships, for installation upon ships of the United States Government, notwithstanding the Marconi United States patents, and their competition for such orders in the United States; that the Government of the Republic of France has ordered the installation of this wireless system upon its vessels, as a war measure, for the

QUE.

S. C.

MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR & FOUNDRY CO.

Bruneau, J.

purpose of creating uniformity of wireless telegraphy between the ships of the French navy and the ships of the United States navy, and United States vessels, in the present war.

The petition has been served, in New York, upon Simon, and for answer he says that he has no interest in these proceedings, but, in so far as he may be held to be subject to the action of the Court under these proceedings, he reiterates all the allegations of the other respondent, on his own behalf, and invokes the affidavits filed by it.

I consider, for the reasons hereafter, that I have not to decide if the petitioner is entitled to the said patent. It can supply, as said by Mr. Cann in his affidavit, apparatus for wireless telegraphy manufactured by it, to the Government of Canada, for all classes of vessels, including trawlers and drifters, used for mine sweeping and other purposes. It may be also that Simon is not the bearer of the license exacted by the statute 3-4 Geo. V. c. 43, s. 3. But I know that this patent is the same as the one used by the petitioner in the United States, where the petitioner has also considerable litigation with the respondent Simon for the same reasons as those alleged in the present petition. I see by a letter of Mr. Sanoff, the manager of the petitioner, dated from New York, October 15th instant, that the suit has been suspended for the duration of the war at the request of the American Government. True, it is, that Mr. Sanoff pretends that the question of liability was decided against Simon by the Supreme Court of the United States, reversing the judgment of the lower courts, but the case went to the Supreme Court of the United States, on *certiorari*, solely on the question as to whether the District Court of the United States, Southern District of New York, had jurisdiction, and on the question whether the complainant would be entitled to damages, if the alleged infringement was proven. The Supreme Court held that the court in question had jurisdiction, and remanded the case to that Court, for the determination of the question of infringement. As I said before, there has been no further proceedings in the said case, and there was, therefore, no injunction against Simon, no determination of the question of infringement, and consequently no adjudication of any damages.

At all events, the question of liability and the question of issuing an interlocutory injunction are not governed by the same

QUE.

S. C.

MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR & FOUNDRY CO.

Bruneau, J.

principle or legal rules. It is a well-known principle, in the matter of injunctions, that the Court will in general have regard not only to the dry strict rights of the plaintiff and the defendant, but also to the surrounding circumstances: *Warwick and Birmingham Canal Co.* v. *Burman* (1890), 63 L.T.670; *Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705; *Cowper* v. *Laidler*, [1903] 2 Ch. 337, 341; *Behrens* v. *Richards*, [1905] 2 Ch. 614; *Harrington (Earl)* v. *Corp. of Derby*, [1905] 1 Ch. 205, 220, 221. Among these circumstances, in the present instance, is the fact that the installation of the respondent Simon's wireless apparatus on board the mine-sweepers now in construction in Canada by the respondent, the Canadian Car & Foundry Co., is effected under a contract made between the French High Commission in the United States, for the account of the French Military Navy, and the respondent Simon. The War Purchasing Commission of the United States Government and the United States Navy Department have authorized the making of this contract, and the necessary export licenses have been granted. The selection of this make of wireless apparatus was recommended to the French High Commission in the United States by the Navy Department in France, in order to have instruments similar to those in use on board those vessels of the United States navy that are to be assigned on the same service along the French coast. Similar ships under construction in the United States, as well as the submarine chasers, are equipped with this type of wireless apparatus. In his affidavit, Captain Denier says that the French High Commission in the United States could not consider fitting their ships with apparatus differing one from the other, which indicates that they would not consider installing the petitioner's apparatus, under the circumstances, on these ships. The granting of the injunction would not have the effect of doing the petitioner any practical good. In such a case, an injunction will not issue, as it has been decided in many cases: *Rileys* v. *Halifax Corporation* (1907), 97 L.T. 278.

It is also a well-settled rule of the jurisprudence that the court will not issue an injunction when the mischief complained of can be, as in this case, properly, fully and adequately compensated by a pecuniary sum: *Kine* v. *Jolly*, [1905] 1 Ch. 480, 496; (on appeal); *Jolly* v. *Kine*, [1907] A.C. 1; *English* v. *Metropolitan Board*, [1907] 1 K.B. 588, 603.

The injury complained of by the petitioner is not irreparable; it can be adequately remedied by damages.

In the case of *Ottawa and Hull Power and Manufacturing* v. *Murphy* (1906), 15 Que. K.B. 230, our Court of Appeals held, that an interlocutory injunction to restrain the defendant from using a patented device will not be granted, when the patent has not been established by a judgment at law. This decision is applicable to the petitioner, because her patent has never been established by such a judgment.

But the most important reason to dismiss the petition of the Marconi Wireless Telegraph Co., is set forth by Captain Denier at the end of his affidavit, as follows:

> The ships involved belong to the French War Navy and urgently needed for carrying on the war; it also is essential that these vessels leave Fort William before the close of navigation on the Great Lakes. We, therefore, in the name of the French Government, petition the Court to settle any difficulty that might delay or prevent the ships from putting to sea as soon as possible to fulfil their mission.

I am sure that the petitioner, a British company, does not pretend or intend to hurt or annoy by these proceedings the French Government, in its efforts to win the war. But the petitioner must remember and understand that that private or individual interest is subordinate to the public interest. The French Government wants these ships at the time stipulated by the contracts. It is a question of urgency. Any interference by this Court, in the execution of the contracts between the respondent, the Canadian Car and Foundry Co., and the French Commission, would have the effect to delay the construction, equipment or delivery of those vessels. Such an action would be against public policy. Mr. Sanoff himself admits and confesses in his letter already referred to, that sales to a government cannot be interfered with in time of war. The respondents might be made to account, but later on after the war. To do otherwise would be, in my opinion, not only a great political mistake, but nothing less than a crime against the French Government, without any practical good to the petitioner.

Under these circumstances, and for the legal reasons above given, an injunction cannot issue, and the petition is dismissed with costs. *Petition dismissed.*

ONT.
S. C.

MERCANTILE TRUST Co. of CANADA v. CAMPBELL.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Kelly, JJ. May 1, 1918.

CONTRACTS (§ I B—8)—SERVICES RENDERED BY NIECE—AGREEMENT TO PAY FOR—SUMS ENTRUSTED TO—NOT A GIFT—PRESUMPTION.

The defendant had at her request brought her aunt to her (the defendant's) house; the aunt, who was suffering from an incurable disease, continued to live with and be cared for by the defendant for nearly a year, when the aunt and the defendant both went to reside with defendant's sister, where the defendant looked after the aunt until her death. The court held, under the circumstances of the case, that large sums of money paid by the aunt to the defendant were intended to enable the defendant to defray the costs of maintenance, nursing, medical supplies and other necessaries of the aunt, and that in accounting the defendant was entitled to a reasonable sum for her services in addition to the money disbursed on the aunt's account.

The evidence was sufficient to rebut the presumption of gratuitous service on account of the relationship.

Statement. Appeal by the defendant from the judgment of Latchford, J. Reversed.

T. R. Ferguson, for appellant; *T. N. Phelan*, for respondents.

Mulock, C.J.Ex. MULOCK, C.J.EX.:—This is an appeal from the judgment of Latchford, J. The action is brought on behalf of the next of kin of one Ellen Broderick, deceased, for an account of all moneys of the deceased in the hands of the defendant.

In the statement of claim the defendant is charged specifically with having converted to her own use $2,600, the property of Ellen Broderick. The defendant denies such conversion and alleges that in January, 1911, the deceased, being indebted to her for board, lodging, and nursing, paid to her the sum of $2,538.62 in payment of such indebtedness and in consideration of the defendant's promise to continue to look after her and keep her for the remainder of her life, whereby the defendant says the said sum became her own money absolutely. But, if it should be held that it did not, then she claims the right to set off against it the moneys paid by her on behalf of the deceased; also a proper allowance for services rendered by the defendant for the care and maintenance of the deceased, and also moneys paid by the defendant on account of the deceased's debts and funeral expenses.

At the trial it appeared that the defendant had received from Ellen Broderick two sums of money, $1,357.30 in the month of October, 1910, and the said sum of $2,538.62 in the month of January, 1911; and the judgment of the Court was that she was accountable to the plaintiff company as administrators of Ellen Broderick's estate, in respect of these two sums, and also of any other moneys of the deceased coming to her hands.

The judgment also directed an inquiry as to the plaintiffs' right in respect of the sum of $200 standing at the credit of the defendant in the Bank of Montreal on the 20th January, 1909.

The learned trial Judge, I think, rightly decided that the said two sums of $1,357.30 and $2,538.62 did not become the property of the defendant; and the real question for us to determine is, whether the defendant is entitled to remuneration for services rendered to the deceased by the defendant and her sister, Mrs. Slanker. This question calls for consideration of the facts, and I shall now proceed to deal with the evidence bearing upon it.

Up to December, 1908, Ellen Broderick had always been a resident of the city of New York, where she was engaged in domestic service, and had accumulated between $4,000 and $5,000, which she had on deposit in two savings banks in that city. She had then reached the age of 60 years. For some years she had been suffering from cancer of the rectum, and became anxious to move to Toronto and live with the defendant, her niece, daughter of Ellen Broderick's sister. On two occasions the defendant was in New York, and on each occasion spent a couple of days with the deceased. She also corresponded with her. Such was the extent of the acquaintance between them. There is no evidence to shew any special degree of affection. The acquaintance between them must have been of a very casual character, for the defendant had only seen the deceased a couple of times. The deceased was a friend of the McMorrins, a New York family, and when unemployed made their house her home, and was godmother to two of the McMorrin children. In December, 1908, her malady incapacitated her for work, and she went to the McMorrins' house, where she stayed for a week. When there, she expressed a wish to go to Toronto to reside with the defendant, and requested Mr. McMorrin to telegraph the defendant to come to New York for the purpose of taking her (the deceased) to Canada. Mr. McMorrin, on her dictation, sent to the defendant a telegram in the following words: "Your auntie is sick. Please come and take her to Canada."

Acting on this telegram, the defendant proceeded to New York, and brought her aunt to her (the defendant's) home in Toronto, in December, 1908, where the aunt resided until November, 1909, when she went to live with the defendant's sister, Mrs. Slanker, also a resident of Toronto; and at Mrs. Slanker's house the aunt continued to live until her death in 1911.

ONT.

S. C.

MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL.

Mulock, C.J.Ex.

During her residence with the defendant and her sister, the deceased's malady steadily increased. The discharge became so copious as to call for constant attendance, notwithstanding which it at times polluted the atmosphere of the house to the great inconvenience of the occupants. On the way from New York the deceased, according to the defendant's evidence, said: "How will I arrange? Shall I pay you any board?" To which the defendant answered: "No, Auntie, you will not; just come to my house and stay there with me."

At this time the defendant thought the deceased was only temporarily ill and making a temporary visit, but would soon return to New York, and no arrangement was made for her paying the defendant for her services. Instead, however, of her recovering, she became worse, and the defendant boarded and maintained her and made many disbursements on her account out of her own moneys.

About July or August, 1910, the aunt was invited to take up her residence with certain nieces at Hamilton, but she refused, and it was then arranged between her and the defendant that she would live permanently with her. Then, according to the defendant's evidence, the deceased said to her: "It is not right that I should be living like this and not turn some money over to you; you have spent a great deal on me;" adding that, as she was going to live with the defendant, who had spent a good deal of money on her, she would turn over her money to her.

On another occasion she said to the defendant, "I had better give you a cheque on New York," and added: "Now if I get sick, I want a trained nurse. If I am very ill, I want two, but don't ever send me to a hospital." Later the deceased wrote to Mr. McMorrin to come and see her. He came, and she then gave him a cheque for $500, being a present for her two godchildren, adding, according to Mr. McMorrin's evidence, "All that I have I am going to give to Miss Campbell to care for me as long as I live," or words to that effect. Subsequently, according to McMorrin, she spoke to the same effect in the presence of the defendant, her words being, "The balance of whatever I am possessed of, money or anything else, is for you to look after me."

These conversations with McMorrin occurred in August, 1910. In October, 1910, the deceased required a trained nurse;

and, according to the defendant's evidence, then offered to pay over to her the two sums on deposit in New York; but, as their withdrawal would involve a loss of interest, the defendant advised that only the smaller amount, $1,367.30, on deposit in one of the banks, be then withdrawn. Accordingly, the deceased then gave her a cheque for the $1,367.30, and in the following January gave her a cheque for the other sum, namely, $2,538.62. According to Mrs. Slanker's evidence, the deceased on several occasions told her that she had given her money to the defendant and that she would take care of her as long as she lived and would pay Mrs. Slanker in full. After Ellen Broderick's death, the defendant did pay to Mrs. Slanker $1,000, being at the rate of $10 a week for 100 weeks' board of the deceased. When the defendant went to New York to bring her aunt to Toronto to live with her, she was employed in the office of Eby Blain & Co., Toronto, at a wage of $10 per week, and this was the rate of her earnings during the whole time that the deceased resided with her and Mrs. Slanker.

On this state of facts, the defendant claims to be entitled to payment on a *quantum meruit* basis for board and services rendered to the deceased for the year during which she resided with the defendant and the two subsequent years during which she resided with Mrs. Slanker. The deceased having been the defendant's aunt, the onus is on the defendant to shew an agreement, express or implied, that she was to be remunerated for her services. The question is one of fact. If the circumstances make it manifest that both parties understood that the defendant was to be compensated for her services, she is entitled to recover their value: *Walker* v. *Boughner* (1889), 18 O.R. 448. The law imputes to parties an intention corresponding to the reasonable meaning of their words and actions: *Reeve* v. *Reeve* (1858), 1 F. & F. 280.

With reference to the evidence of the defendant, the following circumstances satisfy me that, when it became apparent that the deceased was making her permanent home with the defendant, both parties contemplated the defendant being remunerated for her services. The deceased, being possessed of a considerable sum of money, could not reasonably have expected that the defendant, living on a weekly wage of $10, would have gratuitously undertaken the care and maintenance of her during her illness. The deceased must have been well aware from the nature of her malady that

ONT.

S. C.

MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL.

Mulock, C.J.Ex.

she could not live long, and she told McMorrin that the money which she was going to give to the defendant would, she thought, take care of her during the rest of her life.

The payments by the deceased to the defendant must have been either for the purpose of giving them to the defendant absolutely, or in order to enable her throughout to pay for maintenance, nursing, medical supplies, and other necessaries. There was no intimacy between the parties, and no such feeling of affection on the part of the defendant towards the deceased as might naturally prompt the defendant or would lead the deceased to expect that the defendant would be willing personally to defray the cost of maintenance, nursing, and caring for her. Further, so far as appears, the defendant's means (a weekly wage of $10) were too limited to enable her out of them to defray the expenses in connection with her aunt. For many months before the deceased made the payments to the defendant, the deceased had been personally cared for by the defendant and her sister, they performing all the duties of a nurse and providing for all her needs. The deceased, a woman of considerable means, realised that it was unfair to expect these services to be rendered gratuitously; and the proper inference, I think, is that the moneys paid to the defendant were for the purpose of paying those expenses and for the services rendered. If not, there was no need of her paying such a large sum to the defendant. Further, it is to be borne in mind that the deceased had no dependents or nearer relatives. The evidence of Mr. McMorrin and Mrs. Slanker shews that the deceased made the payments for the purpose not only of remunerating the defendant in respect of past services but also to provide for a continuance thereof.

If this case had been tried by a jury, these circumstances could not have been withdrawn from the jury, and would have warranted the finding of an implied agreement for remuneration, and this Court is entitled to draw the same conclusion, which is, I think, the proper one. The circumstances upon which I am dwelling not being in dispute, this Court is in as good a position as was the trial Judge to draw the proper inference; I entertain no doubt that both parties expected that the defendant would be properly remunerated; and, therefore, she is entitled to payment for the services of herself and her sister in the maintenance and care of the

deceased, and of all reasonable expenses in providing her with medical and other attendance, medicines, medical supplies, and also funeral expenses.

In her statement of defence and set-off, the defendant has given particulars of her claim, amounting to $2,980.03. The claim seems a reasonable one; and the cost of a reference should, if possible, be avoided by the plaintiffs consenting to the defendant having credit for $2,980.03 on the two sums in question; but, if the plaintiffs are not so willing, then they may have a reference; and, in such event, the defendant may amend her claim of set-off by claiming an amount in excess of that set forth in the particulars. Costs of the reference should be in the discretion of the Master.

The judgment will declare the defendant entitled to remuneration for her and her sister's services, and it will be for the Master to fix the amount. I think clause (b) of para. (2) of the judgment should be struck out.

The defendant is entitled to her costs here and below, in the first instance to be deducted from the balance, if any, found due by her on taking the accounts, otherwise to be payable by the plaintiffs; and, subject to the payment of the defendant's costs, the plaintiffs are entitled to be paid their costs as between solicitor and client out of the remainder of such balance.

Clute, J.

CLUTE, J.:—Action tried without a jury before Latchford, J. Appeal from the judgment of the learned trial Judge dated the 29th October, 1917.

The plaintiffs are the administrators of the estate of Ellen Broderick, who died at Toronto on the 4th November, 1911, intestate.

The plaintiffs ask an account against the defendant. The two principal items claimed, which came to the hands of the defendant, are:—

October 10, 1910—$1,357.30, being the amount of Miss Broderick's cheque for $1,359, less bank charges.

January 19, 1911—$2,538.62.

The defendant claims these amounts as a gift, and, in the alternative, claims $2,980.03 for expenses in the support and maintenance of the deceased and for doctor's bill, nursing, and medical

ONT.

S. C.

MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL.

Clute, J.

and other expenses incidental to the illness of the said Ellen Broderick for three years.

The statement of claim was in respect of the larger sum only, and the earlier sum is not referred to; the defendant was examined for discovery, and did not frankly state the facts in regard to the amounts which had come into her hands, by reason of which she prejudiced her own case. She also wrote a letter dated the 21st December, 1912, in which she suggests that the money was still intact, and the family to whom she was writing was entitled to one-third. This was not true, and the trial Judge, under the circumstances, refused to support the gift.

During the argument the Court intimated that the alleged gift of the above sums by the deceased to the defendant could not be sustained.

The further question remains: namely, the claim by the defendant for board, lodging, care, nursing, and expenses of the said Ellen Broderick for the three years or thereabouts prior to her death.

The principal facts are not disputed. Ellen Broderick was the aunt of the defendant. She had gone to New York over thirty years ago, and had accumulated at least the amounts above mentioned, which she had deposited in a New York bank. The defendant on two occasions had visited her aunt in New York for a few days, but Miss Broderick had not visited the defendant; their relations, while friendly, were not intimate, apparently.

We learn the condition of Ellen Broderick, prior to her leaving New York for Canada, from the witness McMorrin, who had resided in New York for over 30 years, and had known Miss Broderick for 28 or 30 years. She had been a housekeeper; and in November or December of 1908 she sent word to McMorrin's wife that she was ill and was unable to perform her duties as housekeeper any longer, and she sent for McMorrin to take her away. He went to where she was employed in a taxicab and took her to his home and kept her there for one week. She expressed a wish to go to Canada; she said she wished to go to her niece Minnie Campbell (the defendant) to end her days, and requested that a telegram be sent to the defendant to come and take her to Canada. She dictated the telegram; McMorrin wrote it out and sent it. It read: "Your auntie is sick. Please come and take her to

Canada." The defendant went and brought her aunt to Toronto, and took her to reside with her at 315 Church street, where she remained for a year. The defendant then made arrangements with her married sister, Clara Slanker, that her aunt and herself should reside with Mrs. Slanker, which they did until the death of Ellen Broderick on the 4th November, 1911.

It appears that no express bargain was made between the deceased and the defendant during the time she was residing with the defendant in Church street.

Dr. Herrington describes the condition of Ellen Broderick from the time he was called in. The doctor states that she required constant attention; he saw her during the later stages of the disease, during the time when the treatment would be most trying, and when she would require the most efficient nursing. The case was one of cancer of the rectum, and one of the most disagreeable cases he had ever attended. When he first saw the case, it was beyond operative intervention; he had four or five different nurses, three of them gave up the case on account of its disagreeable character; the odour was so offensive that it was perceptible at the front door when she was in the attic; everything that came into contact with her had to be destroyed.

"Q. Did you see who was looking after her there and who had charge of her? A. Yes.

"Q. Who was it? A. Mrs. Slanker and Miss Campbell—Miss Campbell in particular.

"Q. What was the character of the attendance; was it careful or otherwise? A. I think, most careful. I said to Miss Campbell at the time I didn't see how she could carry on her day-work and do this work at night . . . I was rather solicitous about Miss Campbell's condition. I understood she had a very responsible position in the city and she was working in the day-time and looking after her aunt at night, which I thought was a very difficult proposition."

In cross-examination the doctor states that he looked upon Miss Campbell as being the person in charge.

Mrs. Clara Slanker stated that she was the niece of the late Ellen Broderick and a sister of the defendant; that her aunt was in such a condition in New York that she could not take care of herself; that she wished the defendant to come and get her, which she did; that was in December, 1908.

ONT.

S. C.

MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL.

Clute, J.

The aunt had never been at Mrs. Slanker's before; she came there ill; nor had she visited the defendant in her life before. She states that during the year Miss Broderick resided with the defendant she was ill all the time.

"Q. She was ill when she came there? A. Yes. When she came there she needed attention that no person but some younger girl friend could give her. That is what she needed when she came to my sister's house.

"Q. She had this disease the doctor spoke of? A. She had had it for a number of years, and that's why the people she was with in New York wanted to get rid of her. They wanted her to come up here.

"Q. Who cared for her and looked after her? A. My sister did, Miss Campbell.

"Q. Would your aunt's trouble require attention in 1909? A. Some weeks it would; some days it might not. It was a case of where—I couldn't explain it to you.

"Q. Did your sister and Miss Broderick move over to your house? A. Yes; they moved over to my house. A. My aunt lived with me for two years.

"Q. . . . from November, 1909, until the time of her death in 1911? A. Yes.

"Q. Was Dr. Herrington there attending her? A. One day I had to put out a big washing for my aunt of heavy pads. She slept on pads. If this cancer of the rectum was running we had to change these pads as often as it would flow on to the bedding. If we didn't remove them at once we couldn't stand the odour in the house. I happened to be alone one day and I had to take a basket of this stuff out to wash it and put it on the line. I don't know if I fainted or what happened to me, but a man building a house on the opposite side of the street came over and told me I had been lying in the yard for some time.

"Dr. Herrington came to see me and wanted to know the cause of my condition. I told him it was my aunt, and he went up and examined her. That would be in the spring or summer of 1910. I had to have attendance of some kind all the time she was at my house.

"Q. Did that make much inconvenience and trouble there? A. Auntie really had my house, the use of my home.

"Q. Your house was practically given up to her? A. Yes.

"Q. Your sister, Miss Campbell, would work during the day-time at Eby Blain's? A. Yes.

"Q. At night what was she doing? A. I guess we bathed auntie every night at 7 o'clock.

"Q. You say Miss Campbell was doing that? A. The nurse would leave. It took two of us to attend to her. I attended to her with the nurse in the day-time, and my sister and I would attend to her at night. I was taken ill as a consequence of it, and Dr. Herrington ordered me to go away . . . There had to be material burned every day.

"Q. This material which was used . . . was purchased by whom? A. By Miss Campbell . . . She used to send up absorbent cotton by the bundles and cheese-cloth by the web. We used to make pads a yard square and about two inches thick."

The deceased had nieces residing in Hamilton, who came over to see her in the spring of 1910 and wished their aunt to go and reside with them at Hamilton. She went on a Friday and returned a week from the following Sunday; 8 or 9 days away. Miss Broderick said she could not live there, and refused to remain. They said that their mother had left it in her "will" that she should have a home there. Miss Broderick said she didn't see how any person could "will" where she would live. "When she came back, she asked if she could have her home again. She said: 'Clara, can I have my home back again? Will Mr. Slanker object?' I said, 'No, auntie, you come right in.' She started to cry. I got her room fixed up and had her taken to it."

Her relatives came again to see her, and she declared she would drown herself rather than go and live with them. It was at this time that the witness McMorrin came over. The deceased repeatedly told Mrs. Slanker that Miss Campbell would pay her for any expenses she was put to; that the defendant had the money and would pay her. She also said that the defendant would take care of her as long as she lived; that she was sure of. She told her this when McMorrin came over in August to see her. She then gave him $500 for his two sons for whom she was godmother. She told Mrs. Slanker that she had given the defendant money; that she was getting her money from New York for the defendant. The defendant paid Mrs. Slanker at the rate of $10 per week, $1,000

ONT.

S. C.

MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL.

Clute, J.

in all. Mrs. Slanker said that she understood that she would be paid from the moneys that her aunt had given to the defendant. This claim was not paid until the 5th November, 1913. McMorrin also corroborates the witness Mrs. Slanker, and states that the deceased wrote him to come to Toronto. He came up in answer to the letter, and she gave him a cheque for $500, and she told him at the time: "What I have got I want to give to Miss Campbell to look after me as long as I live. What I have got I intend to give it."

Evidence of McMorrin: "When she gave me the cheque for $500, she said: 'I promised you that for the boys long before I came from New York. I want to give it to you now; and whatever I have, or all that I have, I am going to give to Miss Campbell, to care for me as long as I live.' On another instance—Miss Campbell might have been there afterwards—but we talked this thing over again about the $500. She said: 'I want to get rid of that, because, for one reason, later you may not be able to get it;' and Miss Campbell was there, and she told Miss Campbell the same thing.

"Q. What did she say to Miss Campbell about the $500? A. She said: 'Minnie, I am going to give Robert the $500 for the two boys, which is $250 each, and what I have got is for you, the balance of whatever I am possessed of, money or anything else, is for you to look after me.' "

The first amount was deposited to the defendant's credit in her general account, which had been a trust-account, and was continued in the same form. The second sum was deposited to the defendant's credit in her savings-account.

I think there is quite sufficient evidence, exclusive of that of the defendant, clearly to rebut the presumption as between relatives that no charge is to be made for board, lodging, nursing, and services.

At the time the defendant was sent for, the deceased Ellen Broderick was suffering from an incurable malady, by reason of which she was unable to continue her employment, as housekeeper, and had to seek refuge for the time being with her friends the McMorrins. At her request, the defendant went to New York and brought her to Toronto to be cared for; she had means to pay her way. When she had tried for a few days, at the request of

other relatives, to live with them, she returned to the defendant: and on two distinct occasions she brought over sums of money which she had deposited to her credit in a bank at New York and gave these amounts to the defendant, and the same were deposited in the defendant's accounts. She told the defendant's sister and Mr. McMorrin that she intended this money to be expended for her care and benefit, and that she had given it to the defendant for that purpose.

Her malady was incurable and was of such a nature that she required constant and unremitting care.

I see no reason to doubt that she intended to do what she did do, that is, to have the money which she placed in the hands of the defendant expended in her living and for nursing and every care and attention which she received. It is incredible to me that she intended to sponge upon her relatives for the unremitting care and attention which she received.

I think the case is clearly within that class of cases where a person becomes liable for her support, maintenance, and nursing, notwithstanding the relationship that exists between the parties.

The general question is considered in *Peckham* v. *Depotty* (1890), 17 A.R. (Ont.) 273, and cases there cited. In referring to the case of *Foord* v. *Morley* (1859), 1 F. & F. 496, where Martin, B., said that "the plaintiff must establish that there was an understanding, arrangement, or contract that she should be paid for her services," Osler, J.A. (17 A.R. at p. 278) said: "This, of course, is not to be understood as affirming that proof of an express contract is necessary. And no doubt the general rule is that stated by Channell, B., in *Browning* v. *Great Central Mining Co.* (1860), 5 H. & N. 856, 157 E.R. 1423, that where services have been rendered it ought to be clearly shewn that those services were not to be remunerated. The presumption may be rebutted by circumstances, as in the well-known class of cases, of which there are so many examples in our reports, of actions brought by one relative for services rendered to another while living with the latter as a member of his household." See also *Walker* v. *Boughner*, 18 O.R. 448; *Smith* v. *McGugan* (1892), 21 A.R. (Ont.) 542, and *McGugan* v. *Smith* (1892), 21 Can. S.C.R. 263, in which Strong, J., says (p. 265): "This, then, is not a case in which to apply any presumption arising from the

ONT.

S. C.

MERCANTILE TRUST CO. OF CANADA LIMITED v. CAMPBELL.

Clute, J.

relationship of the parties that the services were rendered gratuitously." See also *Murdoch* v. *West* (1895), 24 Can. S.C.R. 305; *Latimer* v. *Hill* (1916), 36 O.L.R. 321, 30 D.L.R. 660; *Mather* v. *Fidlin* (1916), 10 O.W.N 229; *Herries* v. *Fletcher* (1914), 6 O.W.N. 587, 589; *Johnson* v. *Brown* (1909), 13 O.W.R. 1212; *Re Rutherford* (1915), 34 O.L.R. 395, 25 D.L.R. 782; *Rycroft* v. *Trusts and Guarantee Co.* (1917), 12 O.W.N. 240; *Cross* v. *Cleary* (1898), 29 O.R. 542.

Under this class of authorities, and on the undisputed facts, I think it clear that the services rendered were not intended upon either side to be gratuitous; and the fact that the deceased handed over her money for the very purpose of making payments in respect of these services is conclusive to my mind that a gratuity was not asked for or given in respect to them; it is a question of *quantum meruit*.

The amount claimed by the defendant, $2,980.03, is, in my opinion, reasonable, and, the plaintiffs consenting, the defendant should have credit for that amount on the two sums come to her hands; otherwise there should be a reference to the Master, with leave to the defendant to amend by claiming an amount in excess of her particulars.

The judgment below should be set aside and the counterclaim sustained. The defendant is entitled to her costs here and below, in the first instance to be deducted from the balance, if any, found due by her in taking the accounts, otherwise to be payable by the plaintiffs—and, subject to the payment of the defendant's costs, the plaintiffs are entitled to be paid their costs as between solicitor and client out of what (if anything) remains of such balance. Costs of the reference to be in the discretion of the Master.

Riddell, J.
Kelly, J.

RIDDELL and KELLY, JJ., agreed. *Appeal allowed.*

ALTA.

D. C.

SPANER BROS. v. CENTRAL CANADA EXPRESS Co.

District Court, Edmonton, Crawford, Dist. Ct. J. August 10, 1918.

CARRIERS (§ III G—455)—CONTRACT OF SHIPMENT—FIXING LIABILITY AND VALUE—LOSS OF PART OF SHIPMENT—RECOVERY.

Where the contract of shipment fixes the value of the goods shipped and limits the liability of the carrier to that value, in case of a loss of part of the shipment, the shipper may recover the real value of the property lost, not exceeding the limit of liability stipulated in the contract, and is not limited to a recovery of such proportion of the amount named in the contract as the value of the property destroyed bore to the value of all the property shipped.

[*Gibbon* v. *Paynton* (1769), 4 Burr. 2298, 98 E.R. 199; *Bradley* v. *Waterhouse* (1828), 3 C. & P. 318; *McCance* v. *London and N. W. R. Co.* (1864), 3 H. & C. 343, distinguished.]

ALTA.

D. C.

SPANER BROS. v. CENTRAL CANADA EXPRESS CO.

Crawford, D.C.J.

ACTION to recover the value of part of a shipment of furs lost by the carrier. Judgment for plaintiff.

J. M. Macdonald, for plaintiff; *H. C. Macdonald*, for defendants.

CRAWFORD, D.C.J.:—The company took delivery of 4 sacks of furs on February 27, 1918, from the plaintiffs at Grande Prairie for delivery at Edmonton. It delivered 3 of the sacks, but failed to deliver the other. Hence the action.

One of the plaintiffs valued the goods at the time of the shipment at $500, whereas the real value of the goods was much in excess of that amount. The sack of furs that was lost contained furs to the value of $367.75, and this amount the plaintiff claims.

The sack was lost while being conveyed by the company in a van from the Edmonton and Dunvegan yards to its city office in Edmonton through the accident of a collision with a motor vehicle, according to the defendants' contention. The plaintiff who shipped the goods admits he knew at the time that the goods were of a greater value, and that he declared their value at a low figure to avoid payment of the higher rate for their carriage.

The principal grounds of defence to the action are:—(1) Fraud; (2) Estoppel.

The defendants' counsel at the close of the case asked leave to put in evidence with his written argument that the contract produced had been approved under the provisions of the Railway Act, which was granted him. He has, however, failed to do so. I cannot, therefore, give effect to any special term in the contract limiting the company's liability as a common carrier.

Dealing first with the question of fraud, the facts in the two cases relied on so strongly by the defendants' counsel are not on a parity with the facts in this case. In *Gibbon* v. *Paynton* (1769), 4 Burr. 2298, 98 E.R. 199, the shipper concealed gold in a nail-bag, and thereby concealed the nature of the goods, and, therefore, the carriers did not accept the gold as such for carriage. In *Bradley* v. *Waterhouse* (1828), 3 C. & P. 318, the shipper concealed gold in some hay and the gold was stolen. Lord Tenterden left to the jury the question whether the company had caused the loss through its negligence or the plaintiff had brought this loss upon himself by his manner of conducting his business. In this case it is not urged, nor do I see how it could, reasonably, be

ALTA.

D. C.

SPANER BROS. v. CENTRAL CANADA EXPRESS CO.

Crawford, D.C.J.

urged on the evidence of the witness Neila, that the wrong declaration of value caused the loss. In the two cases above cited it appears, too, that the wrong declaration induced the belief that the goods were of trifling value, and thereby caused the carrier to relax in its diligence in the care of the shipment. None of these conditions obtain here. The company was not induced to accept the shipment or enter into the contract of carriage by reason of the wrong declaration as to value. Nor was the risk of loss or damage increased or the diligence of the company relaxed by reason of such declaration. The company's agent did not even take the trouble to enquire into the value of the goods, but, on the contrary, agreed to the value.

It seems to me on these facts that the contract is not vitiated by fraud.

The defence of estoppel does not seem to me properly applicable to the facts in this case. First, as to the question whether the shipper can recover only such share of the value declared as the part lost bears to the whole shipment. In *McCance* v. *The London and N. W. R. Co.* (1864), 3 H. & C. 343, cited with approval in MacNamara on Carriers, Williams, J., in delivering the judgment of the court, says:—

> Here it appears in evidence that the contract declared on was to be regulated and governed by a state of facts understood by the parties, namely, that the horses were under the value of £10 each. It is laid down in my brother Blackburn's Treatise on the Contract of Sale, p. 163, that "when parties have agreed to act upon an assumed state of facts their rights between themselves are justly made to depend on the conventional state of facts and not on the truth."

The above was for the recovery of damages for injuries to certain horses shipped over a railway company's lines, in which the shipper sought to recover upon the basis of the true value of the horses, instead of on the value declared by him at the time of shipment.

In the above case there was a value set upon each animal separately, which seems to me to distinguish it from this case. Had each skin been valued separately, or even each parcel, the doctrine of estoppel might more reasonably apply. Of the cases collected in 10 Corpus Juris, 184, in support of the doctrine that in case of partial loss the carrier is responsible for only a proportionate share of the damage, there is only one of which I can obtain the full text, viz., *U. S. Express Co.* v. *Joyce* (1904), 38 Am. and E. Rly. Cas. (N.S.) 315. In this case, the value of the horses

was set at $75 each and the value of the whole car lot at $2,100. I think, too, that both the above cases are distinguishable by reason of the fact that no animal was lost, but that a number of the animals that were shipped were partially damaged only; so that the partial loss discussed in both cases is quite different from a total loss of part of the shipment.

In 10 Corpus Juris, p. 184, under the title, "Partial loss of shipment," the author says:—

> According to the weight of authority, where the contract of shipment fixes the value and limits the liability of the carrier to that value, in case of a *loss of part of the shipment* the shipper may recover the real value of the property lost, not exceeding the limit of liability stipulated in the contract of shipment, and is not limited to a recovery of such proportion of the amount named in the contract as the value of the property destroyed bore to the value of all the property shipped.

The defendant also contends that the company delivered to the plaintiff $500 worth of goods and that, therefore, the plaintiff is estopped from claiming more. Exactly the reverse has been held in *U. S. Express Co.* v. *Joyce, supra*, and in *Brown* v. *Cunard Steamship Co.* (1888), 147 Mass. 58.

Looking at the contracts of shipment and the evidence, the shipper, in this case, paid 15 cents for each 100 pounds for the risk of loss or damage in carriage, and paid in addition a rate regulated by the weight of the goods shipped and the distance shipped. Dowling, C.J., in one of the cases above cited, says:—

> Whether appellees are estopped from proving the real value of the property will depend upon the purpose for which a definite valuation was inserted in the contract of shipment. Such clauses are intended to secure the basis for calculating freight charges; to apprize the carrier of the degree of care and vigilance necessary for the safe transportation of the property; to establish a convenient measure of the damages recoverable, so that evidence of such damage in cases of total loss shall be dispensed with, and to protect the carrier from fanciful over-valuations asserted after the property is damaged or destroyed.

The defendant company has been protected from all the foregoing contingencies. The plaintiff has paid the full rate according to the weight and distance, apparently, and if the plaintiff wished to insure himself against loss to the amount of only $500 by paying the rate of fifteen cents on only $500 declared value, he took, it seems to me, the risk of the goods being lost or damaged to a larger extent, and the defendant assumed a liability for the real value, but in no case to exceed $500.

There will, therefore, be judgment for the plaintiff for the sum of $367.75 and costs. *Judgment for plaintiff.*

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S. C.

REX v. RODNEY.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, and Hodgins, JJ.A., and Latchford and Kelly, JJ. April 23, 1918.

CRIMINAL LAW (§ II A—46)—STATEMENTS MADE BY ACCUSED—NO WARNING OR CAUTION GIVEN—STATEMENTS VOLUNTARILY MADE—ADMISSIBILITY.

Statements made by an accused are admissible in evidence against him although the usual warning or caution was not given, if it is shewn that such statements were voluntarily made, and were not obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

[*Ibrahim* v. *The King*, [1914] A.C. 599; *Rex* v. *Voisin*, [1918] 1 K.B. 531; *Rex* v. *Spain* (1917), 36 D.L.R. 522, 28 Can. Cr. Cas. 113, 27 Man. L.R. 473; *Regina* v. *Day* (1890), 20 O.R. 209, referred to. See annotation 16 D.L.R. 223.]

Statement.

CASE stated by the Junior Judge of the County Court of the County of Wentworth, upon the trial and conviction of the defendant before him, in the County Court Judge's Criminal Court, upon a charge of having unlawfully stolen a number of street railway tickets and several sums of money, the property of the Hamilton Street Railway Company, his employers. Conviction affirmed.

The defendant was, without being formally arrested, requested by two detectives to go to police headquarters in the city of Hamilton, and went with them; when at police headquarters, he was searched, and some street railway tickets were found upon his person; he was questioned by the detectives; and made statements to them which they repeated when called as witnesses at the trial. The stated case related to the admissibility of the detectives' testimony.

The learned Junior Judge stated the facts, as set out in the judgments below, and reserved for the consideration of a Divisional Court of the Appellate Division these three questions:—

"1. Was I right in admitting the evidence of detectives Shirley and Smith relating to admissions made by Rodney to them at police headquarters?

"2. Had detectives Shirley and Smith any right to question Rodney at police headquarters without having first warned him that what he might say would be used against him?

"3. Was I right in holding that he was not under arrest?"

M. J. O'Reilly, K.C., for defendant.

J. R. Cartwright, K.C., for the Crown.

Maclaren, J.A.

MACLAREN, J.A.:—The defendant was, on the 3rd December, 1917, convicted in the County Judge's Criminal Court of the County

of Wentworth of having unlawfully stolen a number of street railway tickets and several sums of money, the property of the Hamilton Street Railway Company, his employers.

The trial Judge reserved and stated a case, which set forth that the evidence shewed that on the day of the arrest the railway superintendent told the defendant he was wanted "down the street," and the two went out of the office together, and were met by two detectives, Shirley and Smith, who asked the defendant to get into a taxicab with them, and they took him to the police headquarters, where they searched him and found some street railway tickets on him. The trial Judge in the stated case proceeds to say: "He was then asked by the detectives where he got the tickets, and he then voluntarily made the statements given in evidence by the detectives. No promises were made or threats used by the detectives to the prisoner. He was not then under arrest. He was then detained on the above charge. I believe the detectives' evidence and I disbelieve the prisoner's evidence. No warning was given him by the detectives that what he might say would be used against him."

The questions reserved for the consideration of the Court are—

"1. Was I right in admitting the evidence of detectives Shirley and Smith relating to admissions made by Rodney to them at police headquarters?

"2. Had detectives Shirley and Smith any right to question Rodney at police headquarters without having first warned him that what he might say would be used against him?

"3. Was I right in holding that he was not under arrest?"

The decisions on the point as to whether the answers of a prisoner to questions put to him by a policeman or other person in authority could be received as evidence, where he was not warned or cautioned that his answers would be given in evidence against him, have not been uniform or consistent either in England or in this country. There is nothing in the law of either country which requires that a prisoner in such a case must be warned or cautioned, as is directed by sec. 684, sub-sec. 2, of the Criminal Code, at the close of the preliminary examination before a magistrate in the case of indictable offences.

In a recent case in the Privy Council, *Ibrahim* v. *The King*, [1914] A.C. 599, the English decisions on the point were very fully reviewed by Lord Sumner, who says at p. 609: "It has long

ONT.
S. C.
REX
v.
RODNEY.
Maclaren, J.A.

been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

The present case fully complies with these conditions and meets the requirements of this definition, as the trial Judge certifies in the stated case that the accused "voluntarily made the statements given in evidence by the detectives." He also states that "no promises were made or threats used by the detectives to the prisoner" and that "he was not then under arrest" when he made the admissions or confession.

Although the English Court of Criminal Appeal is not bound by the decisions of the Privy Council, the foregoing definition by Lord Sumner was approved and applied by that Court in the recent case of *Rex* v. *Voisin*, [1918] 1 K.B. 531, Lawrence, J., in pronouncing the unanimous judgment of that Court, says, at pp. 537, 538, that "the general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in *Ibrahim* v. *The King*," and adds: "It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible. It may tend to shew that the person was not upon his guard as to the importance of what he was saying or as to its bearing upon some charge of which he has not been informed." See also, to the same effect, *Rex* v. *Colpus*, [1917] 1 K.B. 574.

There have been also recent decisions in this Court to the same effect, by which we are bound, as well as by the decision in the Privy Council to which reference has been made. The latest of these to which we have been referred are: *Rex* v. *Ryan* (1905), 9 O.L.R. 137, and *Rex* v. *Steffoff* (1909), 20 O.L.R. 103.

In *Rex* v. *Spain* (1917), 36 D.L.R. 522, 28 Can. Cr. Cas. 113, 27 Man. L.R. 473, the Manitoba Court of Appeal lays down the same rules.

The first and second questions should consequently be answered in the affirmative. It therefore becomes unnecessary to answer the third question, as the above authorities shew that, even if the appellant was under arrest at the time, the first and second questions should be answered in the affirmative.

ONT.
S. C.
REX
v.
RODNEY.
Latchford, J.

If he was not under arrest, then *à fortiori* the same answers should be given.

MAGEE and HODGINS, JJ.A., agreed with MACLAREN, J.A.

LATCHFORD, J.:—Case reserved and stated under sec. 1014 of the Criminal Code by J. F. Monck, Esquire, Junior Judge of the County of Wentworth, sitting as Judge of the County Court Judge's Criminal Court of the County of Wentworth at Hamilton.

On the 3rd December, 1917, George Rodney was tried before the said County Court Judge's Criminal Court upon the following indictment:—

"For that the said George Rodney, within six months last past, at the city of Hamilton, in said county, did unlawfully steal a number of street railway tickets and several sums of money, the property of the Hamilton Street Railway Company, his employers."

At the said trial, evidence was adduced by the prosecution and defence that on the day the prisoner George Rodney was taken in custody, he, the said George Rodney, reported for work at the office of the Hamilton Street Railway Company in Hamilton, whereupon the superintendent of the Hamilton Street Railway Company, in charge of the said office, told Rodney that a fellow wanted to meet him (Rodney) "down the street;" the superintendent then accompanied Rodney to King street between James and Hughson streets, Hamilton, where they were met by two Hamilton detectives, Shirley and Smith, who had a taxicab in waiting; Rodney was then told to get into the taxicab, and the two detectives accompanied Rodney to the police headquarters. Rodney was then, at the police headquarters, searched by the detectives, and some street railway tickets were found on him. He was then asked by the detectives where he got the tickets, and he then voluntarily made the statements given in evidence by the detectives. No promises were made or threats used by the detectives to the prisoner. He was not then under arrest. He was then detained on the above charge. I believe the detectives' evidence and I disbelieve the prisoner's evidence. No warning was given him by the detectives that what he might say would be used against him. I admitted as evidence what detectives Shirley and Smith testified was said by Rodney at the police headquarters to them, and convicted the prisoner of the offence charged, and judgment on the said conviction was postponed until the questions hereinafter stated should be decided.

ONT.

S. C.

REX v. RODNEY.

Latchford, J.

The said George Rodney has been discharged on recognizance of bail to appear and receive judgment.

The questions reserved for the consideration of the Court are:—

"1. Was I right in admitting the evidence of detectives Shirley and Smith relating to admissions made by Rodney to them at police headquarters?

"2. Had detectives Shirley and Smith any right to question Rodney at police headquarters without having first warned him that what he might say would be used against him?

"3. Was I right in holding that he was not under arrest?"

It is obvious that question No. 1 is the important question. If it were necessary to answer No. 3, I should be disposed to say that, while Rodney had not formally been arrested, he was in the custody of the detectives. Physical custody is not necessary to make evidence of a confession inadmissible: *Rex* v. *Booth and Jones* (1910), 5 Cr. App. R. 177, at p. 180. But the prisoner, having been subjected to search at police headquarters, was, in my opinion, in the same situation as to any admissions which he made as if he had been formally arrested.

The main question accordingly is this: Was the learned Judge right in admitting the evidence of what Rodney had stated to the detectives in answer to their questions while he was in their custody?

That evidence, if credited, as it was, was conclusive as to Rodney's guilt. He admitted the theft of the street car tickets, told by what means he had obtained them from the fare-boxes, and indicated where he had hidden the instrument which he had used. Rodney, when giving evidence on his own behalf, stated that he did not remember what he told the detectives, and that he did not know where the tickets found in his pockets came from.

The question raised is by no means new, and it has been the subject of much discussion in the Courts.

In *Regina* v. *Day* (1890), 20 O.R. 209, statements made by the prisoner while in custody were admitted by Rose, J., who, however, in view of the decision in *Regina* v. *Gavin* (1885), 15 Cox C.C. 656, reserved a case for the consideration of the Queen's Bench Division. It came on to be heard before a very strong Court—Armour, C.J., and Falconbridge and Street, JJ. All the cases up to that

time were cited, but reliance was chiefly placed by counsel for the prisoner on the *Gavin* case and by counsel for the Crown on *Regina* v. *Johnston* (1864), 15 Ir. C.L.R. 60. The Chief Justice, in delivering the judgment of the Court, said: "We think, although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible. The great weight of authority in England and Ireland, and all the cases in which the point has been considered by a Court for Crown Cases reserved, go to shew that the evidence is admissible."

Mr. O'Reilly seeks to distinguish this case from the case at bar, owing to the fact that the prisoner had been given the usual caution. But, as the caution, according to the Chief Justice, was "a very illusory caution," the case was decided as if no caution was given.

Regina v. *Gavin*, which was the decision of a single Judge, received its quietus in the Court of Criminal Appeal—Alverstone, L.C.J., and Channell and Walton, JJ.—in *Rex* v. *Best*, [1909] 1 K.B. 692: "In our opinion *Regina* v. *Gavin* is not a good decision."

The test by which the admissibility of a confession should be determined was stated by Cave, J., in *Regina* v. *Thompson*, [1893] 2 Q.B. 12, at pp. 17, 18: "They (the magistrates) have to ask, is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible . . . It is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary." Holding that the magistrates had not discharged themselves of this obligation, the Court quashed the conviction.

In *Rogers* v. *Hawken* (1898), 67 L. J. Q. B. 526, 19 Cox C.C. 122, Lord Russell of Killowen, referring to *Regina* v. *Male* (1893), 17 Cox C.C. 689, said: "I should like to say that the observations made by Mr. Justice Cave in that case were perfectly just, but that they must not be taken to lay down the proposition that a statement of the accused made to a police-constable without threat or inducement is not in point of law admissible. There is no rule of law excluding statements made in such circumstances, and such a

ONT.
S. C.
REX
v.
RODNEY.
Latchford, J.

rule might be most mischievous and a hardship upon a falsely accused person." The evidence was held admissible because there was "no ground for a suggestion that it was made in reply to a threat or upon any inducement."

In the recent case of *Ibrahim* v. *The King*, [1914] A.C. 599, Lord Sumner, in delivering the judgment of the Privy Council, says (p. 609): "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." The leading cases on this point are concisely reviewed and the varying trends of judicial opinion noted. The accused, an Afghan in a British regiment of native troops, was a prisoner in the guard-room and in bonds, when a British officer approached him and said, referring to the killing, a short time previously, of Ibrahim's subadar, "Why have you done such a senseless act?" Nothing else was said. Ibrahim answered in Hindustani: "Some three or four days he has been abusing me; without a doubt I killed him." The trial Judge admitted evidence of the prisoner's statement. There was, it may be said, other evidence pointing to Ibrahim as the murderer of his company commander. The jury failed to agree on this first trial, but upon a second trial Ibrahim was convicted and sentenced to death. Upon an appeal, based mainly, it would appear, on the question of the jurisdiction of the trial Court, the conviction was affirmed. Pending that appeal and the further appeal to the Judicial Committee the sentence was respited. Before the Committee, the question arose as to the admissibility of the prisoner's statement. Lord Sumner, in delivering the judgment of the Privy Council, said (p. 614): "The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court

of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned Judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a 'probable opinion' of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that 'violation of the principles of natural justice' which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial Judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think . . . that in the circumstances of this case his discretion is not shewn to have been exercised improperly."

In the recent case of *Rex* v. *Colpus*, [1917] 1 K.B. 574, Lord Reading says (p. 579) that the rule cannot be better stated than in the words of Lord Sumner.

Rex v. *Kay* (1904), 9 Can. Cr. Cas. 403, was relied upon by Mr. O'Reilly. That, however, was but the decision of a trial Judge, who considered that the arrest, combined with the charge of murder, constituted an inducement. The case may have been properly decided in the circumstances, but it cannot, I think, be regarded as laying down a rule of general application.

It is not, in my opinion, the fact that an accused person was under arrest that determines whether a statement made by him to a constable or other person in authority is admissible, though that fact is of undoubted importance, and should receive careful consideration when evidence of a statement so made is proffered. Nor is the absence of warning the determining factor in such a case. The utmost circumspection should, no doubt, be exercised in the reception of evidence of statements made in such circumstances.

Before admitting evidence of statements so made, the magistrate or Judge should be satisfied that no inducement whatever has been held out to the accused by any person having authority over him or concerned in the subject-matter of the charge. But, if satisfied that the statement has not been obtained by fear of prejudice or hope of advantage held out by a person in authority, he

ONT.

S. C.

REX v. RODNEY.

Latchford, J.

should, in my opinion, declare the evidence admissible. The matter is largely, if not entirely, one of discretion, to be exercised in accordance with the rule laid down by Lord Sumner.

In the present case the evidence of Rodney's statement, made while he was in custody, though not formally under arrest, and in the absence of the usual, and I may add proper, caution, was admissible. The first question should be answered in the affirmative.

In view of what I have stated, it is unnecessary to answer either the second or third question.

Kelly, J.

KELLY, J.:—My opinion is that, in the circumstances which arise in this case, the admission in evidence of the statements made by the accused to the detectives cannot, under the authorities, be held to have been improper, the statements having been voluntary. *Conviction affirmed.*

MAN.

C. A.

CANADIAN NORTHERN R. Co. v. WILSON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. November 18, 1918.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION BOARD—JURISDICTION—FINALITY OF DECISION.

Where the Workmen's Compensation Board has jurisdiction over any matter brought before it, its action or decision is final and not subject to question or review in any court. If, however, the Board attempts to deal with a matter over which it has not acquired jurisdiction, or if it fails to be governed by the provisions of the Act according to their true intent and meaning, its actions, decisions or proceedings are not protected by s. 57 of the Workmen's Compensation Act, and a party affected may seek the remedies available to him in the courts.

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION BOARD—ENQUIRY BY—JUDICIAL PROCEEDING—FAILURE TO GIVE NOTICE TO EMPLOYER.

An enquiry held by the Board as to the compensation to be allowed the representatives of a deceased workman, is a judicial one, and the employer should be given notice of the time and place of such enquiry. Failure to give such notice is not a ground for setting aside the order, if the Board has jurisdiction to deal with the matter.

Statement.

APPEAL by defendants from the judgment of Galt, J. Affirmed.

A. E. Hoskin, K.C., and *E. R. Siddall*, for appellants.

O. H. Clark, K.C., for respondents.

Perdue, C.J.M.

PERDUE, C.J.M.:—This suit is brought for the purpose of obtaining an injunction against the members of the Workmen's Compensation Board restraining them from filing in the Court of King's Bench a certain order of the Board directing payment of

compensation to the widow and children of one William John Craig, deceased.

The facts of the case as alleged by the plaintiffs are fully set out in the judgment of Galt, J., from whom this appeal is brought. The allegations of importance are as follows:—Craig, the deceased man, was, on or prior to 15th October, 1917, in the employ of the plaintiffs as a machinist. While engaged in repairing the cab of an engine in the shop of the plaintiffs he died, as it is alleged by the plaintiffs, from natural causes. According to medical testimony before the Board the deceased was suffering from "oedema of the brain, secondary to chronic interstitial nephritis." On December 5, 1917, the defendant Herbert George Wilson, who then was and still is the commissioner under the Workmen's Compensation Act, 6 Geo. V. c. 125, made an order for the payment by the plaintiffs to the widow of the deceased of the sum of $20 each month so long as she should live and remain unmarried, and of the sum of $5 to each of the two children of the deceased until each child reached the age of 18 years, and also the medical and burial expenses of the deceased, amounting to $80. The actual order made by the commissioner has not been produced but the provisions of it appear in his letter of December 5, 1917, written to the general claims agent of the plaintiffs. In this letter, which is written by the assistant commissioner, a demand is made upon the plaintiffs for the immediate payment of the sum of $6,331.20 to meet the above-mentioned monthly payments. The following is the clause in the letter explaining the reasons for the demand:—

> In requesting your cheque for the above amount we would remind you that in the event of the total sum being found inadequate to meet the pensions due and payable, your company may be called upon to make further payment in respect thereto, and in the same way, should the total pension payments prove to be less than the above-mentioned sum, the balance remaining will be placed to your credit as against any claims which may be outstanding at that time. In the meantime the unpaid portion of the award will bear interest at the special rate of 3½%.

On the same day, a further request was made by the commissioner upon the general claims agent of the plaintiffs for the sum of $80 to cover burial and medical expenses of the deceased.

The affidavits filed on the motion for injunction shew, and it is admitted by counsel for the defendants, that no notice of the proceedings leading up to the making of the above order was

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Perdue, C.J.M.

given to the plaintiffs. The plaintiffs had no knowledge of the order until they were notified by the above letters that it had been made.

At the time when the above order of the commissioner was made, the other two defendants, Messrs. Paterson and Kennedy, were not members of the Workmen's Compensation Board. They were afterwards appointed as directors under the amendment of the Act passed at the last session of the legislature: See statutes of 1918, c. 105, s. 6. They were made defendants for the purpose of enjoining the members of the Board from filing the order in the Court of King's Bench and thereby making it a judgment of that Court under the provisions of s. 60 of the Act.

When the motion for injunction came before Galt, J., the defendants raised two objections:—(1) That if any remedy exists it should be against the Board, which is a corporation under the Act, and not against the individual members; (2) That the Court has no jurisdiction to deal with any transactions of the Board, as all such interference by the Court is expressly taken away by the Act: See s. 57 of the Act.

As to the first objection, counsel for defendants stated that there were substantial questions affecting the construction of the Act, and that, for this reason, he would facilitate the argument by consenting that the Board of Commissioners should be substituted for the individual defendants; but objected to the members of the Board being made defendants personally. The Judge allowed the plaintiffs to amend the statement of claim by adding the Board as a defendant, the individual members of the Board by name remaining as co-defendants.

The second objection was dealt with at great length by the Judge and overruled by him. He also allowed the plaintiffs to amend the statement of claim by adding to par. 3 thereof an allegation that "the said order was made without notice to the plaintiff, nor did the plaintiff have knowledge of the making of the same until notified by the Workmen's Compensation Board that the order had been made."

The appeal is brought from the order allowing the above amendments, no order for an injunction having been made.

The real question involved in this appeal arises under the second objection set forth as above.

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Perdue, C.J.M.

Section 57 (1) of the Act is as follows:—

57 (1). The board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court.

The first part of the section down to and including the words "conferred upon the board" declares the exclusive jurisdiction of the Board as to the matters, questions and things arising under the first Part of the Act. Then follows the provision that "the action and decision of the board thereon," that is, upon the matters etc. in respect of which jurisdiction is conferred by the first Part of the section, "shall be final and conclusive," and shall not be questioned or reviewed in any court and that no proceeding of the Board shall be restrained by injunction etc. or be removable by *certiorari*. I think the true construction to apply to the section is that where the Board has jurisdiction over any matter brought before it, its action or decision is final and not subject to question or review in any court. It follows that if the Board attempts to deal with a matter over which it has not acquired jurisdiction or if it fails to be governed by the provisions of the Act according to their true intent and meaning, its actions, decisions or proceedings are not protected by the section and a party affected might seek the remedies available to him in the courts notwithstanding the provisions of s. 57.

In support of this proposition, I would refer to the decision of the House of Lords in *Andrews* v. *Mitchell*, [1905] A.C. 78. In that case, a member of a friendly society was summoned before the arbitration committee for a breach of the rules. The respondent attended, and evidence was given that the charge was well founded and that the respondent had at first given an untrue account of the facts. The respondent was desired to withdraw and the arbitration committee in his absence expelled him from the society by a resolution of the committee, not upon the charge which he had been called to answer but upon a charge of fraud and disgraceful conduct in giving an untrue account of the facts. S. 68 of the Friendly Societies Act, 1896 (Imp.), governing the society

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Perdue, C.J.M.

and its proceedings, enacted that every dispute between a member of the society and the society should be decided in manner directed by the rules of the society and that the decision so given should be binding and conclusive on all parties without appeal, and should not be removable into any court of law or restrainable by injunction. It was held by the House of Lords that this provision did not apply to a decision given by the arbitration committee without jurisdiction, and that there was not jurisdiction inasmuch as the committee had passed the resolution in the absence of the member and without giving him notice of the charge upon which he had been expelled, the rules of the society requiring that notice should be given in such a case. It was therefore held that the expulsion was null and void and that the court had jurisdiction to set aside the resolution expelling the member.

Wayman v. *Perseverance Lodge*, [1917] 1 K.B. 677, was a case also under the Friendly Societies Act. In that case, while the plaintiff, who had been for many years the secretary of the defendant society, was away on his military duties, a complaint was made against him of misapplying the society's funds. He denied the allegation, and some months later, without giving him any notice of an intention to hold an inquiry, or formulating any charge against him, and without hearing him, the committee of management expelled him from the society under one of the rules which provided that an officer misapplying the funds of the society should repay the same and be expelled, without prejudice to his liability to prosecution for the misapplication. The rules of the society provided for the decision of disputes by arbitration. The plaintiff took proceedings against the defendants in the County Court for a declaration that the rule was *ultra vires* and void, and for an injunction and damages. The respondents contended that under s. 68 of the Friendly Societies Act, which provided that every dispute should be decided in the manner directed by the rules of the society, and that the decision should be binding and conclusive and should not be removable into any court of law, or restrainable by injunction, the court had no jurisdiction to try the action or grant an injunction. The County Court Judge overruled the objection of want of jurisdiction, made the declaration asked for by the plaintiff and granted the injunction claimed. Ridley, J., granted a writ of prohibition against the County Court,

but on appeal to the King's Bench Division, Lush, J., and Bailhache, J., following *Andrews* v. *Mitchell*, [1905] A.C. 78, allowed the appeal and restored the judgment in the County Court.

In the above cases the rules of the friendly society in each case required that notice of a charge against a member should be given to him before he could be expelled. But where the provisions of a statute do not expressly require notice to a party before taking proceedings against him under the statute and do not dispense with the giving of notice, it is a fundamental principle that the party must receive notice of the proceedings and that otherwise they do not bind him.

In the present case, it is established by the plaintiffs and admitted by counsel for the defendants that no notice was given to the plaintiffs of the hearing of the application for compensation in respect of the death of the deceased and that the plaintiffs had no knowledge of the making of the order until advised by the letters from the commissioner above referred to. It is an elementary principle of law that a man shall not suffer in person or in property unless he has had an opportunity of being heard. This principle has been reiterated in case after case for the last three hundred years, not always expressed in the same words, but with the same force and meaning.

In *Bagg's* case, 11 Coke (Anno 1616) 93 b, it was held by the Court of King's Bench that the disfranchisement and removal of a burgess by the corporation of a borough, where it appeared that the proceedings had been taken "without hearing him answer to what had been objected" and that he "was not reasonably warned," were void and should not bind him even though the corporation had lawful authority to remove him upon just cause. The report of this case intimated that the principle goes back to Magna Charta.

In *Dr. Bentley's* case, *Rex* v. *Chancellor of the University of Cambridge*, (1723), 1 Stra. 556, 557, Fortescue, J. said: "The laws of God and man both give the party an opportunity to make his defence if he has any." This case is cited with approval by Maule, J., in *Abley* v. *Dale* (1850), 10 C.B. 62, 71, 138 E.R. 26.

Abley v. *Dale* was a case in which a County Judge ordered a party to pay money on a future day or in default to be committed

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Perdue, C.J.M.

and the party made default. It was held that the party could not be committed without being examined as to the cause of such second default.

In *Cooper* v. *Board of Works for the Wandsworth District* (1863), 14 C.B.(N.S.) 180, 143 E.R. 414, a section of the Metropolis Local Management Act empowered the district board to alter or demolish a house where the builder had neglected to give notice of his intention to build seven days before proceeding to dig the foundation. It was held that this did not empower the board to demolish a building without first giving the party guilty of the omission an opportunity of being heard. Erle, C.J., said, p. 189:

> It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point: but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down.

He then referred to *Dr. Bentley's* case, above quoted, and proceeded:

> The district board must do the thing legally; there must be a resolution; and, if there be a board, and a resolution of that board, I have not heard a word to shew that it would not be salutary that they should hear the man who is to suffer from their judgment before they proceed to make the order under which they attempt to justify their act.

Byles, J. said:

> It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with *Dr. Bentley's* case, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, *yet the justice of the common law will supply the omission of the legislature.*

He then refers to *Dr. Bentley's* case above cited. Willes, J., and Keating, J. were of the same opinion.

Capel v. *Child* (1832), 2 Cr. & J. 558, 149 E.R. 235, was a case where a statute enabled a bishop, if it should appear to his satisfaction, either of his own knowledge or upon proof by affidavit, that the ecclesiastical duties of a benefice were negligently performed, to require the vicar to nominate a stipendiary curate, and the bishop made a requisition to this effect on the vicar founded

on his own knowledge, without hearing the vicar. The Court of Common Pleas held the requisition bad. Lord Lyndhurst, C.B., at p. 573, thus expressed himself:

> Does not this (the statute) import inquiry, and a judgment as the result of that inquiry? He is to form his judgment; it is to appear to him from affidavits laid before him; but, is it possible to be said that it is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence—without having an opportunity even of being summoned for that purpose?

In *Bonaker* v. *Evans* (1850), 16 Q.B. 162, 117 E.R. 840, where an order had been issued at the instance of a bishop to sequester the profits of a benefice without notice to the incumbent of the benefice, it was held that the order was void for the reason that notice had not been given to the incumbent of the benefice. In giving the judgment of the Exchequer Chamber, Parke, B., said:

> No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary.

In support of this he refers to *Bagg's* case *supra*; *Dr. Bentley's* case, *supra*; *Rex* v. *Benn* (1795), 6 T.R. 198, 101 E.R. 509; *Harper* v. *Carr* (1797), 7 T.R. 270, 101 E.R. 970; *Rex* v. *Gaskin* (1799), 8 T.R. 209, 101 E.R. 1349; *Capel* v. *Child*, *supra*.

Smith v. *The Queen* (1878), 3 App. Cas. 614, is a decision of the Privy Council on an appeal from the Supreme Court of Queensland. In that case the defendant and appellant, Smith, had obtained from the Crown a lease of land for a term of ten years, subject to the requirements of an Act applying to pastoral and agricultural lands. Some time thereafter the acting commissioner made a report to the Secretary for Public Lands that the lessee had abandoned the land and failed in performance of the conditions of residence. A few days later a proclamation was issued by the Government declaring the lease to be forfeited and vacated. Ejectment proceedings were then commenced by the Crown for the recovery of the land. One of the grounds urged in defence was that no hearing of the defendant's case had taken place before the commissioner. Sir Robert P. Collier, in delivering the judg-

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Perdue, C.J.M.

ment of the Privy Council, held that the inquiry to be made by the commissioner under the Act was in the nature of a judicial inquiry and that the defendant was entitled to a hearing before the commissioner. His Lordship cited with approval the judgment of Bayley, J., in *Capel* v. *Child*, and also the case of *Cooper* v. *Board of Works for the Wandsworth District*, 14 C.B.(N.S.) 180, 143 E.R. 414. His Lordship then proceeds as follows, p. 625:—

Assuming the contention of the Crown to be correct, that in such a case as this it would be enough that the commissioner should be satisfied of abandonment alone, residence being put out of the question, their Lordships would be disposed to say that there does not appear to have been a finding of the commissioner of abandonment apart from non-residence. But they decide the case upon broader grounds. It appears to them that the defendant has not been heard in the sense in which "a hearing" has been used in the cases which have been quoted in many others, and in the sense required by *the elementary principles of natural justice*. The commissioner, doubtless, acted with perfect good faith, but, apparently, without being aware that he was performing a judicial function, or even a function of a judicial nature. He has not stated upon what evidence he formed his opinion, whether written or *viva voce*, whether direct or hearsay. He refused to furnish the solicitor of the defendant with any note or memorandum of that evidence, to give him any information as to who the witnesses against his client were, or even what was the general character of their evidence. The defendant could not answer or explain testimony of which he was kept in ignorance, and, therefore, was not heard in his defence in any proper sense of that term.

In *Painter* v. *Liverpool Oil Gas Light Co.*, 3 Ad. & E. 433, 111 E.R. 478, the principle under discussion was applied. There, a statute establishing a gas-light company enacted that if any person should neglect, for a period of 10 days after demand, to pay rent due from him to the company for gas supplied, the rent should be recoverable by warrant of a justice and execution thereon. A warrant issued by a justice without previously summoning and hearing the party to be distrained upon, was held to be illegal, though a summons and hearing were not in terms required by the Act. Williams, J., said, p. 448:

I never heard the proposition doubted, that a party is not to suffer in person or in purse without an opportunity of being heard.

Denman, C.J., referred to Lord Kenyon's statement in *Harper* v. *Carr* (1797), 7 T.R. 270, at 275, 101 E.R. 970, that:

It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence.

The same principle was applied by Jessel, M. R., in *Fisher* v. *Keane* (1878), 11 Ch. D. 353, where the committee of a club had expelled a member of the club for alleged misconduct without

giving him due notice of their intention to proceed against him and affording him an opportunity of defending or palliating his conduct. It was held that the committee was acting as a *quasi-judicial* tribunal and was bound to act according to the ordinary principles of justice; that notice of the investigation should have been given to the member and that the committee should be restrained by injunction from enforcing the resolution.

The last case was followed by Street, J., in *Gravel* v. *L'Union St. Thomas* (1893), 24 O.R. 1., at p. 10. That judge says:—

> It is one of the fundamental principles of every judicial inquiry, whether conducted in a court or by a body such as this, that a person accused shall not be condemned without a fair chance of hearing the evidence adduced against him and of being heard in his own defence.

The same principle was adopted in *Labouchere* v. *Wharncliffe*, (1879) 13 Ch. D. 346. I would also refer to *Bonanza* v. *The King* (1908), 40 Can. S.C.R. 281, and especially to the judgment of Duff, J., and the cases referred to by him.

I have discussed the above principle almost at greater length than was needful, but have done so because it was strenuously urged that the Workmen's Compensation Act does not require the commissioner to give notice to the employer in disposing of a claim and that he was justified in the course followed in the present case. In order to justify the action of the commissioner it must be shewn that the legislature, as Parke, B., points out in *Bonaker* v. *Evans, supra*, has expressly or impliedly given an authority to act without notice. Turning to the Act, there is nothing which in terms dispenses with notice to the employer of the time and place when the inquiry is to take place, but there are many sections which to my mind clearly intimate that the employer should be notified.

The definition of "employer" and "workman" in s. 2 of the Act shew that it must be established that there was a contract of hiring between the employer and the workman, and the nature of the work in which the workman was engaged must be shewn, so that the claim may be brought within the provisions of the Act. The employer should be permitted to shew, if he can, that no contract of hiring existed between him and the workman.

S. 11 declares that no action shall lie for the recovery of the compensation, but all claims for compensation shall be heard and determined by the Board, without the intervention of counsel or solicitor on either side except with the express permission of the

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Perdue, C.J.M.

Board. This section shews that an adjudication between the parties is to take place, but there can be no proper adjudication without notice to the employer and without hearing what he has to say in his defence either personally or by his solicitor if he is permitted by the Board to employ a solicitor. The statement of the law by Lord Lyndhurst in *Capel* v. *Child*, *supra*, and adopted by the Privy Council in *Smith* v. *The Queen* (1878), 3 App. Cas. 614, shews that there can be no proper adjudication of a case in the absence of the party who is to be charged.

S. 13 (2) of the Act is as follows:—

Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part and as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive.

This necessarily implies that the party applying to the Board must notify the opposite party that an application is being made to the Board to take away or suspend the right of action. It is not necessary in this appeal to deal with the question of jurisdiction which may arise under the clause. I can find no similar provision in the Ontario Act.

S. 18 makes it necessary that notice of the accident is to be given by the workman as soon as practicable and contains provisions as to how the notice is to be given. It is difficult to see what would be the object of giving notice of the accident to the employer unless the latter was also to have notice of the inquiry before the Board.

S. 19 (1) provides that a workman who claims compensation shall, if so required by his employer, submit himself for medical examination. This is evidently for the purpose of obtaining evidence as to the nature of the injury and of other facts for use on the inquiry.

S. 29 is as follows:

Where a claim for compensation is made, notice of every such claim shall be given to the insurance company or other underwriter liable and to the employer and the Board shall determine the question of the right of the workman or dependent to compensation and the amount of such compensation, subject to the provisions of this Part, and shall make an order as hereinafter provided.

This section appears to me to shew clearly that it was the intention of the Act that notice of the inquiry should be given to the employer.

S. 52:

The Board shall have the like powers as the Court of King's Bench in Manitoba or a judge thereof for compelling the attendance of witnesses and of examining them under oath, and compelling the production of books, papers, documents and things.

In this connection, if the commissioner or the Board exercises the power of calling and examining witnesses under oath, are these witnesses not to be subject to cross-examination, and is no evidence to be offered in contradiction of the evidence so adduced? Clearly it was the intention of the Act that the inquiry was to be conducted as a judicial inquiry at which the party to be charged had the right to be present and to be heard.

S. 57 (1) declares that the Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions under this Part. This shews that the inquiry by the commissioner is in the nature of a trial of an action.

The inquiry held in this case by the commissioner under the provisions of the statute was beyond doubt intended by the statute to be a judicial one. His duty therefore was to see that it was conducted as a judicial inquiry. The plaintiffs were entitled to notice of the proceedings before the Board leading up to the adjudication upon the claim, but they received no notice of the proceedings or of the adjudication and the order in question was made behind their backs. The words of Lyndhurst, C.B., in *Capel* v. *Child*, at p. 577, are peculiarly applicable in this case:

Here (he says) is a new jurisdiction given—a new authority given . . . and according to every principle of law and equity such judgment could not be pronounced, or, if pronounced, could not for a moment be sustained unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not.

S. 58 authorises the Board to award such sum as it may deem reasonable to the successful party to a *contested claim* for compensation or to any other contested matter, as compensation for his expenses of the contest. How, it may be asked, can a contested claim arise if the employer is not notified of the inquiry and it all takes place behind his back?

Turning to the order itself, the effect of which is given in the commissioner's letter of December 5, 1917, we find that the plaintiffs are ordered to pay the widow of the deceased $20 a month during her life and that her expectation of life was fixed at 25.38 years. Supposing that she lived up to the end of this period, all

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Perdue, C.J.M.

the monthly payments to be made to her would amount in the aggregate to $6,091.20, and the order calls upon the plaintiffs to pay this actual sum of money into court forthwith. The cash is to be paid at once to cover monthly payments extending over 25 years if the widow lives that long. One might expect that if she died during the period, the balance of the money would be returned to the plaintiffs. But the order says, no, the balance will be held by the Board to meet future claims against the plaintiffs. In the meantime, the plaintiffs will have the satisfaction of knowing that the unpaid portion of the award will bear interest at the rate of 3½ per cent. per annum which is to be added to the amount lying at their credit. It is worthy of remark that just about the time when the order was made the Dominion Government was selling long-term bonds at a rate which would realize for the investor 5.61 per cent. An investment, therefore, of some $4,280 in such bonds would produce the necessary annual income to provide the payments to the widow and at the end of her life would leave for the plaintiffs their capital sum unimpaired. The order speaks for itself. It is needlessly oppressive in its terms regarding the security to be furnished. This makes it all the more necessary that the plaintiffs should have been present at the making of the order and should have been given an opportunity to protest against its terms.

As I have already mentioned, the order appealed from only gave leave to amend the statement of claim and did not grant an injunction. But the parties desired the opinion of this Court upon the legal objections raised and this involved a somewhat full discussion of the Act.

I do not express any opinion upon the finding of the commissioner that the death of the deceased arose out of his employment by the plaintiffs. That is a question which should be decided on an inquiry at which the plaintiffs would be given an opportunity to be heard and to present their side of the question.

I think the plaintiffs were entitled to make the members of the Board party defendants to an action to restrain the Board from enforcing the order: See *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

I might suggest that notwithstanding the provision of s. 57 of the Act, the filing of the order in the Court of King's Bench would have the effect of making it a judgment of that Court under

s. 60 of the Act and the result would be that such judgment would immediately come under the jurisdiction of that court. The Court of King's Bench might in such case refuse to permit its process and proceedings to be made use of to enforce a judgment where no notice of the proceedings leading up to it had been given to the party against whom the judgment had been obtained. It may be said, why do not the plaintiffs wait until the order has been filed in the Court of King's Bench and then move to stay proceedings on the judgment? But the plaintiffs might very properly apprehend that unless they promptly took such steps as might be available to set aside or stay proceedings on the order, they might be charged with laches or acquiescence.

The courts have nothing to do with the general policy of the Act, which is a matter for the legislature. The intention of the Act is to afford protection and relief to a large and important class of persons, workmen and their families. It is the duty of the court to interpret the Act and declare its meaning where it is properly brought before the court for that purpose. The court can only interfere where the powers given by the Act have been exceeded, or where a fundamental principle inherent in the Act has been disregarded, so that a want of jurisdiction in its officers supervenes.

I think the appeal should be dismissed. At the same time, I would suggest that the Board might set aside the order under the powers given to it by s. 57 (3), and that the inquiry might be heard again, notice being given to the plaintiffs to appear and a full opportunity being given to them to present their side of the case. The plaintiffs being a corporation, they cannot be present in person. Permission, therefore, should be given by the Board under s. 11 for the plaintiffs to be represented by their solicitor at the inquiry. If this suggestion meets with the approval of both parties an order to the above effect might be made.

CAMERON, J. A.:—With reference to legislation in this province dealing with the subject of employers' liability and workmen's compensation, I might mention the Act respecting Compensation to Families of Persons Killed by Accident, our form of Lord Campbell's Act. This Act was passed in 1881 as c. 26 of 44 Vict. and is now c. 36 R.S.M. 1914. It is incidentally only that this Act deals with compensation to the families of deceased workmen. The

Cameron, J.A.

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Cameron, J.A.

only other enactment on the subject prior to the Workmen's Compensation Act, 10 Edw. 7, c. 81, was to be found in the Employers Liability Act, as it is called in c. 61 R.S.M. 1913, now repealed. This Act, as found in R.S.M. 1902, c. 178, was called the Workmen's Compensation for Injuries Act and was so styled in its original form, 56 Vict. c. 39. This statute was founded on and closely followed in terms the Imperial Employers Liability Act, 1880, which was passed, as is well known, to allay the dissatisfaction on the part of the public with the decisions of the courts on the subject of common employment, decisions regarded as repugnant to good sense and sound reasoning.

These decisions were modified to some extent by the Act.

Under the Act a workman is *primâ facie* entitled to recover where the employer—be he private employer or corporation—has delegated his duties or powers of superintendence to other persons, and such other persons have caused injury to the workman by negligently performing the duties and powers delegated to them, but the doctrine of common employment, save in so far as it is thus abrogated, remains: Ruegg, Employers' Liability, p. 89.

The restrictions on the amount which could be recovered in actions brought under these Acts have evoked continuous criticisms. It may be interesting to notice that the exclusion from the word "workmen" of the meaning "a labourer, domestic or menial servant in husbandry, gardening or fruit growing" as set out in s. 2 (c), of our Act is not to be found in the English Act.

We now come to the Act of the Legislature, 10 Edw. VII. c. 81, (c. 209, R.S.M. 1913, now repealed) the Workmen's Compensation Act founded on the Imperial Act entitled the Workmen's Compensation Act 1906, 6 Edw. VII. c. 58, with which the Workmen's Compensation Act 1897, of which it is an extension, must be considered. It was under this last-mentioned Act that, for the first time, the employer was made liable to compensate his workman for injuries quite apart from the question whether he, the employer, or anyone acting for him, was guilty of any breach of "duty in respect of the matter out of which the accident arose." The Act made the employer an insurer of his workmen against loss caused by injuries sustained by them when engaged on his work. Originally, the Act applied only to a few of the leading industries, and the first great extension of its benefits was made in 1900 to workmen engaged in agriculture. The partial application of these Acts was found to be unjustifiable and the Work-

men's Compensation Act, 1906, in which the broad principle of universal insurance against industrial accidents was recognized and applied, was enacted. By this Act, the Acts of 1897 and 1900 were repealed.

Under s. 5 of the Act (c. 209, R.S.M. 1913), the provisions of the Act apply only to employers employing five or more workmen and do not apply to domestic servants nor, it need hardly be added, to the employment of agriculture. And, by s. 3, when an accident occurs in any employment to which the Act applies to a workman, the employer shall be liable to pay compensation as prescribed. In certain cases of injury, where personal negligence intervenes, the civil liability of the employer is preserved at the option of the workmen. S. 2 (3). If the injury is due to drunkenness no compensation is recoverable; if an injury producing partial incapacity is due to the serious and wilful misconduct of the workman, no compensation is recoverable; otherwise, however, if the result of such misconduct is total disability or death. S. 4 (4).

If any question arises as to liability (including the question whether the employment or the person injured is a workman within the Act) it is to be settled by agreement or in default thereof by arbitration in accordance with the second schedule of the Act.

I think there is no difficulty in deducing from the terms of the Act the intention of the legislature to discountenance appeals and references to the Courts in matters arising thereunder. The only right of appeal given by the Act is of a strictly limited kind and is to be found in s. 4 of the second schedule, which is as follows:—

4. No other Act of the legislature referring to arbitration shall apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the Judge of the County Court, and the decision of the judge on any question of law, either on such submission or in any case where he, himself, settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by the statute governing appeals from the County Court either party appeals to the Court of Appeal. The court shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the court.

This (with some non-essential differences) is the same as s. 4 of the 2nd schedule of the Imperial Act, 1906, which is in turn taken from s. 4 of the 2nd schedule of the Act, 1897, except that the words "or where he gives any decision or makes any order

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Cameron, J.A.

under the Act" are inserted in the Act of 1906. As it is now, in England an appeal lies only from the decision of a County Court Judge on a question of law submitted to him by an arbitrator or from his decision on a question of law or a mixed question of fact and law where he himself acts as arbitrator. This appeal lies to the Court of Appeal, from which there is another appeal to the House of Lords.

I do not imagine that the framers of s. 4 of the 2nd schedule of the Act of 1897 (carried into the Act of 1906 and into our own Act as above pointed out) had any other idea than that they were providing for an appeal where a question of law came, incidentally, before the County Court Judge for determination. That Parliament deliberately intended, by the words of s. 4, to confer upon the Court of Appeal the right to inquire into and determine the jurisdiction of the County Court Judge, I find it difficult to believe.

As a matter of fact, under the Acts of 1897 and 1906 there was no appeal whatever when the County Court Judge dealt with questions of fact. Nor under the Act of 1897 was there any appeal whatever from any decision of an arbitrator appointed by a County Court Judge: See *Gibson* v. *Wormald*, [1904] 2 K.B. 40, where it was sought to read into the section a right of appeal from the arbitrator. I quote the following from the judgment of Collins, M.R., in that case:—

> A strong appeal was made to them by the learned counsel for the employers, which in effect asked them to take upon themselves the functions of the legislature and to say that the case was a *casus omissus*, and that the court ought to clothe the arbitrator with all the obligations and limitations of the County Court Judge. But it must be remembered that, when the Act was passed, in all probability none of the questions which had subsequently arisen were contemplated, and the scheme of the Act was that all questions under it should be settled by arbitration, the arbitrators being either a particular committee or an arbitrator agreed on by the parties, or an arbitrator appointed by the County Court Judge, or the County Court Judge himself. The general scheme of the Act was to have matters settled by arbitration, and *primâ facie* the decision of the arbitrator would be final, and not subject to appeal. The legislature thought that, as a general rule, they would deal with these disputes by what he might call a law or a non-technical tribunal, and, therefore, he could understand the view of the legislature that there should be no appeal. Then the legislature, in dealing with the County Court Judge, gave an appeal from him; but with regard to the other arbitrators the legislature only gave an appeal when the arbitrator thought fit to submit the question of law for the decision of the County Court Judge, perhaps in the hope that the judge's decision would be taken as final, and that an appeal to him would not involve the same expense as an appeal

to this court. Therefore, it was reasonable to suppose that the legislature deliberately intended that no appeal should lie from the arbitrator except where he thought fit to submit any question of law for the decision of the County Court Judge.

I would call attention to the language of Lindley, L. J., in *Fenton* v. *Thorley*, [1903] A.C. 443, at p. 453, where he says:

> But when personal injury and its cause or causes have been ascertained, the question whether such cause or causes amount to an accident within the meaning of the Act is a question of law on which the decision of the County Court Judge is not final; and is not a question of fact on which his decision is not open to appeal.

This has long been settled law, but it may well be considered that it states a question that parliament, when the Act of 1897 was originally framed and passed, did not contemplate or intend should be made appealable and an open door to costly litigation. In any event, the decision of an arbitrator on the point of jurisdiction is not open to appeal. That is absolutely clear. But from all decisions of the County Court Judge on what constitutes an accident, an appeal lies, as held in *Fenton* v. *Thorley* and in other cases.

The result of the liberal interpretation given by the courts to s. 4 of the 2nd schedule is to be found in the flood of reported cases in England. Special sets of reports have been brought out to include the decisions in appeal under the Act. While the maximum of compensation under the Act is fixed at £300 in case of death and much less in the case of injuries not resulting in death, yet there have been not only a great number of appeals to the Court of Appeal but a large number of these have been carried to the House of Lords. Some of these decisions have involved considerations not easily intelligible, and some of them have been based on the narrowest possible distinctions. The difficulty in reconciling them has been commented on by text writers. Lord Robertson remarked in *Fenton* v. *Thorley* (p. 452),

> Much poring over the word "accident" by learned counsel has evolved some subtle reasoning about these sections. I confess that the arguments seem to me to be entirely over the heads of parliament, of employers and of workmen.

It can be said without disrespect that this "subtle reasoning" has not been confined to counsel.

I observe that in [1917] A.C. there were no less than five appeals before the House of Lords arising out of the Workmen's Compensation Act. In Part I. of the [1918] A.C. there are no less than

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Cameron, J.A.

three appeals under the Act. In one of them, *Great Western R. Co.* v. *Helps*, [1918] A.C. 141, it was held by the House of Lords that, for the purpose of assessing compensation under the Act to a railway porter who has sustained injuries, gratuities or "tips" received by him from passengers whom he has "assisted" in the execution of his duties, where the practice of giving and receiving tips is open and notorious and is sanctioned by the railway company, are included in his "earnings." It is to be observed that Lord Parmoor issued a warning that "the decision in this case is applicable to tips which are notorious and well known, and not to tips which are casual, sporadic and trivial in amount."

We have it therefore firmly settled that, under the Workmen's Compensation Act, R.S.M. 1913, c. 209, there was no appeal from an arbitrator on a question of law or fact. If the arbitrator thought fit, he might submit a question of law for the decision of the County Court Judge which would be appealable to the Court of Appeal. Otherwise the decision of the arbitrator was unassailable and so also was the decision of the County Court Judge, except on a question of law or mixed question of law and fact.

And now we come to the Act in question in this appeal, the Workmen's Compensation Act, c. 125, 6 Geo. V., by which cc. 61 and 209, R.S.M. 1913, are both repealed and a new method of determining compensation to workmen for injuries sustained in their employment is provided.

By s. 3:

Where in any employment to which this part applies, personal injury by accident arising out of and in the course of the employment is . . . caused to a workman his employer shall be liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned.

By s. 46 of the Act:

There is hereby constituted a commission for the administration of this Act to be called "The Workmen's Compensation Board," which shall consist of a commissioner to be appointed by the Lieutenant-Governor-in-Council and shall be a body corporate.

By subsequent amendment two members have been added to the Board.

The Board is given wide powers and by s. 52 has the like powers of the Court of King's Bench for compelling the attendance of witnesses etc.

The section of importance on this appeal is s. 57, which is as follows:—

MAN.

C. A.

CANADIAN NORTHERN R. Co. v. WILSON.

Cameron, J.A.

57 (1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court. (2) Without thereby limiting the generality of the provisions of s-s. (1) it is declared that such exclusive jurisdiction shall extend to determining:—

(*a*) Whether any industry or any part, branch or department of any industry falls within the provisions of this part;

(*b*) Whether any part of any such industry constitutes a part, branch or department of an industry within the meaning of this Act.

(3) Nothing in sub-section (1) shall prevent the Board from reconsidering any matter which has been dealt with by it or from rescinding, altering or amending any decision or order previously made, all of which the Board shall have authority to do.

Other sections of importance are ss. 58, 59 and 60.

Now it is to be observed that there is in this present Act no right of appeal from the decision of the Board, not even such a limited right as was conferred by s. 4 of the second schedule of the former Workmen's Compensation Act repealed by this Act. Not only is there no such provision, but we have the express and explicit provision of s. 57 forbidding any appeal to the courts from, or interference by the courts with, the actions and decisions of the Board, in language that is incapable of being made more effective. There is no question in my mind that this is precisely what the legislature intended. It wished to eliminate the expenses and delays consequent on the everlasting series of appeals which had gone far, in the minds of many, to make the administration of the old law a scandal, and, for that purpose, to give the administration of the Act to a non-technical and business Board clothed with absolute powers and responsible to the Government and legislature only. That this is the legitimate conclusion to be drawn from the history of the legislation and from a consideration of the defects found in the administration of the original enactments, is, in my judgment, beyond question.

As stated by Collins, M.R., in the passage above cited, "The legislature thought that, as a general rule, they would deal with these disputes by what might be called a lay or non-technical tribunal and therefore he could understand the view of the legis-

MAN.

C. A.

CANADIAN NORTHERN R. CO. v. WILSON.

Cameron, J.A.

lature that there should be no appeal." These remarks, applicable to an arbitrator under the English Act of 1897, are most applicable to the Board under our Act. It is a lay and non-technical tribunal and it was the intention, wish and direction of the legislature that it, and it alone, should deal finally and absolutely with matters coming before it. Therefore, the jurisdiction of the courts to review or interfere with its orders and proceedings is definitely and positively excluded. All this seems absolutely clear to me. To adopt the argument of the plaintiff means, to my mind, that this court must repeal s. 57 of the Act and read into the Act in lieu thereof, not the old s. 4 of the second schedule, for that would be insufficient, but a general right to appeal or to interfere by injunction or prohibition, which is the same thing. All orders and decisions of the Board, whether in establishing its jurisdiction (which is certainly a question arising under the first part) in the first instance or after, and whether made *ex parte* or not, are in my judgment unassailable and unimpeachable, save as they may be reconsidered by the Board or be dealt with by the legislature. It is true there may be an occasional hardship in working out the Act, but possibly there can be no greater abuses than flourished under former legislation. There is no doubt in my mind that in the scheme of the Act it was intended, as it was declared, that there should be no appeal to the courts and no interference by the courts with the decisions of the Board.

Cases which were cited to us, such as *Bonanza* v. *The King*, 40 Can. S.C.R. 281, at 287, and other cases of like tenor, to my mind have, in view of the evident intention of the legislature, of the history of the legislation in question, and the clear and unequivocal language used by it in expressing its intention, no application whatever.

As to the question of parties: It was said by Romer, J., in *Raleigh* v. *Goschen*, [1898] 1 Ch. 73, at p. 80 (an action against the Lords Commissioners of the Admiralty):

> The conclusion I come to is that the present action was intended to be, and is, a claim against the defendants in their official capacity and not as individuals.

I think those words are applicable here. This action is undoubtedly directed against the Board and not against the individual members of the Board, who are not necessary or proper parties.

In my view the statement of claim discloses no cause of action and should be dismissed.

HAGGART and FULLERTON, JJ.A., concurred with PERDUE, C.J.M.

Appeal dismissed.

MAN.

C. A.

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

CLEMENT v. NORTHERN NAVIGATION Co.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 17, 1918.

NEGLIGENCE (§ I C—48)—CARRIERS—PLACING CRATED WAGGON ON WHARF—DANGEROUS POSITION—INJURY TO CHILDREN—LIABILITY.

Carriers are guilty of negligence in placing a crated waggon on a public wharf in too perpendicular a position, so that children lawfully on the wharf pull it over and are injured. The selection by the wharfinger of the place of deposit does not make him liable for the negligence of the carriers' servants.

APPEAL by the plaintiffs from the judgment of Sutherland, J. Reversed. Statement.

J. E. Irving, for appellants.

R. I. Towers, for respondents.

The judgment of the Court was read by

MACLAREN, J.A.:—Appeal from a judgment of Sutherland, J., rendered on September 17, 1917, which dismissed an action, brought under the Fatal Accidents Act, by the father and mother of the infant Joseph W. Clement, aged 6 years. The action was based both on negligence and on nuisance. Maclaren, J.A.

The defendants received at Owen Sound a crated democrat waggon, weighing about 800 or 1,000 pounds, consigned to Thessalon, on the north shore of Lake Huron, whither it was taken on their steamer "Germanic" and landed upon the Government wharf there, about midnight on the 17th September, 1916. The mate of the steamer, who had charge of the 5 or 6 men who unloaded it, asked the wharfinger where they should place it, and he directed it to be deposited leaning against the storehouse on the wharf, which was done; the axles of the waggon protruding through the boards of the crating and resting upon the flooring of the wharf. The following evening between 6 and 7, the plaintiffs and their children came to the wharf, which was a usual resort for the townspeople to enjoy the fresh air; and, while Mr. Clement and the wharfinger were seated and engaged in conversation, Joseph and two other smaller children climbed on the leaning crated waggon, which fell over on them, and Joseph received injuries from which he died, 6 days later.

ONT.

S. C.

CLEMENT v. NORTHERN NAVIGATION CO. LIMITED.

Maclaren, J.A.

The trial Judge found that the employees of the defendants unloaded the waggon from their vessel and delivered it on the Government wharf, at the spot and in the position indicated by the wharfinger, in fact under his supervision, and that they had nothing further to do with it. He adds: "If it was negligent to leave it in that position, or if as so left it constituted a nuisance, in either case I am of opinion that damages for injuries resulting could not be claimed as against the defendants in this action, but only as against the owners of the wharf."

The wharf in question belonged to the Dominion Government, and it was under the control of their wharfinger, and was regulated by an order in council of the 12th June, 1889, which, by sec. 9, provided that no goods or materials of any kind should be landed or placed upon it unless by permission of the wharfinger, and on such portion of the wharf as might be allowed, and should be so landed and placed in such a manner as the wharfinger might direct.

It was argued before us, for the defendants, that the old maritime rule that consignees are obliged to take delivery of cargoes and freight at the rail of the vessel should be applied here; and that, consequently, the defendants had no liability beyond that point, and that their employees were really the servants of the wharfinger and under his direction and acting for the consignees when they deposited the crate on the wharf and leaning against the wall of the warehouse. It is not necessary to consider whether the above maritime rule applies to the case of our inland coasting passenger steamers, carrying miscellaneous articles of freight for numerous private consignees, and it is a matter of common knowledge that local wharfingers do not as a rule handle such freight, but that the vessel employees do so under the direction of the wharfinger as to location of deposit. In the present case the custom of the port is clearly proved, and this is sufficient to override the above rule, even if it would otherwise have been in force. See Halsbury's Laws of England, vol. 10, p. 290, para. 544; *Marzetti* v. *Smith and Son* (1883), 49 L.T.R. 580.

The evidence is, that about 6 deck hands carried the crate in question off the boat, and the mate asked the wharfinger where they should place it, and he directed them to place it over against the wall of the warehouse, near the door, leaning against the wall, which they did.

ONT.

S. C.

CLEMENT v. NORTHERN NAVIGATION CO. LIMITED.

Maclaren, J.A.

The freight charges on the crate had been prepaid, and these included the charge for carrying it to the place indicated by the wharfinger. The latter collected from the consignee only the wharfage dues, 25 cents. The wharfinger kept no staff for handling such freight; and, in my opinion, the mere selection of the place of deposit and the indication of the place to the mate did not make the men his servants or make him liable for their negligence.

The accident was clearly caused by the fact that the leaning crate was left too nearly in a perpendicular position. This was the act of the men who placed it in such a position and leaning at such an angle. To my mind, by leaving it in that position, they were guilty of gross negligence, and thereby created a common nuisance. Whether or not the wharfinger also became liable for not abating the nuisance, we need not now inquire, as he is not a party to the suit, and it was landed at midnight, when it probably was dark. In addition to the natural presumption arising from the fact that the crate did actually turn over and fall upon the children, there is evidence from actual experiment, after it was raised up and replaced, that a very slight pressure or weight was sufficient to draw it away from the wall, and the wharfinger found it necessary to place a block of wood under the outer side of the crate to prevent the recurrence of another similar accident. There is no doubt that the men who placed it in such a dangerous position should have made it lean at a different angle or have placed a block or other support under the outer edge. As it was left by them, it was a veritable trap.

The wharf was really a continuation of Algoma street, which terminated at the water's edge, and was open to the public, and a popular resort for rest, recreation, and fresh air. The mate himself admits that children, as well as adults, were in the habit of going there when the boat called in the day-time, especially when the weather was fine.

The present case has much in common with an Irish case in which the Irish Courts held that a railway company was not liable, but which was reversed by the House of Lords: *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229. The facts of the present case are, in my opinion, much more favourable for the plaintiff than those of the *Cooke* case. Lord Atkinson says, at p. 237:—

ONT.

S. C.

CLEMENT v. NORTHERN NAVIGATION CO. LIMITED.

Maclaren, J.A.

"It would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred."

The facts in the present case are much more favourable for the plaintiffs than in the Irish case. In the first place, Joseph W. Clement was not a trespasser, as were the Irish boys. He and his family may be said to have been the guests of the wharfinger at the time, and were seated with him and engaged in friendly conversation, and, if not strictly invitees, they were, at the very lowest, licensees. The wharf was a "public place," and not private property as in the *Cooke* case, and the Clement children did not intentionally set any machinery in motion, as was done in the other case. Besides, there is evidence in this case that the plaintiffs were on the alert to prevent their children intermeddling with the implements on the wharf, although they did not observe until too late their approaching this fatal trap.

The employees of the company having thus been guilty of negligence and having created a nuisance, their liability would not terminate with their departure from the premises, as the trial Judge suggests, but would continue so long as the nuisance was not abated, or until the effects of their negligence ended. Even if the wharfinger were guilty of negligence in not abating the

nuisance, or not making the crate safe after he became aware of its dangerous position, he would thereby become a joint tort-feasor with the defendants, and be jointly and severally liable with them. The plaintiffs might sue any one or more of them at their choice, and each would be liable for the whole damage: Pollock on Torts, 9th ed., p. 202. As, however, no claim is made against the wharfinger, this point does not arise.

The liability of the defendants being so established, and there being evidence of a reasonable expectation of pecuniary advantage to the plaintiffs in the future from their deceased son, it becomes our duty to assess such damages, which we do at the sum of $600, apportioned $200 to the father and $400 to the mother.

The appeal must be allowed, and the defendants condemned to pay $600, with the costs of both Courts.

Appeal allowed.

WILLIAMS MACHINERY Co. v. GRAHAM.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ., October 21, 1918.

ASSIGNMENTS FOR CREDITORS (§ VIII A—65)—INSOLVENCY—CLAIMS—AMENDMENT—ESTOPPEL.

A creditor having amended his claim and valued his securities against an insolvent debtor, and such valuation having been acquiesced in, is estopped from subsequently setting up any preferential claim not set out in the amended claim.

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, (1917) 39 D.L.R. 140, affirming the judgment of Murphy, J., at the trial, by which the plaintiff's action was dismissed. Affirmed.

Mason and *Carter*, for appellant; *Griffin*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The facts of this case are not doubtful or indeed disputed. They are sufficiently set out in the judgment of the courts below and only a brief statement of them is called for here.

When the Westminster Woodworking Co. assigned to the respondent for the benefit of its creditors, of whom the appellant company was one, this last-named company held certain securities for its claim, the largest in amount arising out of a claim to certain insurance moneys under an agreement for insurance for a much larger amount, covering the whole of the Westminster Woodworking Co.'s works, made two days previous to the fire which destroyed that company's mill, but for which no policies had been

CAN.

S. C.

WILLIAMS MACHINERY CO. v. GRAHAM.

Fitzpatrick, C.J.

issued or receipts given. The insurance companies refused payment and it was exceedingly doubtful if anything could be recovered under the agreement until as the result of legal proceedings they were held bound by it.

The appellant, called upon by the respondent to value its securities, after some hesitation put in a valuation of the securities it held other than its claim under the insurance in litigation, of which it made no mention and proved for the balance of its claim as a creditor.

When the insurance moneys had been recovered, the appellant asserted its original right in these as a secured creditor and its claim to be at liberty to do this was repudiated by the respondent on behalf of the other creditors.

The action is for a declaration that the respondent holds the sum of $9,000 part of the insurance moneys collected as trustee for the appellant.

Whether the appellant considered that the claim against the insurance company was so doubtful as to be negligible or was desirous of holding off until it was seen how the lawsuit would turn out, is perhaps immaterial. The position it eventually attempted to take was that it had reserved the right to take after the event whichever course had been shewn to be for its advantage, either to abandon its security and assert its claim in full or to stand upon its security and prove for the balance of the claim reduced by the amount received in respect of the security. This I do not think it could do. The proof put in must, I think, be considered, under the circumstances, as having been a valuation of all the security claimed to be held. There can, of course, be no question of valuation now when the security has been realized.

The result of the appellant's contention would manifestly be unfair to the other creditors. The appellant would have had the suit fought at their expense, though itself the party chiefly interested, besides having the advantage if it had failed of having its claim rank in full with those of the other creditors.

That the appellant was badly advised by its solicitor, as suggested in its factum, can be no ground for holding that it is not bound by its acts.

The case is concisely, but I think sufficiently, dealt with in the reasons of Macdonald, C.J., in the judgment appealed from

and I do not think it necessary to add anything further to these, with which I agree.

The appeal should be dismissed with costs.

Davies, J.

Davies, J.:—I concur with the reasons for judgment of Macdonald, C.J., in the court appealed from, and am of the opinion that either upon the ground of estoppel or of abandonment of its claim the plaintiff is not entitled to the preferential claim it seeks to have affirmed in its action.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant's factum says that:—

This action was brought for a declaration that the plaintiff was entitled to the sum of $9,000 insurance received by the defendant from certain insurance companies and that the defendant holds the same as trustee for the plaintiff, and for an order directing payment of said amount to the plaintiff.

This is possibly in accord with the writ issued by appellant which claimed $9,000 out of moneys received by respondent from four companies named. But the statement of claim, departing therefrom, claims in respect of insurance contracts with five companies named.

Whichever way it is put, the prayer in the statement of claim is for a declaration that defendant (now respondent) holds as trustee for plaintiff (now appellant) $9,000 and an order for its repayment to the plaintiff, or alternatively that plaintiff is entitled to the sum of $9,000 out of the proceeds of the said insurance policies, which must mean out of the five policies.

There is a further prayer for costs, but no other specific alternative or, as usually happens, in way of a prayer for such further or other relief as the plaintiff might be found entitled to.

I do not think the appellant at the trial made out by the evidence adduced any such claim as set forth, or, on such basis, right to relief as prayed for.

The claim as made is of a very ordinary character if the facts had supported it.

It is that of the ordinary mortgagee with a covenant assuring him that the mortgaged property will be insured for his benefit. He sometimes gets an assignment of the policy thus promised, and at other times gets a policy containing a clause reading "loss, if any, payable to him as his interest may appear."

The appellant and the insolvent company or the latter's founder began a course of dealing on that basis which, if adhered to, would have produced a very simple set of facts to deal with.

CAN.

S. C.

WILLIAMS MACHINERY CO. v. GRAHAM.

Idington, J.

Their dealings, however, so grew in complications arising from the later form of insurance policy adopted and the conflicting interests of others entitled to claim under the several policies issued, and relied upon, that I am strongly inclined to think the legal situation of the several parties under the policies so issued was entirely different from what they imagined and present in the statement of claim.

The companies concerned had agreed on a basis of indemnity which distributed the total amount of any given policy over a number of different subject matters, which would result in the application or appropriation of the proceeds in the event of a loss in a manner entirely different from that originally agreed on, or that presented by appellant in its statement of claim.

The claim so made was attacked in the court below and here by respondent on the ground of illegality, as infringing the provisions of the Imperial Gambling Act re-enacted in British Columbia.

That ground is fairly arguable, but upon what I conceive to be the true construction of the policies (which is that the terms used do not extend the insurances in favour of appellant to buildings) is not, in my opinion, tenable.

The claim, however, as made by appellant and founded upon an entirely different construction, is untenable. And whilst it had a tenable claim such as I conceive existed at one time, it failed by its statement of claim to put forward that and cannot do so now without amendment of its pleadings, which is not asked for, and in any event at this stage should not be granted, under the peculiar circumstances of its devious course of conduct which has, beyond doubt, induced the respondent and those he represents to change his and their position.

The actual situation in law, of the appellant, on the true construction of the policies confining its rights to such claims according to its interests (which I take to mean insurable interests) as might appear would upon the application of the relevant facts reduce same to a mere fraction of what is now claimed.

That claim, perhaps legal at one time, is not now put forward, and by its conduct the appellant is debarred from now setting it up. Quite true the counsel for appellant, at an early stage of the argument, in answer to my suggestion that the claim might be a

fractional part, was good enough to say his client would accept that rather than nothing. An examination since, of the pleadings, leads me to the conclusion which I have already expressed.

I am not to be taken as holding that an insurance upon property of a debtor in which a creditor has no interest may not, pursuant to an agreement therefor, be assigned as a security by the debtor to his creditor and the fruits thereof claimed by such assignee in event of loss. I merely hold that the ordinary phrase, "Loss, if any, is payable to the party named as his interest may appear," does not extend his rights to cover more than his insurable interest unless and until something more express is made to appear as the intention of the parties.

In the case of *McPhillips* v. *London Mutual Fire Insurance Co.*, 23 A.R. (Ont.) 524, relied upon by appellant, the late Burton, J., whose opinion is entitled to great respect, evidently held the same view, for he says, p. 526, after quoting the phrase in question:—

> This, though an appointment in favour of the mortgagee, was manifestly confined to his interest in the mortgaged premises.

When the judgment for recovery therein was given for something more in respect of chattels, it was expressly rested upon a later assignment by the assured to the creditor. If that had been made, and in question herein, another case than pleaded would exist. Or if any verbal agreement existed to produce such an assignment the pleading falls far short of expressing any such case; as do also the particulars delivered to make the pleading clear.

The case of *Castellain* v. *Preston* (1883), 11 Q.B.D. 380, though not expressly in point, furnishes an exposition of the relevant principles of law well worth bearing in mind that an insurance contract is one of indemnity only; and surely *primâ facie* is confined solely to property the assured had claimed to be interested in. There are many American authorities cited in May on Insurance, 4th ed., sections 347 and following, to end of c. 22, giving illustrations of almost every shade of opinion as to the relative right of mortgagor and mortgagee, and what falls within the usual phrase, "loss, if any, payable to one named as his interest may appear."

I suspect all these considerations were present to the mind of the solicitor for the appellant when he framed the last proof of its claim on the basis of discarding such a security as practically worthless.

CAN.

S. C.

WILLIAMS MACHINERY CO. v. GRAHAM.

Idington, J.

The first proof of claim made by the appellant, immediately after the assignment to respondent, set forth its total claim of indebtedness, and said:—

That the said A. R. Williams Machinery Co. of Vancouver, Limited, hold lien security for the said indebtedness.

It was only lien security that was thought of and it might be fairly inferred insurance thereof but not of something else.

The appellant's course of business had been, in making sales, to take receipts shewing that the property in the thing agreed to be sold did not pass to the intended vendee. And then it was agreed to insure such personal properties for the benefit of the appellant.

The schedule system was never intended to give any substantially different right, but was supposed, no doubt, to be so proportionately adjusted as likely to work out approximately the same result.

I do not think, in fact, that it did so work out. But certainly it never occurred to any one concerned to imagine that the insurance on the buildings which might, in event of loss, be satisfied by reinstatement, was to go to pay off the appellant or such like parties concerned in personal or chattel property only.

When the parties concerned were confronted with the actual situation of the results of a fire, it turned out that application had been made two days before the fire for a total insurance, in a new set of companies, of $40,000—an insurance of $5,000 beyond that theretofore existent and to be taken up or placed as old policies expired.

This was only an oral arrangement with insurance agents, and its validity, or at all events enforceability, is of a dubious nature.

None of the companies concerned seemed inclined to respond to such a claim, and appellant failed to take any steps to enforce its alleged individual rights against any of such companies, though well aware of all the facts known to respondent. I was surprised to hear it suggested in argument that appellant could not sue and was entirely at the mercy of respondent in that regard. The common law right of action, no doubt, rested with the insolvent company and was passed on by virtue of the effect of s. 2 of the Creditors' Trust Deeds Act to the respondent, who, in the view contended for by the appellant, became a mere trustee for it of

the entire insurance of the $6,000 placed with and accepted by the Stuyvesant Company.

The clear right of the appellant under such circumstances, if any foundation for its contention, was, in the first place, exactly what the assignee of any chose in action had long been in the enjoyment of, namely, to bring an action in the name of the assignor thereof upon duly indemnifying him against costs or what practically amounted to the same thing, any form of suit which local procedure sanctions to enforce its alleged equitable right; and in the next place, under s. 53 of the Creditors' Trust Deeds Act, to obtain an order from the judge entitling it to bring the action and receive the benefit thereof solely for itself.

The appellant, very prudently having regard to the untenable nature of its right to extend its claim into the region of illegality, if anything worth while is to be made of its claims, did none of these things, but being represented by its manager, as one of the inspectors of the estate, took an active part in promoting actions by the assignee for the joint benefit of all creditors against some of the insurance companies alleged to be liable on the oral agreement for insurance and formulating a scheme for the financing of such litigation.

This latter necessity was met by an assessment made upon the creditors; first of one per cent. of their respective claims, and again of another, and a third call till $750 had been collected.

The appellant first contributed $90 to this fund and, after the learned trial judge had decided in respondent's favour in the suit against the Stuyvesant company, ((1915), 25 D.L.R. 284, 22 B.C.R 197) which case was tried as a test one, another $90 to fight the appeal in which the respondent was successful.

Then appellant turned around and put forward the claim now presented that it was entitled to the whole $6,000 so secured as its own and to $3,000 beyond out of later recoveries.

Meantime, some months after the action was brought and months before it was tried, the assignee, apparently advised to make clear and undoubted the actual position of the appellant, called upon it to value, in accordance with the Creditors' Trust Deeds Act, any securities it had and, in accordance with such request, it filed an amended claim whereby its secretary, on its behalf, conversant with the foregoing history of the litigation then

CAN.

S. C.

WILLIAMS MACHINERY CO. v. GRAHAM.

Idington, J.

pending and advised by counsel, well aware of all the facts then obtainable, after setting forth as previously its claim, declared as follows:—

3. That the said the A. R. Williams Machinery Co. of Vancouver, Limited, holds security for the said indebtedness in the form of lien notes covering machinery and an insurance policy with Ceperley, Rounsefell & Co. covering portion of insurance on the machinery, which security we value as $3,700.

This was done, not hastily or in error, but on the advice of a solicitor since deceased, who, no doubt, appreciated not only the difficulties of supporting any litigation in maintenance of the assignee's claim, but also the difficulties which I have already referred to, of appellant, in any aspect of the matter involved, getting more than a fractional part of its entire claim.

The difference between what it might get standing alone, or jointly with other creditors of which its claim above represented, roughly speaking, would be a fourth part, was such that it could not be worth while raising any question about, and, alone, unaided running risk of litigation.

The statute under which such proof was made provided, by s. 31 (*a*) as follows:—

Every creditor in his proof of claim *shall state* whether he holds any security for his claim, *or any part thereof*, and if such security is on the estate of the assignor or on the estate of a third party for whom such assignor is only secondarily liable, *he shall put a specified value thereon*; and the assignee, under *the authority of the creditors*, may either consent to the right of the creditor to rank for the claim after deducting such valuation, or *he may required from the creditor* an assignment of the security at the specified *value to be paid* together with interest thereon at the legal rate from the date of filing the claim until payment, out of the estate as soon as the assignee has realised such security, and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor *shall be the amount* for which *he shall rank and vote in respect of the estate*. Before assigning such security such creditor shall be entitled to receive security from such assignee for the value of such security so to be assigned. In case of any dispute a Judge of the Supreme or County Court may settle the same *in a summary application*.

It was thus obligatory by the statute, as well as otherwise, upon the appellant to be honest in presenting its claim, and to name any security from which it hoped to reap anything exclusively for itself, such as now claimed, and to value it. The respondent assignee was advised by the creditors to accept and act upon this declaration and surrender the securities claimed, and did so, on faith thereof.

With that obligation by statute and all other moral obligations resting upon it requiring the observance of fidelity in dealing with its co-adventurers who had embarked with it in promoting risky litigation for their common advantage, it saw fit, after the victory sought was won, to turn round and claim as its own one-half of the entire sum recovered. This was a violation of the contract clearly inferable from the expressions and conduct of the parties. It was an improper attempt to evade or to abuse the provisions of the statute. Its conduct had estopped it from so claiming.

Idington, J.

We are called to give effect to such a claim deliberately abandoned, if faith was to be put in its statutory declaration. It had clearly elected to take its chances in common with all its fellow-creditors, instead of bearing alone the burden of asserting in litigation a claim for which I can find no support in law, and if possible still less in equity, to the rules of which it pretends to appeal as against the respondent, claimed by it to have been throughout its trustee.

I should be very sorry, indeed, if I had found our law such an impotent instrument for the administration of justice as to compel us to assent thereto.

I think the appeal should be dismissed with costs.

DUFF, J. (dissenting):—I am of the opinion to allow this appeal.

Duff, J.

ANGLIN, J.:—Whether what the appellants did should be held to amount to an abandonment of their claim upon the insurance in question as security for the indebtedness to them of the Westminster Woodworking Co. Ltd., in liquidation, or merely to be conduct raising an estoppel *in pais* against their inserting a prior right to an integral part of such insurance as against the other creditors of the Woodworking company and its assignee, for the reasons stated by the learned Chief Justice of the Court of Appeal, I am of the opinion that, having regard to all that has taken place, it would certainly be inequitable to permit such a right to be now insisted upon.

Anglin, J.

BRODEUR, J.:—The question in this case is whether the appellant company, having failed to claim a security and to value it under the provisions of s. 31 of the Creditors' Trust Deeds Act of British Columbia, is considered as having abandoned it or is estopped from exercising any right in connection with that security.

Brodeur, J.

CAN.

S. C.

WILLIAMS MACHINERY CO. v. GRAHAM.

Brodeur, J.

The appellant company had sold some machinery to the Westminster Woodworking Co., and it had been agreed between them that out of their total insurance on their mill and machinery the latter company would undertake to see that their liability to the Williams company would be protected, and the policies provided that fire losses would be payable to the Williams company as its interest may appear.

Several of those insurance policies terminated on February 13, 1914, and an insurance agent verbally agreed in the name of different companies which he represented to insure the plant and the machinery of the Woodworking company for the amount asked for. There was no written receipt given.

Before any policies were issued, a fire occurred and the mill and contents were destroyed.

That accident put the Woodworking company in financial difficulties and they were forced to assign for creditors under the Creditors' Trust Deeds Act of the province to respondent, John Graham.

It was decided by the creditors to claim the payment of the insurance, and the creditors were called upon to file their claims.

On March 16, 1914, the appellant filed with the respondent a sworn declaration stating that a sum of $13,267 was due them and claimed security by lien. Later on the assignee asked the appellant to have particulars of their securities and the value they placed on them. That letter of the assignee was referred to their solicitors, who discussed the question with the solicitor of the estate and he evidently came to the conclusion that the appellant company would be in a better position to rank as an ordinary creditor than to claim any preference under the verbal insurance policies which were under litigation.

They could have valued their securities, but then would have lost a part of their claim if later on the litigation with the insurance company would prove to be unsuccessful.

They could also abandon their securities and prove their total claim as an insured creditor.

They adopted the latter course.

Later on, however, the creditors succeeded in their action against the insurance companies and the insurance money was paid to the assignee. Now the Williams company wants to claim part of that money as a secured creditor.

CAN.

S. C.

WILLIAMS MACHINERY CO. v. GRAHAM.

Brodeur, J.

I agree with the trial judge and the Court of Appeal that the appellants can claim only as ordinary creditors. They were, under the provisions of the Act, bound to prove their claims and to state if they had some securities and value them; or they could abandon their securities. They thought, when the matter was under litigation and their alleged securities were very uncertain, that their interests would be better served by abandoning their privilege claims on that insurance money. They have deliberately elected not to claim as privileged creditors and they have abandoned their rights in that respect.

The appeal should be dismissed with costs. *Appeal dismissed.*

ONT.

S. C.

GERARD v. OTTAWA GAS Co.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins, and Ferguson, JJ.A. June 14, 1918.

NEGLIGENCE (§ I B—9)—EXPLOSIVE STICK FOUND IN TOOL BOX ON ROADSIDE—INJURY TO CHILD—QUESTIONS SUBMITTED TO JURY—FINDING—FINALITY OF—JUDGMENT.

In an action to recover damages for injury to an infant caused by an explosive stick which he said he found in a tool box left unlocked on the roadside by the defendants, the jury in answer to questions submitted to them found: (1) that the infant plaintiff obtained the explosive which injured him from the defendants' box; (2*a*) that the defendants "may not have known" it was there; (2*b*) that the defendants ought, by the exercise of reasonable care, to have known that it was there; (3) that the explosive was in the possession of the defendants when the infant plaintiff obtained possession of it; (4) that the defendants were guilty of negligence in their care of the explosive; (5) that the negligence consisted in not locking their tool-box; (6) that the defendants' negligence caused or contributed to the accident; (7) that the infant plaintiff was not guilty of any negligence which caused or contributed to the accident:—The court held that the main question, whether the boy had obtained the explosive from the defendants' tool-box, was a question for the jury, their finding could not be disturbed, and that judgment was properly entered for the plaintiff on the findings.

Statement.

AN appeal by the defendants from the judgment of Mulock, C.J.Ex., at the trial, upon the findings of a jury, in favour of the plaintiffs. Affirmed.

The action was brought by John Gerard, a boy of 9 years of age, by his father as next friend, and by the father as a plaintiff in his own right, to recover damages arising from an injury to the boy from an explosive said to have been negligently left in a tool-box on wheels, by the defendants' servants, on the side of a street in the city of Ottawa, where they were digging a trench for the laying down of gas-pipes.

The jury awarded the boy $700 damages and his father $100, and judgment was given in their favour for these sums, with costs.

ONT.

S. C.

GERARD v. OTTAWA GAS CO.

Maclaren, J.A

G. F. Henderson, K.C., for appellants.

A. E. Fripp, K.C., for respondents.

MACLAREN, J.A.:—This is an appeal by the defendants from a judgment for $700 in favour of John Gerard, a boy of 9 years of age, and $100 to his father, amounts awarded by a jury for damages sustained by the boy from an explosive said to have been negligently left in a tool-box on wheels, by the defendants' servants on the side of a street where they were digging a trench for the laying down of gas-pipes.

The story of the boy was, that at the noon hour, while the workmen were resting and sleeping at some distance on the other side of the street in the shade, he was on his way to school, and peered into the box, which had the lid up, and saw in a smaller box the explosives (sticks, he calls them), one of which he took and hid in an adjoining field, where he left it for about two weeks, when he went for it and carried it in his pocket for two days. In playing with it he struck it violently against a stone. An explosion followed, which carried off part of the thumb and parts of two fingers of his left hand.

As to his finding and taking the explosive, he is corroborated by his older brother, Thomas, 11 years of age, who was with him, and who tried to take the stick from him, but did not succeed. His description of the stick does not tally closely with the plaintiff's, but that is of little importance, as he only got a glimpse of it.

The defendants produced the foreman and the men who worked on the job in question, and they all swore that they had used no explosives on that street, and had not done so anywhere that season, and that there was no such small box of explosives in the cart; also that they always took their mid-day meal around the tool-cart, as it was on the shady side of the street, and that they never all left that spot during that hour, as the boys alleged; and that there was no such small box or such explosives, or any explosive, in the cart-box while they were working on that street, and that it was impossible for the plaintiff to have got the explosive as he claimed.

They also produced a policeman and companions of the infant plaintiff, who swore that he had at the time given them accounts widely different from what he stated in the witness-box.

The following are the questions submitted by the trial Judge to the jury and the answers given by them:—

ONT.

S. C.

GERARD v. OTTAWA GAS CO.

Maclaren, J.A.

"1. Where did the infant plaintiff obtain the explosive which injured him? A. In the Ottawa Gas Company's tool-box.

"2. If from the defendants' tool-box: (*a*) did the defendant company know it was there? A. May not have known. (*b*) Ought they, by the exercise of reasonable care, to have known that it was there? A. Yes.

"3. Was the explosive in the possession of the defendant company when the infant plaintiff obtained possession of it? A. Yes.

"4. Were the defendant company guilty of any negligence in their care of the explosive? A. Yes.

"5. If so, in what did such negligence consist? A. In not locking their tool-box.

"6. If the defendants did not exercise reasonable care, did such negligence cause or contribute to the accident? A. Yes.

"7. Was the infant plaintiff guilty of any negligence which caused or contributed to the accident? A. No.

"8. What damages do you award: (1) To Mr. Gerard? A. $100. (2) To Jack Gerard? A. $700."

The questions were submitted to counsel before they addressed the jury; and, after some discussion, they both expressed themselves as satisfied with them.

The main issue in the case was, whether the infant plaintiff had obtained the explosive in question from the defendants' tool-box. On the one side was the direct, positive, affirmative testimony of the two boys; against this the strong statements of the defendants' workmen that there was no such explosive in their box. It was peculiarly a case for the jury, and they have seen fit to accept the story of the boys, as they had a perfect right to do.

When the jury brought in their verdict, counsel for the defendants urged that, under the answers of the jury to questions 2 (*a*) and 2 (*b*), they were entitled to judgment, on the ground that the company would only be liable in case there was actual knowledge on their part. In my opinion, the jury having found that the explosive was in the defendants' box, the onus was upon them to shew that it had come there in some way for which they were not responsible, and this they wholly failed to do.

The verdict was, moreover, satisfactory to the trial Judge, and I do not think we can interfere with the judgment.

In my opinion, the appeal must be dismissed.

MAGEE and FERGUSON, JJ.A., agreed with Maclaren, J.A.

Magee, J.A.
Ferguson, J.A.

ONT.

S. C.

GERARD v. OTTAWA GAS CO.

Hodgins, J.A.

HODGINS, J.A.(dissenting):—Appeal from the judgment at the trial, the jury's answers to questions being construed as entitling the respondents to judgment.

Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, at p. 413, states a proposition of law which, if applicable, covers this case. He speaks of the general rule "that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself . . . that injury would not have occurred."

In *Ruoff* v. *Long & Co.*, [1916] 1 K.B. 148, Avory, J., adds this (p. 152): "To determine whether this negligence (if any)," (i.e., leaving a steam lorry unattended on the street), "was an effective or proximate cause of the damage the question to be answered is this: Admitting that the accident would not have occurred but for the intervention of a third person, was such an intervention a thing which the defendants as reasonable men ought to have anticipated?"

[The learned Judge then set out the jury's findings, as above.]

It is plain that the direct contradiction between the parties has been settled by the jury's answer to the 1st and 5th questions. The result of these answers is that the explosive was left in an unlocked box on the highway, the servants of the appellants being at some little distance at their dinner.

But these men, while servants of the company, had nothing to do with the explosives, and all denied any knowledge of their presence in the box. The jury say (Q. 2) that the appellants may not have known that the explosives were in the box, but ought to have been informed of the fact if they had exercised reasonable care.

That answer, taken in connection with the other findings, must either mean that the company's men at work did not themselves know of the explosives being in the box, in which case it is hard to find that negligence consisted in not guarding them, or that, if they did know, they were not employees whose knowledge was sufficient to charge the company with actual knowledge, and that reasonable care demanded something more.

But what was in the jury's mind is not specified, and yet that is just what the Court must know in order to be sure that what they may have considered lack of reasonable care was really such as a matter of law. There is no use asking the jury questions, if their answers are not specific or are so vague as to render it necessary to spell out what they meant. It must be reasonably clear from the charge and their response that some definite act or omission is intended. This is particularly so when, on examining the charge, it becomes apparent that what was said upon question 2 (*b*) had reference really to reasonable care in guarding against danger from the explosive and not to reasonable care in acquiring the knowledge that it was in the box; and the jury may, therefore, have so interpreted the question.

It has been decided that, where there are several acts of negligence set up in the evidence, the jury's finding of one or more excludes the others.

But, if they have not specifically named anything, is it to be determined that they meant to include all that are suggested in the charge, especially in such a wide field as reasonable care? Then again, if the company did not know or may not have known, how could they have contemplated an act by a boy or other passer-by being such as to cause damage to him or others? No question was put to them on this head, and their attention was not directed to it—and it cannot be premised that, under the circumstances as found, the company should have so anticipated if they did not in fact know. The importance of this is obvious from the fact that, unless such a question is properly found against the company, they cannot be made liable: *McDowall* v. *Great Western R.W. Co.*, [1903] 2 K.B. 331, and *Latham* v. *R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, 413; *Geall* v. *Dominion Creosoting Co.* (1917), 55 Can. S.C.R. 587, 39 D.L.R. 242.

While, therefore, every respect should be paid to the finding of a jury, I am of opinion that proper deference thereto is limited to cases where there is a definite finding of fact, and not a general "statement of want of care without proof given or reason assigned, based upon the jury's own inner consciousness and on their own notions of the fitness of things," to quote from Lord Justice Hamilton's words in *Newberry* v. *Bristol Tramways and Carriage Co. Limited* (1912), 107 L.T.R. 801.

ONT.

S. C.

GERARD v. OTTAWA GAS CO.

Hodgins, J.A.

I think this is all that is meant by Lord Atkinson in *Toronto R.W. Co.* v. *King*, [1908] A.C. 260, when he says (at p. 270): "They" (the jury) "are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at."

In *Lewis* v. *Grand Trunk Pacific R. Co.* (1915), 52 Can. S.C.R. 227, 26 D.L.R. 687, the Supreme Court of Canada decided that want of definiteness rendered the jury's answers unsatisfactory; and in *Ryan* v. *Canadian Pacific R. Co.* (1916), 37 O.L.R. 543, 32 D.L.R. 372, this Court sent the case back for a new trial because the cause of the accident was obscure on account of the want of particularity in the answers of the jury as to the connection between what they called negligence and the accident itself.

In the latter case the jury had not followed the request of the trial Judge that they should find how the negligence alleged had caused the plaintiff's death. In this case they were not directed on that point. I have not fully considered the question argued that actual knowledge of the presence of the explosives was a condition precedent to liability for want of reasonable care, but at present I do not see why, as a matter of law, carelessness in acquiring or neglect to obtain knowledge may not, in some cases, be urged as equivalent to knowledge.

The verdict is, in view of the foregoing, an unsatisfactory one, and I think the appellants are entitled to a new trial, the costs of which should be in the cause.

The respondents should pay the costs of the appeal in any event of the action.

Appeal dismissed (HODGINS, J.A., *dissenting*).

ALTA.

S. C.

Re TRISKOW and CHILDREN'S PROTECTION ACT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 28, 1918.

PARENT AND CHILD (§ IV—45)—DESERTED CHILD—IN CHARGE UNDER CHILDREN'S PROTECTION ACT—RIGHT OF PARENT TO BE INFORMED OF WHEREABOUTS.

The parents being both in jail on criminal charges, their children were taken in charge under the Children's Protection Act as deserted children. After their release the parents applied for the return of the custody of the eldest child. This application was refused. A subsequent application for an order compelling the Superintendent of Neglected Children

ALTA.

S. C.

RE TRISKOW AND CHILDREN'S PROTECTION ACT.

to inform them of the whereabouts of the then youngest children and to keep them informed of any changes, was granted. The Superintendent of Neglected Children complied with the order as to the present whereabouts, but appealed from the order, objecting to be under the obligation in case of future changes.

The court held, Harvey, C.J., and Hyndman, J., dissenting, that a Judge of the Supreme Court as *persona designata* had jurisdiction to make the order.

Per Stuart, J.:—There is nothing in the statute which has the effect of destroying the court's inherent power to control the guardian who has been substituted for the natural guardian . . . There should be, however, a right reserved to the Superintendent to shew that for some special reason, arising out of very special and temporary circumstances, he ought to be allowed to keep the whereabouts of the child, for a time, concealed from the parent.

Per Beck, J.:—The intention of the Act is to leave the parents' rights and duties existing with respect to their neglected children unaffected, except in so far as the circumstances with respect to character and conduct on the part either of the parents or the child make it expedient, having regard only to the interest of the child, that the parents shall not be allowed to have the control of the child.

Statement.

APPEAL from an order of Ives, J., compelling the Superintendent of Neglected Children to inform the parents of the whereabouts of the children and keep them informed of any changes, the children being kept by the Department of Neglected Children. Affirmed by an equally divided court.

H. H. Parlee, K.C., for Attorney-General and Superintendent of Neglected Children.

A. U. G. Bury, for respondents.

Harvey, C.J.

HARVEY, C.J.:—In 1915 the parents, the present applicants, being both in jail on criminal charges, their four children were taken charge of by the Superintendent of Neglected Children under the said Act (Alta. 1909, c. 12) as deserted children, s. 9 (5) providing that,

> Where a parent has been convicted on a criminal charge . . . the child shall be deemed to be deserted by that parent.

At the time the children were taken, they were aged respectively 14, 11, 9 and 6 years. In the spring of the present year the parents applied for the return of the custody of the eldest daughter, then 17 years old, and in a foster-home. The application was refused.

On the evidence used on that application and an additional affidavit, upon the subsequent application of the parents for an order compelling the Superintendent of Neglected Children to inform them of the whereabouts of the then youngest children and to keep them informed of any changes, an order was made by Ives, J.; the application was granted. The Superintendent of Neglected Children has given the information as to the present

ALTA.

S. C.

RE TRISKOW AND CHILDREN'S PROTECTION ACT.

Harvey, C.J.

whereabouts but has appealed from the order, objecting to be under the obligation in case of future changes.

It is contended that a judge has no jurisdiction to make the order asked and that if he has it ought not to be exercised in the present case.

It may be that the Supreme Court, as such, has jurisdiction over the guardians of all children, whether natural guardians or otherwise, and in the exercise of such jurisdiction in the interest of the children may require the guardians to do anything it considers proper. But the argument on both sides on this appeal was based on the view that Ives, J., in making the order he made, was acting not as a judge of the court but as *persona designata*, and one of the respondent's objections was that there was no right of appeal without leave under the Act relating to orders by judges out of court. Mr. Parlee then applied for leave and as the court heard, and is disposing of the appeal on the merits, I think it may be taken as intending to grant the leave asked for.

What I understand Mr. Parlee to mean is that, in view of the provisions of the Act and what has taken place, these delinquent parents have no legal right to the information demanded, though the superintendent of course may, if he deems it wise, furnish it to them and that the judge being *persona designata* has no power to make any order not authorized by the Act which does not authorize any such order as this.

Under s. 9 (1) it is provided that the Children's Aid Society may resolve that a child shall be under its control until it reaches the age of eighteen or an earlier age and that, thereupon, all the rights of the parents vest in the society.

Provision is made for a judge determining the resolution in a proper case, whereupon the society loses the rights of the parents.

There is no evidence as to whether any resolution was passed with reference to the children in question. I am of opinion that, if such a resolution has been passed, the rights of the parents have passed away from them and to the society.

No parent can, of course, be compelled, in any ordinary case, to disclose the whereabouts of his own children to another, and yet that would be practically what we would have here.

Apart from this provision, however, under s. 8 the Children's Aid Society is made the legal guardian of children committed to it,

and under s. 4, the superintendent has all the powers conferred on a society. A judge is given power under the Act to restore a child to its parents, the effect of which of course is to restore the parents' rights as parent and guardian and take them from the society and superintendent and the fact that the Act provides that upon resolution by the society, as mentioned before, all the parents' rights become vested in it would seem to indicate that the Act contemplates that without such resolution some of the parents' legal rights remain in them and do not pass to the society or superintendent.

The fact is, however, that in respect to the children in question the legal guardianship is in the society and superintendent and whatever jurisdiction the Supreme Court has over them in the interests of the infants the judge to whom the application was made, and this court on appeal from him, have, in my opinion, no jurisdiction to do any more than the Act authorizes the person designated as the one to whom an application may be made, to do. The application was intituled, "In the matter of the Children's Protection Act" and clearly appears to have been made to the judge as *persona designata*.

I can find nothing in the Act authorizing the judge to make such an order as this.

Even if, however, the power did exist, it would be simply a case of a judge, in his discretion, over-riding the discretion of the superintendent which I think he should hesitate to do.

It may be that a judge is supposed to be free from bias and prejudice, but that is no reason for supposing that the Superintendent of Neglected Children is full of it or indeed is any less free from it. He certainly has much greater knowledge and experience of the working out of the Act and of the facts which are thus met with. I can quite easily understand that, in providing a good home for a young child of criminal parents, the superintendent might be much hampered by the necessity of keeping the parents advised of the child's whereabouts. The fact that persons who have a criminal disposition agree not to interfere is not a very satisfactory safeguard from such interference.

It is a recognized principle in Courts of Appeal that a discretion exercised by a judge on proper principles should not, except in rare instances, be disturbed. I would feel that much the same principle

ALTA.

S. C.

RE TRISKOW AND CHILDRENS' PROTECTION ACT.

Stuart, J.

should apply with respect to the discretion of the superintendent in such a case as this, even if a judge has the legal right to interfere with it, and, in my opinion, the facts of the present case are not such as to warrant such interference.

I would, therefore, allow the appeal with costs and set aside the order of Ives, J., and dismiss the application with costs.

STUART, J.:—I think this appeal should be dismissed with costs.

The Superintendent of Neglected Children is not given by the Act any greater powers than are given also to local Children's Aid Societies. He is of course also given the duty of advising and instructing these societies in the performance of their functions. Such societies, in order to come within the Act, must, of course, be approved of by the Lieutenant-Governor-in-Council.

The power given by the statute to a judge to take a child away from its parents and place it under the legal guardianship of another person or persons seems to me to be no narrower than the power possessed by the Court of Chancery. The Act, possibly, extended the court's power, and also bestowed it upon judges of another court, but it certainly does neither destroy nor narrow the inherent power of this court. It is, in fact, entirely a statutory enactment of what could, in most cases, have been done in any case (see 17 Hals. p. 106), with some subsidiary provisions as to children's shelters, creating certain statutory offences with respect to children, providing for children's courts in case of violation by children of provincial laws etc. Previously the court could act only when some person interested himself in the abused or neglected child. Now the statute, in effect, authorizes the court to look upon the superintendent and the approved societies as proper persons to be made legal guardians of a child when the parent has, by his misconduct, forfeited his common law right, and is intended to encourage the Children's Aid Societies in their charitable work, and to make it, practically, the duty of a paid official of the government to look after such children and to apply to the court on their behalf.

I can find nothing in the statute which has the effect of destroying this court's inherent power to control the guardian who has been substituted for the natural guardian, and I should very much regret it, if I had found any such provision. I do not think the legislature ever intended to make the superintendent an

uncontrollable autocrat any more than to make the Children's Aid societies such. Of course, in saying this, I am not suggesting at all that the particular superintendent now in office has been acting oppressively or would be likely to do so. No one appreciates the very valuable work he is doing more than I do. I am speaking, only, of the effect of the legislation in question and of possible future superintendents.

The statute gives the parent a right, which I think he would have had without any such provision, to complain to the court that the child is not being maintained by the society or that he is not being brought up in the religion of the parent. A knowledge as to where the child is must surely be necessary before the parent could have information upon these subjects. The parent may also be made liable for the expenses of the support of the child.

I can see nothing in the statute which can be taken as declaring that the parents' rights are all gone for ever, or, however neglectful and wicked he may have been, that he must never hope to have his child as his own again, but there is a great deal to shew the contrary.

I think, therefore, the judge below had jurisdiction to make the order which he did make.

As to whether the order was a proper one to make in the particular circumstances, I do not feel disposed to interfere with the judge's decision. The fact turned out to be that one of the children had been taken away down to Nevada. This appears to me to be a sufficient reason why the superintendent should be ordered to keep the father informed, in the future, as to where his child is.

There should be, however, a right reserved to the superintendent to shew that, for some special reason arising out of very special and temporary circumstances, he ought to be allowed to keep the whereabouts of the child, for a time, concealed from the parent. I do not say that it would never be possible that a situation could arise which would justify such a course. But, as this case now stands, I think an undertaking or injunction not to interfere with or entice the child is sufficient and I understand this is assented to.

I can see no relevancy in any reference to the matter of adoption or the Act dealing with it. There is no adoption in question here, and I think the two chance uses of the word in the Children's

ALTA.

S. C.

RE TRISKOW AND CHILDREN'S PROTECTION ACT.

Stuart, J.

Beck, J.

Protection Act were due merely to oversight or careless drafting. Nothing in the way of real adoption is, in my opinion, contemplated by the latter Act at all. The superintendent is appointed legal guardian of the child, and, as he cannot, of course, personally look after every child, he is allowed to place him in a foster home. But the persons who take them do not adopt them, but merely enter into a written contract with the guardian, which the latter, according to the statute, can determine whenever he pleases.

BECK, J.:—The father and mother of three children who had been taken in charge by the Superintendent of Neglected Children, under the provisions of the Children's Protection Act, applied on notice to Ives, J., in Chambers, for an order directing the superintendent to supply them information, from time to time, as to the homes in which or places where the said children are being kept, and as to the states of health of the said children and upon such other matters as may be thought proper by a judge.

Ives, J., made an order that the superintendent furnish to the parents information as to where the said children are now being kept, and if the said children, or any of them, are moved from their present homes, then, upon request, to furnish the parents with the then present address of their new homes. The superintendent appealed on the ground that the judge of first instance had no jurisdiction to make the order, or, if he had, he should not have done so under the circumstances.

Perhaps a passing reference to the question of the rights of parents generally with regard to their children may not be out of place.

The Alberta Legislature recently (1913, 2nd sess., c. 13), passed an Act respecting infants which, amongst other things, declared certain rights of the father and mother, and some restrictions upon those rights, and provided for the judicial adoption of children.

S. 6 of the Act provided that

> Where a parent has
>
> (*a*) abandoned or deserted his infant; or
>
> (*b*) allowed his infant to be brought up by another person at that person's expense for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties;
>
> the court shall not make an order for the delivery of the infant to the parent unless the parent has satisfied the court that it would be for the welfare of the infant so to do.

ALTA.

S. C.

RE TRISKOW AND CHILDREN'S PROTECTION ACT.

Beck, J.

The English courts have in the course of the last few years, by a process of development, much modified older views, and declared the law to be virtually as expressed in the just quoted section. *Re Mathieson* (1918), 87 L.J. Ch. 445.

The Children's Protection Act (1909, c. 12), is one dealing solely with neglected children. The Act, s. 2 (*a*) and (*h*) defines a neglected child as

> A child, actually or apparently under 17 years of age . . . who is found begging, receiving alms, thieving in a public place, sleeping at night in the open air, wandering about at late hours, associating or dwelling with a thief, drunkard, or vagrant, *or* who is incorrigible or cannot be controlled by its parents, *or* who is employed anywhere between the hours of 10 o'clock p.m. of one day and 6 o'clock a.m. of the following day, *or* a child who, by reason of the neglect, drunkenness, or other vice of its parents, is growing up without salutary parental control and education, or in circumstances exposing such child to an idle and dissolute life; *or* who is found in a house of ill-fame or known to associate with or be in the company of a reputed prostitute; *or* who is a habitual vagrant or an orphan and destitute; *or* deserted by its parents; *or* whose only parent is undergoing imprisonment for crime; *or* who by reason of ill-treatment, continual personal injury or grave misconduct or habitual intemperance of its parents or either of them is in peril of loss of life, health or morality; *or* in respect to whom its parents or only parent have or has been convicted of an offence against this Act or under the Criminal Code; *or* whose home by reason of neglect, cruelty or depravity is an unfit place for such child.

Such a child is liable to apprehension, whereupon the child is to be brought before a "judge," as defined by the Act, who may order that the child be delivered to the Children's Aid Society who may send the child to a temporary home or shelter until placed in a foster-home; or, if in the opinion of the judge, the child has been leading an immoral or depraved life and ought not to be sent to a shelter and thence to a foster-home, may order the child to be committed to an industrial school or refuge or other suitable institution or to a charitable society willing to receive the child, to be kept, cared for and educated for a period not exceeding 3 years and thereafter to be delivered to the Children's Aid Society for the purpose of being placed in a foster-home until the child arrives at the age of 18 years.

In the case that there is a charge against the child if it appears to the judge that the public interest and the interest of the child would be best served thereby, an order may be made for the return of the child to its parents, or friends, or the judge may authorise the officer (the executive officer of the Children's Aid Society or

ALTA.

S. C.

RE TRISKOW AND CHILDREN'S PROTECTION ACT.

Beck, J.

the superintendent) to take the child and bind it out to some suitable person until it attains the age of 18 years or for any less time, or may impose a fine or suspend sentence for a definite or indefinite period or may cause the child to be sent to an industrial school.

Again, if there is a charge against the child itself, the judge, instead of committing the child to prison, may order it to be removed to any place in Alberta or may hand it over to the charge of a home for destitute and neglected children or to an industrial school or Children's Aid Society, the manager being at liberty to permit the "adoption" of the child by a suitable person or to apprentice it to a suitable trade, calling or service, and the transfer (*i.e.*, by adoption or apprenticeship) is to be as valid as if the managers were the parents. Then (s. 23, 2), it is enacted that the parents of such child shall not remove or interfere with the child so adopted or apprenticed, except by permission in writing of the home, school or society.

By s. 8 the society becomes the legal guardian of every child committed to its care; but it becomes the duty of the society promptly to provide for it a suitable home—designated a foster-home. Sub-s. 2 of this section provides that the society may place the child in a foster-home *until* he or she is 18 years of age, or for any shorter period in the discretion of the society, *under a written contract*, which shall provide (1) for the education of the child in a public school, if available (or in case of a Roman Catholic child in a separate school, if available), (2) for teaching some useful occupation, (3) kind and proper treatment as a member of the family, (4) *for payment on the termination of such contract to the society for the use, i.e.*, benefit, *of the child of any sum of money that may be provided for in the contract*, and (5) for the withdrawal of the child when, in the opinion of the society, the welfare of the child so requires.

S. 9 (1) provides that the Children's Aid Society may resolve that a child, subject to its jurisdiction, shall be under the control of the society until it reaches the age of 18 years, or such earlier age as may be thought proper, and that "thereupon until the child reaches that age all the powers and rights of the parent in respect of the child shall, subject to the provisions of the Act, vest in the society"; and (sub-s. 2):

The society may rescind such resolution, if they think that it will be for the benefit of the child that it should be rescinded, or may permit the child to be either permanently or temporarily under the control of its parent or any other relative or of any friend;

and (sub-s. 3) that a Judge of the Supreme or District Court, *if satisfied on a complaint made by a parent of the child*, may set aside the action of the society, and that thereupon the society shall cease to have the rights and powers of the parent; and (sub-s. 6) that nothing in the section shall relieve any person from liability to contribute to the maintenance of a child.

S. 10 provides:—

If at the time of an application (by a parent for the production of a child) the child is being brought up by another person or has been placed out by a Children's Aid Society, the court, if it directs the child to be given up to the parent, may order that the parent shall pay to such person or society the whole of the expenses properly incurred in bringing up the child, or such portion thereof as may seem just.

Then there are provisions which require the court, though refusing to give the custody of the child to the parent, to recognise the parent's right to have the child brought up in the religion "in which the parent has a legal right to require that the child shall be brought up," and for the admission of ministers of religion to any temporary home or shelter to give religious instruction.

S. 20 provides penalties on summary conviction being imposed upon persons (among whom would be included parents) interfering with children in charge of a Children's Aid Society or in a foster-home or apprenticed.

The Superintendent of Neglected Children is given all the powers of a Children's Aid Society (s. 4).

Taking the Act as a whole, and particularly the sections, the effect of which I have set out, it seems to me that the intention of the Act is to leave the parents' rights and duties existing with respect to their neglected children unaffected, except in so far as the circumstances with respect to character and conduct on the part either of the parents or the child make it expedient, having regard only to the interest of the child, that the parents shall not be allowed to have the control of the child.

While the child is in a mere temporary home or shelter, or an Industrial School, or is apprenticed to some master-workman, it would scarcely be suggested that, so long as the parents did nothing to interfere with the rules by which the child's conduct was regulated, or to induce the child to disregard them, the parents

ALTA.

S. C.

RE TRISKOW AND CHILDREN'S PROTECTION ACT.

Beck, J.

should be prevented from access and communication with them at any reasonable time and on any reasonable circumstances. It seems to be, though, that when the child is in a foster-home the case is different. But it seems to me, as I have already said in other words, that the Children's Protection Act, unlike the provisions of the Infants' Act relating to judicial adoption, does not contemplate the extinguishment of the parents' rights and obligations towards the child and the substitution of other persons for the natural parents, but is directed only to the temporary care and training of the child so long as it seems necessary, having regard to the welfare—and chiefly the moral welfare—of the child, and that it was not intended to sever definitely the natural relationship or to take away the hope in the parents or the child of the reward of reformation in the one in whom the fault lay. It seems to me that the grounds of objection raised by the superintendent to allow the parent to know of the whereabouts of his child have been much exaggerated. The parents can be duly instructed with regard to what the character of their communications is to be, and in the event of misconduct on the parents' part they can be sufficiently punished by summary proceedings, and, if necessary, can be enjoined and punished in the event of further interference by attachment. The cases which would go to such a length would doubtless be few, if any.

I think, therefore, the order of Ives, J., should stand, and the appeal being dismissed I see no reason why the department should not pay the costs of the applicants.

Hyndman, J.

HYNDMAN, J.:—I concur with the Chief Justice that the judge appealed from being *persona designata* had no jurisdiction under the Act to make the order which he did and that the appeal should be allowed.

I would not, however, like it to be understood that a parent, under the circumstances of this case, has no remedy whatever, for I am in accord with what Stuart, J., has said with respect to the inherent jurisdiction of the Supreme Court over guardians and infants, and, in my opinion, there was nothing to prevent the applicants coming to the court in the regular way with the request which they brought before Ives, J., and having the matter dealt with upon the merits, under the general jurisdiction of the court.

Affirmed by an equally divided court.

DINGLE v. WORLD NEWSPAPER Co.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. June 10, 1918.

LIBEL AND SLANDER (§ III A—99)—NOTICE—MUST BE GIVEN TO DEFENDANT—LIBEL AND SLANDER ACT (R.S.O. 1914, c. 71, s. 8 (1)).

The notice required to be given under the Libel and Slander Act R.S.O. 1914, c. 71, s. 8 (1), in an action for libel contained in a newspaper, must be given to the defendant, and not to the editor.

Statement.

APPEAL from the trial judgment dismissing an action to recover damages for libel. Affirmed by an equally divided court.

The judgment appealed from was as follows:—

The action is brought to recover damages of a libel published in the defendant company's paper. It is admitted that the only notices served were addressed "To The Editor of the World."

The Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 8 (1), provides that "no action for libel contained in a newspaper shall lie unless the plaintiff has, within six weeks after the publication thereof has come to his notice or knowledge, given to the defendant notice in writing," etc.

It is contended that the notice relied on is not sufficient, as it is addressed to the editor, and not to the defendant.

The matter is concluded, in favour of this contention, by the decisions of Meredith, C.J.O. (then C.J.C.P.), in *Burwell* v. *London Free Press Printing Co.* (1895), 27 O.R. 6, and *Benner* v. *Mail Printing Co.* (1911), 24 O.L.R. 507.

According to these decisions, the statute means what it says, and requires a notice to the defendant, and it is not enough to give a notice to some one else, even if that person is an officer of the defendant.

The notice to the defendant may be served in the manner pointed out by the statute (sec. 8 (1)).

The action must be dismissed with costs.

D. J. Coffey, for appellant.

K. F. Mackenzie, for defendant company, respondent.

At the conclusion of the argument for the appellant, judgment was delivered by the Court.

Meredith, C.J.O.

MEREDITH, C.J.O., said that the case was not distinguishable from the *Burwell* and *Benner* cases, which, in his opinion, were rightly decided. The appeal should be dismissed.

ONT.

S. C.

DINGLE v. WORLD NEWSPAPER CO.

MAGEE, J.A., was of opinion that there had been a substantial compliance with the Act, and that the appeal should be allowed.

HODGINS, J.A., agreed with Meredith, C.J.O.

FERGUSON, J.A., agreed with Magee, J.A.

The Court being equally divided, appeal dismissed with costs.

SASK.

C. A.

CANADIAN BANK OF COMMERCE v. EYE.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 30, 1918.

1. COSTS (§ II—32)—RULE 304 (SASK.)—TAXING OFFICER—POWERS—DISCRETION—APPEAL.
Rule 304, Rules of Court, Sask., contemplates that it is in his capacity as taxing officer, and upon a taxation that the taxing officer is to exercise the discretion vested in him by the rule; his jurisdiction is not concurrent with that of the trial judge, and an appeal to the local master is a proper appeal.

2. DISCOVERY AND INSPECTION (§ IV—31)—RULE 279 (SASK.)—OF OFFICER—EXAMINATION USELESS—SECOND EXAMINATION—COSTS.
Under rule 279 (Sask. Rules of Practice) the defendant is entitled to examine any officer or servant of the plaintiff corporation without an order, but having examined one officer he is not entitled to examine another without an order of the court, and will not be allowed the costs of a useless examination unless the plaintiffs have refused to furnish him with the name of the proper officer to be examined.

APPEAL from a judge in chambers dismissing an appeal from a Local Master, dismissing an appeal from a taxing officer refusing to allow certain costs of an examination for discovery. Affirmed.

B. D. Hogarth, for appellant; *H. Fisher*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Lamont, J.A.

Newlands, J.A.

NEWLANDS, J.A., concurred with Elwood, J.A., being of the opinion that there was no appeal under our rules without the consent of the taxing officer.

Lamont, J.A.

LAMONT, J.A.:—The questions involved in this appeal are:—(1) Does an appeal lie in the manner in which this appeal has been brought, and (2) if so, did the taxing officer exercise sound discretion in refusing to allow the defendant to tax against the plaintiffs the costs of examination for discovery of the plaintiffs' teller, Young?

The plaintiffs brought an action against the defendant for $2,000. At the trial the defendant succeeded. The defendant had examined for discovery the manager of the plaintiff bank at Biggar. Not getting all the information he desired, his counsel arranged with counsel for the bank for the examination of one Young, the teller of the Biggar branch. This was done. The costs of the examination of the plaintiffs' manager at Biggar were

included in the defendant's bill of costs and allowed, but the costs of the examination of Young, which were also included in the bill, were refused by the taxing officer. An appeal was taken from the taxing officer to the local master, who dismissed the appeal. From the local master an appeal was taken to a judge in chambers, who likewise dismissed that appeal. From his decision the defendant now appeals to this court.

Counsel for the plaintiffs contends that this appeal does not lie; that under s. 56 of the King's Bench Act, and r. 646, which is to the same effect, an appeal from an order as to costs only lies by leave of the court or judge making the order, and that, under r. 304, the taxing officer, in refusing to allow the costs in question, was exercising jurisdiction concurrent with that of the trial judge, and, that being so, leave to appeal should have been obtained, and when obtained, the appeal should have been direct to the Court of Appeal from the decision of the taxing officer.

The soundness or otherwise of this contention depends upon whether the taxing officer in refusing to allow the costs in question was acting simply as taxing officer—in which case his decision is open to review—or whether he was exercising concurrent jurisdiction with the trial judge.

R. 304 reads as follows:—

304. The costs of every interlocutory *viva voce* examination and cross-examination shall be borne, in the first instance, by the party who examines and shall be allowed as part of his costs where, and only where, such examination shall appear to the judge at the trial; or, if there is no trial, to the court or a judge, or shall appear to the taxing officer to have been reasonably asked for.

No application was made to the judge at the trial to allow these costs.

In *Mann* v. *Crittenden* (1905), 11 O.L.R. 46, an appeal was taken to a judge in chambers from the refusal of the senior taxing officer to allow the defendants the costs of examining more than one of the plaintiffs. It was held that under the Ontario rules no appeal lay from such an adjudication by the senior taxing officer, because the jurisdiction of that taxing officer was concurrent with that given to a Judge of the High Court. The Ontario r. 1136 as it originally stood read as follows:—

1136—(1). The costs of every interlocutory *viva voce* examination and cross-examination shall be borne by the party who examines, unless it is otherwise ordered, as to the whole or a part of the examination, in actions

SASK.

C. A.

CANADIAN BANK OF COMMERCE v. EYE.

Lamont, J.A.

in the High Court by a Judge of the High Court, or by the senior taxing officer at Toronto *on notice to the opposite party* . . .

By r. 1267, r. 1136 was repealed and the following substituted:—

The costs of every interlocutory *viva voce* examination and cross-examination shall be borne by the party who examines, unless, as to the whole or part thereof, it be otherwise directed, in actions in the High Court by the senior taxing officer on his appointment served . . .

In giving judgment in *Mann* v. *Crittenden*, *supra*, Anglin, J., said:—

Formerly the allowance or disallowance of such costs in High Court actions might be determined either by a judge of the High Court or by the senior taxing officer, and it was then held that no appeal lay from such an adjudication by the senior taxing officer to a Judge in Chambers, because the jurisdiction conferred by rule 1136, as it then stood, upon the senior taxing officer was concurrent with that given to a Judge of the High Court.

In my opinion, it was not intended that the change effected by rule 1267, doing away with the original jurisdiction in this matter formerly vested in a Judge of the High Court, should render an adjudication of the senior taxing officer under rule 1136 appealable; and I strongly incline to the view that from such a decision there should be no appeal.

In my opinion, the case of *Mann* v. *Crittenden*, *supra*, is distinguishable from the case at bar. Under the Ontario rules it is clearly contemplated that the application for the allowance of the costs of examination shall be made prior to taxation. The former rule provided that notice of the application should be given to the other party, while the rule as amended provides that the allowance of such costs must be endorsed upon the appointment of the taxing officer when served, otherwise such costs will not be taxed.

Under our r. 304 such costs will be allowed, if they appear to the taxing officer to have been reasonably asked for. No provision, however, is made, as in the Ontario rules, for an application to have these costs allowed prior to taxation. Where the rule simply directs that the allowance or disallowance of certain costs is a matter within the discretion of the taxing officer, it is in his capacity as taxing officer that he allows or disallows them, unless the rules clearly indicate that, in doing so, he is acting in some other capacity. The Ontario rules above cited make it abundantly clear that it was not as taxing officer on a taxation that the senior officer was acting when he allowed the costs of an interlocutory examination, but as a person designated by the rules to hear an application in reference to such costs. As our rule leaves the matter, when not dealt with at the trial by the

judge, in the hands of "the taxing officer," and has omitted to make any provision for the application to him prior to taxation, the rule, in my opinion, contemplates that it is in his capacity as taxing officer—and upon a taxation—that he is to exercise the discretion vested in him by this rule. Consequently, his determination thereon is open to review in the same way as any other item in the bill. The appeal, therefore, in this case to the local master was a proper appeal.

The next question is: Did the taxing officer exercise sound discretion in refusing to allow the costs in question?

In my opinion he did. The defendant seems to think that he is entitled to charge up against the other side the costs of all examinations for discovery that he may make. I can find no authority for this view in the rules. It is only such examinations as have been reasonably asked for that a party is entitled to have the other side pay for; each case must be decided upon its own facts and circumstances. In the present case, the plaintiffs claimed that the defendant—from a point at which there was no bank—drew upon them for $2,000; that, by mistake, the plaintiffs' branch bank at Biggar sent $4,000 in money instead of $2,000, and they sought a return of the extra $2,000.

Under r. 279, the defendant was entitled to examine any officer or servant of the plaintiff corporation without an order, but, having examined one officer, he was not entitled to examine another without an order of the court. The officer whom, in the defendant's interest, it was necessary for him to examine was the one who claimed to have made the mistake in paying out the money. In the ordinary course of business this would be the teller. Instead, however, of ascertaining from the plaintiffs the name of the officer who they claimed had made the mistake, the defendant proceeded to examine the manager of the branch, only to ascertain that he had no personal knowledge of the transaction, but that it was the teller who had sent out the money. Under these circumstances, what were the rights of the defendant? In my opinion, he was entitled to an order to examine the teller, but that examination must be at his own expense; or, at most, if it appeared that the examination of the teller was the one he could reasonably ask for, that he would have the costs of that examination, but could not have the costs of the useless examination

SASK.

C. A.

CANADIAN BANK OF COMMERCE v. EYE.

already held; if, indeed, he should not be made to pay the plaintiffs their costs of that useless examination. As I have already indicated, the defendant should have applied to the plaintiffs for the name of the officer who claimed to have made the mistake for the purpose of having him examined for discovery. Had the plaintiffs, on such request being made, refused to furnish him with the name of the officer who had personal knowledge of the facts under dispute, the defendant, in my opinion, would have been entitled to the costs of both examinations. He, however, did not pursue that course and the costs of one examination were uselessly incurred. These costs the defendant claimed, and they have been allowed to him. Under these circumstances he cannot have the costs of a second examination.

Lamont, J.A.

The appeal should, therefore, be dismissed with costs.

Elwood, J.A.

ELWOOD, J.A.:—In this matter judgment was rendered in favour of the defendant, with costs. During the course of the action, the defendant examined for discovery a local manager of the plaintiff, and thereafter a former officer of the plaintiff. Prior to the latter examination the defendant did not obtain an order of the court or a judge for such examination. The officer in question was apparently produced—without objection by solicitors for the plaintiff—on request of the defendant's solicitors. When the defendant came to tax his costs of action he sought to tax the costs of and incidental to this second examination, and the taxing officer refused to allow any of such costs. The defendant then took the matter up in review before the local master, who upheld the decision of the taxing officer, and from the decision of the local master an appeal was taken to a judge in chambers, who dismissed the appeal. From this latter decision the appeal now comes before this court.

The trial judge made no order with respect to the costs the subject of this appeal.

R. 304 of our Rules of Court is as follows:—(See judgment of Lamont, J.A.)

In view of the conclusion I have reached, it is not necessary that I should express any opinion as to the effect of the defendant not having obtained an order of a judge before proceeding with the second examination.

Inter alia, it was contended by the respondent that the appellant erred in reviewing the item of costs disallowed, and that his

proper procedure would have been to have appealed to this court direct.

In *Mann et al.* v. *Crittenden*, 11 O.L.R. at p. 46, Anglin, J., is reported as follows:—

> The defendant appeals from the ruling of the learned senior taxing officer whereby he refused to allow the costs of examining for discovery more than one of the plaintiffs in this action. Formerly the allowance or disallowance of such costs in High Court actions might be determined either by a Judge of the High Court or by the senior taxing officer, and it was then held that no appeal lay from such an adjudication by the senior taxing officer to a Judge in Chambers, because the jurisdiction conferred by r. 1136, as it then stood, upon the senior taxing officer was concurrent with that given to a Judge of the High Court.

R. 1136 above referred to is as follows:—(See judgment of Lamont, J.A.)

It will be observed that r. 1136, so far as a consideration of this case is concerned, is, in effect, the same as our r. 304.

Under our r. 304, the taxing officer is exercising jurisdiction concurrent with that given to a judge of the court, and, therefore, in my opinion, no appeal or review of taxation will lie from him to another judge of the court, but the appeal, if any, should be to the Court of Appeal. I am, therefore, of opinion that this appeal should be dismissed with costs. *Appeal dismissed.*

MILLER v. TIPLING.

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S. C.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell and Kelly, JJ. May 7, 1918.

EASEMENTS (§ II A—5)—FOR A PARTICULAR PURPOSE—LIMITATION—LANDS APPURTENANT—COLOURABLE USE.

In a conveyance of a house and lot were these words: "Together with a right of way for the purpose only of getting in . . . fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet . . . and subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 ft. 6 inches to a depth of 76 ft." The court held that upon a proper construction of the words quoted, the right of way over the 2 feet 6 inches was limited to the owners or occupants of the parcel on which the house to the north stood and to which the easement was appurtenant. A colourable use could not be made of such right of way for the real purpose of reaching a different adjoining close.

Statement.

AN appeal by the defendant from the judgment of Meredith, C.J.C.P., restraining the defendant from making use of the northerly 2½ feet to the depth of 76 feet of the plaintiffs' land except in connection with the ownership or occupancy of the adjacent premises to the north. Affirmed.

C. J. Holman, K.C., and *J. H. Bone*, for appellant.

I. F. Hellmuth, K.C., and *Alexander MacGregor*, for respondents.

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S. C.

MILLER v. TIPLING.

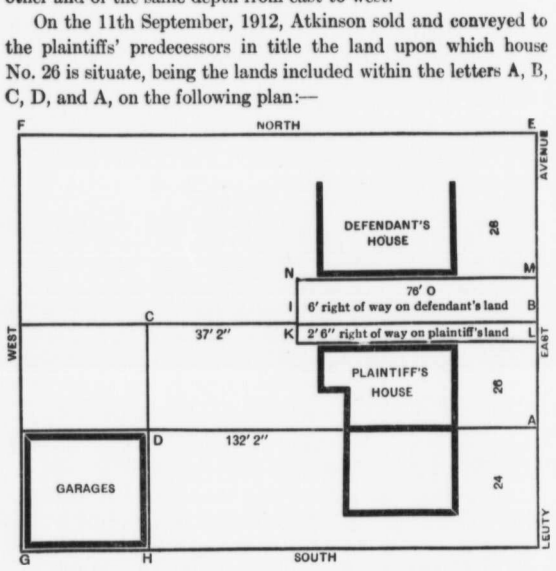
Mulock, C.J.Ex.

MULOCK, C.J.Ex.:—This is an appeal from the judgment of Meredith, C.J.C.P., in favour of the plaintiffs; and the sole question is, whether the defendant is entitled to use or authorise the user of a certain way 2 feet 6 inches wide by a depth of 76 feet, extending westerly from Leuty avenue, in the city of Toronto, as appurtenant to certain of the defendant's lands.

The facts are as follows:—

One Atkinson owned a block of land situate on the west side of Leuty avenue, and erected thereon three houses known as street numbers 24, 26, and 28 respectively, number 24 being the southerly one, then came No. 26 and lastly No. 28. Houses Nos. 26 and 28 were separated from each other by a strip of land, not built upon, having a width of 8 feet 6 inches and extending westerly from Leuty avenue. The two houses were immediately opposite each other and of the same depth from east to west.

On the 11th September, 1912, Atkinson sold and conveyed to the plaintiffs' predecessors in title the land upon which house No. 26 is situate, being the lands included within the letters A, B, C, D, and A, on the following plan:—



House No. 26, now the plaintiffs', stood 2 feet 6 inches south of the northerly limit of the plaintiffs' land. At the time of this sale

and conveyance, Atkinson owned the land adjacent thereto on the north, on which stood house No. 28, and he also owned the land adjacent thereto on the west, the two portions together forming an L-shaped piece of land, being the land included within the letters B, E, F, G, H, C, and B on the plan. After the description of the land contained in the conveyance from Atkinson to the plaintiffs' predecessors in title are these words: "Together with a right of way for the purpose only of getting in coal or other fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet from Leuty avenue and subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue of the premises hereby conveyed."

This 6-foot right of way is over the defendant's land shewn in the plan as included within the letters B, I, N, M, and B, and the 2-foot 6 inch right of way, being that in question in this action, is over the plaintiffs' land embraced within the letters B, I, K, L, and B. Shortly after the sale of premises No. 26, Atkinson sold the premises No. 24 to a third party; and later, by deed dated the 23rd September, 1915, conveyed to the defendant his remaining two parcels of land, being together the L-shaped parcel above mentioned, and the defendant has erected at the south-westerly end thereof, at the place indicated on the plan, three garages, which he lets to persons for storage therein of automobiles, and he claims for his tenants the right of way over the plaintiffs' strip of 2 feet 6 inches for a distance of 76 feet westerly from Leuty avenue, basing such claim on the above-quoted words contained in the conveyance from Atkinson to the plaintiffs' predecessors in title, which he says created a right of way over the 2 feet 6 inches strip, appurtenant to the premises where the garages now are.

The grantees did not execute the conveyance containing these words.

In *Durham and Sunderland R. Co.* v. *Walker* (1842), 2 Q.B. 940, 967, 114 E.R. 364, at 374, Tindal, C.J., says:—

"It is to be observed that a right of way cannot, in strictness, be made the subject of an exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a

ONT.
S. C.
MILLER
v.
TIPLING.
Mulock, C.J.Ex.

reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee."

The grantee of the land in question not having executed the deed, I fail to see how the insertion of the quoted words in that deed created what is described sometimes as a re-grant and sometimes as a covenant. It may be that the grantee might be compelled to carry out the intention of the parties by executing an instrument sufficient to create an express grant. The plaintiffs not pressing the point, I will assume that the instrument created a re-grant of a right of way; and the question is, to what land was such right of way made appurtenant? The defendant contends that the words created a right of way appurtenant not only to the land adjacent on the north to the 76-foot strip, but also to the other lands then owned by Atkinson, namely, that parcel lying westerly and south-westerly of the plaintiffs' land, on the southerly portion of which are the garages in question.

The only dominant tenement referred to in (I shall call it) "the re-grant" is "the adjacent premises to the north" etc.

The defendant's claim must fail unless the re-grant created a right of way appurtenant to the lands lying westerly and southerly of the plaintiffs' land, and which I shall hereafter refer to as the westerly premises. Does it? It is of the very essence of a right of way appurtenant that it be appurtenant to some particular parcel of land. It exists solely for the benefit of that land and has no separate existence. Unless appurtenant to a definite piece of land, there is no easement.

As a matter of correct conveyancing, the dominant tenement should be named in the grant of an easement appurtenant, and its omission in the present case is significant.

In the 5th volume of the Encyclopædia of Forms and Precedents, p. 500, the learned editor says: "In every grant of an easement of way the *termini â quo* and *ad quem* should be clearly defined;" and in Brickdale & Sheldon's work on the Land Transfer Acts, 2nd ed., p. 590, is given a form approved by the Registrar under that Act, indicating his opinion that it is essential to the creation of a right of way appurtenant to a piece of land, that the instrument should define the dominant and servient tenements.

I have examined the forms of grants of right of way appurtenant, given in many of the recognised standard books of precedents, and have failed to observe a single form which does not provide for the *termini à quo* and *ad quem* appearing in the instrument.

The re-grant here makes no reference to the westerly premises, and the conclusion must be that it was not intended to create a right of way appurtenant thereto—a view which, if correct, is fatal to the defendant's contention. That the parties did not contemplate a re-grant applying to the westerly premises is suggested by many circumstances.

Atkinson owned the 6-foot strip extending from Leuty avenue westerly and lying immediately to the north of the 2 feet 6 inches strip. By his deed of the 12th September, 1912, he conveyed to the plaintiffs' predecessors in title the land extending westerly from Leuty avenue a distance of 113 feet 2 inches; but that same deed provided that the 8 feet 6 inches strip (composed of the 6 feet and the 2 feet 6 inches strips) should extend only 76 feet westerly. If it had been intended to create a right of way appurtenant to the westerly premises over the plaintiffs' land, the obvious course would have been not to stop the right of way at the 76 feet point, but at the westerly limit of the plaintiffs' land. Stopping where it did, at a point a few feet west of the west side of both houses, suggests that it was made to run past the houses just far enough to enable vehicles to turn around, thus indicating that it was created for the benefit of premises Nos. 26 and 28 only.

Further, Atkinson, though examined as a witness, does not say that it was intended or contemplated that he, *quâ* owner of the westerly premises, should have any rights over the 2 feet 6 inches strip.

Further, Atkinson owned the 6-foot strip of the land beyond the 76-foot point, and it furnished to him means of ingress and egress in respect of his westerly premises.

Further, the re-grant defining only "the premises adjacent to the north," etc., goes to shew that the parties had those lands in their minds as the only ones to which the right of way should be appurtenant. *Expressum facit cessare tacitum.*

These circumstances, I think, indicate that the parties did not contemplate a right of way over the two feet six inches strip

ONT.
S. C.
MILLER
v.
TIPLING.
Mulock, C.J.Ex.

as appurtenant to the westerly premises, but it remains necessary to deal with the contention of the defendant that, according to the strict reading of the re-grant, he is entitled to such right. The argument is that the words "subject to a right of way for the party of the first part" are to be read apart from those that follow. Even if that were so, those words apply to Atkinson only, and this defendant takes nothing under them. But we are asked to make them include the defendant, and to that end to make a new contract for the parties to the re-grant, by reading into it terms creating a right of way appurtenant to the westerly lands. Such is not the privilege of the Court.

I am, however, unable to accept the defendant's construction of the meaning of the re-grant, and am of opinion that it must be read as a whole, and that the words which follow, namely, "and the owners or occupants of the adjacent premises to the north," qualify all the preceding words, and that its legal effect is to limit the right of way to Atkinson and other owners or occupants of the adjacent premises to the north.

If the words in the reservation of the right of way had omitted the words "to the north," leaving it to read "subject to a right of of way for the party of the first part and the owners or occupants of the adjacent premises," Atkinson (who was at the time the owner thereof) would have been included in the word "owners," and the easement would have become appurtenant to all of his adjacent premises, namely, those to the west as well as those to the north; and, if such had been the intention of the parties, it would have been accomplished by the omission of the words "to the north." Then why were those words added? Clearly, I think, to limit the right of way to the premises to the north. No other reason, I think, can be assigned.

Further, if, without the words "to the north," Atkinson, the party of the first part, is included in the word "owners," the addition of the words "to the north" cannot reduce the scope of the word "owners" by excluding him therefrom; and, therefore, the reservation must be read as creating a right of way appurtenant to the premises to the north only.

Whilst there is not a strict grammatical connection between the words "party of the first part" and the words" adjacent premises," etc., the controlling idea is that of a right of way appur-

tenant to those premises available to their owners or occupants, one of whom was Atkinson, and the defining of those premises only excludes any other premises from the scope of the re-grant.

A further argument is, that the defendant, having the right to use the way in question in respect of his adjacent premises to the north, is entitled to pass over those premises to and from his westerly premises, and for such purpose to use the 2-foot 6-inch way. That way, being appurtenant only to the defendant's adjacent premises to the north, can be used for the benefit of those premises only. Such is the measure of the defendant's rights, and user in excess of those rights is trespass.

The law is well-established that a right of way appurtenant to a particular close must not be used colourably for the real purpose of reaching a different adjoining close. This does not mean that where the way has been used in accordance with the terms of the grant for the benefit of the land to which it is appurtenant, the party having thus used it must retrace his steps. Having lawfully reached the dominant tenement, he may proceed therefrom to adjoining premises to which the way is not appurtenant; but, if his object is merely to pass over the dominant tenement in order to reach other premises, that would be an unlawful user of the way: *Skull* v. *Glenister* (1864), 16 C.B.N.S. 81, 143 E.R. 1055; *Finch* v. *Great Western R. Co.* (1879), 5 Ex. D. 254; *Telfer* v. *Jacobs* (1888), 16 O.R. 35; *Harris* v. *Flower & Sons Limited*, [1904] W.N. 106, 180; *Purdom* v. *Robinson* (1899), 30 Can. S.C.R. 64, 71; *Ackroyd* v. *Smith* (1850), 10 C.B. 164, 138 E.R. 68.

In the present case the defendant claims the right to use the way in question for the benefit of his westerly premises, or to use it as a way to the adjacent premises to the north, for the purpose of thereby reaching his westerly premises. I am of the opinion that he is not entitled to either of such users, and that the learned trial Judge rightly decided the case, and that this appeal should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—One Atkinson, a builder, was the owner of a block of land on the west side of Leuty avenue, Toronto, divided into three lots, Nos. 24, 26, and 28, numbering from the south. He built two semi-detached houses on lots 24 and 26; he also built a a house on lot 28, in which he lived; to make room for the semi-detached houses, he moved back (i.e., west) a house theretofore

ONT.
S. C.
MILLER v. TIPLING.
Riddell, J.

there standing, moving it behind Nos. 24 and 26 (not 28); he then used this as a tool-house.

He sold lot 24, on the 9th September, 1912, to Verner; and lot 26, on the 11th September, 1912, to the plaintiffs; on the 9th January, 1913, he mortgaged lot 28 to the defendant.

There is a strip of land to the rear of each of these lots, which was not covered by the deeds; recently Atkinson, apparently in consideration of release from his covenants in the mortgage, conveyed to the plaintiffs lot 28 and also the land to the rear of lots 24, 26, and 28—this land has never been fenced off from lot 28. The defendant has recently erected a garage at the south end of the land behind lot 24; and rented space in it to various persons (see the plan attached).

In the conveyance to the plaintiffs there is a grant of a right of way on the south side of lot 28, running for a distance of 73 feet west from the west line of Leuty avenue, the front of the lot; and the grant of lot 26 by metes and bounds is expressly "subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue. . . ." The defendant claims to have the right under this reservation to empower those who use his garage to use the right of way over this strip.

Automobiles have used this right of way with considerable frequency, to the annoyance of the plaintiffs; this action was brought for an injunction and damages. At the trial judgment was given for the plaintiffs, and the defendant now appeals.

Some troublesome questions as to parties etc. are avoided by the plaintiffs abandoning the nominal damages given and the injunction awarded, and confining their claim to a declaration of rights—the sole question, then, is the interpretation of the clause set out above.

In this Province we are governed in real estate matters by the law of England—except as it may have been modified by statute—the law of England having been introduced by the first chapter of the first statute of the first Parliament of the new Province in 1792. While in practice the law is as it is shewn by the existing decisions, the theory is that the Courts may be mistaken, and the law which all the time existed is shewn by the later decisions, not that the law has been altered by late decisions.

We must, therefore, find not what the authorities in and before 1792 said the law was, but what the latest authorities shew it to have been. It has been said that the law of land in countries under the Common Law of England is a "rubbish-heap which has been accumulating for hundreds of years, and . . . is . . . based upon feudal doctrines which no one (except professors in law schools) understands"—and rather with the implication that even the professors do not thoroughly understand them or all understand them the same way.

However that may be, it seems that, while a grant of a right of way can be given to a person "in gross," such a grant is a mere personal contract, and gives no estate or interest in the land itself —the tenement is not servient.

If then the reservation or exception could be considered personal to Atkinson, it would give no right to any control of the land, and Atkinson could not convey the right he had.

The plaintiffs must claim by way of easement or not at all.

It is now definitely settled that there is no such thing as an easement in gross in the proper sense of the words : Halsbury's Laws of England, vol. 11, pp. 235, 236, para. 471, citing *Rangeley* v. *Midland R. Co.* (1868), L.R. 3 Ch. 306, *per* Lord Cairns, L.J., at p. 311; *Hawkins* v. *Rutter*, [1892] 1 Q.B. 668, *per* Lord Coleridge, C.J., at p. 671; *Ackroyd* v. *Smith*, 10 C.B. 164, *per* Cresswell, J., at p. 188; notwithstanding such cases as *Great Western R. Co.* v. *Swindon and Cheltenham Extension R. Co.* (1882), 22 Ch. D. 677, 706, 707 (C.A.); *Bailey* v. *Stephens* (1862), 12 C.B.(N.S.) 91, 142 E.R. 1077, *per* Willes, J., at p. 111—to these I add *David Allen & Sons Billposting Limited* v. *King*, [1915] 2 I.R. 448 (affirmed in Dom. Proc., *sub nom. King* v. *David Allen & Sons Billposting Limited*, [1916] 2 A.C. 54), where an interesting and valuable discussion by Ronan, L.J., will be found, pp. 463 *sqq.*

The grantee of an easement must, at the time of the creation of the easement, have an estate in the tenement to which the easement is to be appurtenant: *Rymer* v. *McIlroy*, [1897] 1 Ch. 528; Halsbury, vol. 11, p. 246, para. 497. It is also now clear that, properly speaking, there can be no easement the subject-matter of an exception; but where the instrument conveying the servient tenement purports to reserve an easement (or as here to except an easement) in favour of the owner of the dominant tenement, the

ONT.
S. C.
MILLER
v.
TIPLING.
Riddell, J.

true effect is to create an easement in favour of the latter by a new grant of the right to the grantor of the servient tenement by the grantee: *London Corporation* v. *Riggs* (1880), 13 Ch. D. 798; *Dynevor* v. *Tennant* (1886), 33 Ch. D. 420 (affirmed in Dom. Proc. (1888), 13 App. Cas. 279); Halsbury, vol. 11, p. 249, para. 501. The difference between a reservation and an exception, which is fully explained by Lord Watson in *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, at p. 289, and by Swinfen Eady, J., in *South Eastern R. Co.* v. *Associated Portland Cement Manufacturers (1900) Limited*, [1910] 1 Ch. 12, at p. 22, is here immaterial. See also articles in 27 Law Quarterly Review 150 and in 32 Law Quarterly Review 70.

We must then read this "exception" as though there had been a deed in fee to the plaintiffs and a grant by the plaintiffs in the words of the exception in a deed having the plaintiffs as grantors and Atkinson as grantee. As an easement is never in gross, it must be appurtenant to some particular piece of land (or, as it is sometimes put, appurtenant to the ownership of a particular piece of land), and of course passes with the land without express mention: Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15; Short Forms of Conveyances Act, R.S.O. 1914, ch. 115, sched. B. 2, 3 (this was so even at the common law: Co. Litt. 121 b; Shep. Touch. 89)—the defendant then has all the rights which Atkinson had at the time of the deed in question, the 11th September, 1912—I am unable to read the exception as a double grant (1) to the grantor in the deed, and (2) to the owners or occupants of the adjacent premises to the north, i.e., as a grant to Atkinson of a right of way appurtenant to some other or some additional land and to the owners or occupants of this particular piece of land.

It seems to me that the dominant tenement described, i.e., "the adjacent premises to the north," is the dominant tenement to which this right of way is appurtenant, and that the right of way is appurtenant to the ownership (using the word in a large sense) of that land. There is a particular piece of land which is accurately described as "adjacent premises to the north" of the land conveyed by the deed to the plaintiffs—no doubt, "'adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage:" *Mayor of Wellington* v. *Mayor of Lower Hutt*, [1904] A.C. 773, at p. 775; but the word connotes, both etymo-

logically and in ordinary use, a "lying beside." Lot 28 lies beside lot 26 to the north, and it is literally the "adjacent premises to the north" of it.

One canon of interpretation of deeds and other contracts is that, if an object can be found exactly fulfilling the description, the words being used in their ordinary signification, that is taken as the object meant by the contract, unless there is something in the contract or the circumstances indicating some other object—here I find nothing in the circumstances or the contract of such a kind.

We have three houses built by the same person on land owned by him, two sold and one retained—to the two houses sold a certain depth of land is attached by Atkinson. Why should any one think that he intended to act differently by the third retained by him? Moreover, in the very deed in question there is attached to lot 26 a similar easement over lot 28—wider indeed but the same length. Why should the owner of lot 26 imagine he was giving to the owner of lot 28 a greater right than he was receiving?

It seems to me that the right of way "excepted" was so excepted for the advantage of lot 28, and that only—and that no one not in privity with the owner (using the word in the large sense) of lot 28 can use the way—and it can be used only in connection with the use or enjoyment of lot 28.

The use of the garage to the rear of lot 24 is entirely unconnected with the use or enjoyment of lot 28—*Ackroyd* v. *Smith*, 10 C.B. 164—and the use of the way for the purposes of the use of the garage is wholly unjustified by the deed.

The short user of the tool-house by Atkinson is not sufficient to give any right of way by prescription.

I am not to be considered as holding that the right of way in question cannot be used at all in connection with the back premises; there may be a use of this land which is merely for the beneficial enjoyment of lot 28 (probably the use of the tool-house was such). I do not decide anything in respect of premises so used: the only matter which is under consideration and which this judgment covers is the use for a garage which has no relation with the beneficial enjoyment of lot 28.

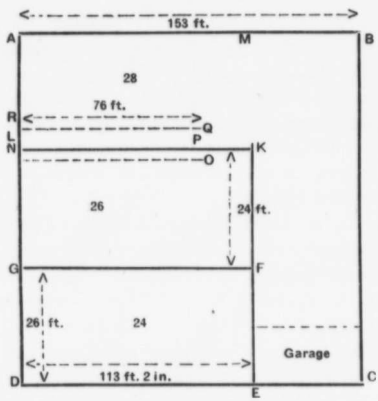
With the modification mentioned, this appeal should be dismissed with costs.

ONT.

S. C.

MILLER v. TIPLING.

Riddell, J.



Kelly, J.

KELLY, J.:—I agree with the judgment of my Lord the Chief Justice. I desire, however, to add this. Assuming for the purposes of argument that a right of way was created over the strip of 2 feet and 6 inches by the deed from Atkinson of premises No. 26, the question arises, did that right become appurtenant to all the land which Atkinson retained or only to a part of it, and, if so, to what part?

In my opinion, that question may be determined on the construction of the document itself, following the recognised rules of construction, that an agreement ought to receive that construction which will best fit the intention of the parties to be collected from the whole of the agreement, and that contracting parties are to be taken to have meant precisely what they have said unless from the whole tenor of the instrument a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would convey.

If the intention of the parties that the right over this 2 feet 6 inches should be appurtenant to all the remaining lands—not merely the lands comprising premises No. 28 but the lands on which are now the garages as well—then there could have been no purpose in introducing into the description the superfluous qualifying words "to the north." If, on the other hand, their intention was to limit the use of the right of way to the premises No. 28

and so exclude from its use the lands to the rear of premises Nos. 24 and 26, the language used is apt and proper to effect that object. If the contracting parties meant otherwise, then why were the qualifying words introduced? To my mind, the language is of itself conclusive; and from the tenor of the whole instrument a broader interpretation than their literal meaning conveys cannot be put upon the words used. Not only is this so, but there appears from the evidence a number of circumstances from which an inference can readily be drawn that the contracting parties must have intended that the language should be restricted to its literal meaning.

Clute, J.

CLUTE, J., (dissenting):—Appeal from the judgment of the Chief Justice of the Common Pleas, restraining the defendant from making use of the northerly 2½ feet to the depth of 76 feet of the plaintiffs" lands, except in connection with the ownership or occupancy of the adjacent premises to the north thereof, and particularly from letting the same for a garage.

The question for decision turns upon the construction of the grant of a right of way contained in a deed from Herbert J. Atkinson to Julia Ball and the plaintiff, Olive Miller, dated the 11th September, 1912. I have used the plan (exhibit 5) annexed to the abstract as being more accurate.

The facts are as follows:—

One Atkinson owned a small parcel of land on the west side of Leuty avenue, Toronto, consisting of the south 40 feet of lot 16 and the whole of lot 17, containing about one-third of an acre, with a frontage on Leuty avenue of 90 feet by a depth of 153 feet. Upon this land he erected, on the southerly portion, two semi-detached houses, and a single house on the northerly portion. On the 9th September, 1912, he sold the south house, with a frontage of 26 feet and a depth of 113 feet 2 inches, to one Verner, being house No. 24; and on the 11th September, 1912, he sold the house adjoining, with a 24 feet frontage and also a depth of 113 feet 2 inches, to Julia Ball and the plaintiff Olive Miller, being house No. 26, "together with a right of way for the purpose only of getting in coal or other fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet from Leuty avenue and subject to a right of way

ONT.
S. C.
MILLER
v.
TIPLING.
Clute, J.

for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue of the premises hereby conveyed."

On the 23rd September, the said Atkinson conveyed the remaining portions of the said parcel above described, to the defendant Tipling, containing about one-sixth of an acre, being house No. 28. This L-shaped piece of land contains a frontage upon Leuty avenue of 30 feet with a depth of 153 feet, and includes the L-shaped piece of land not conveyed to Verner and the plaintiffs.

The deeds both to the plaintiffs and the defendant are made in pursuance of the Short Forms of Conveyances Act. The deed in each case is signed by the grantor, but not by the grantee in either case. The part of lots Nos. 16 and 17 not sold to Verner and the plaintiffs, remained in Atkinson. There was a tool-house upon what has been called the "L-portion" in rear of the lots conveyed to the plaintiffs. The defendant has erected a garage on that portion of the "L" in rear of the land conveyed to Verner.

The plaintiffs claim that the defendant is entitled only to a right of way to the premises to the north of the plaintiffs' land, and not to that portion forming the "L" in rear of Verner and the plaintiffs' land. The defendant claims that he has a right of way to the remaining portions of parts of lots 16 and 17 owned by him and not conveyed to Verner and the plaintiffs.

The question is one of construction, having regard to the deed as a whole; and the surrounding circumstances may be taken into consideration to determine the intention of the parties: Goddard's Law of Easements, 7th ed., p. 407; *Cannon* v. *Villars* (1878), 8 Ch. D. 415; and other cases there cited.

It will be seen that the grant to the plaintiffs of the 6 feet purports to be "adjoining the premises hereby conveyed to the north," the implication being that the grantor owns the premises to the north, over which this limited right of way is granted.

It is said in *Durham and Sunderland R. Co.* v. *Walker*, 2 Q.B. 940, 967, that an easement cannot strictly be made the subject either of exception or reservation, but the reservation or exception operates as a grant of a newly created easement by the grantee of the land to the grantor, and in that case it was said that the deed must be signed by the grantor; but in *May* v. *Belleville*, [1905]

2 Ch. 605, it was held that the reservation may be such that a grant of the easement by the purchaser is to be implied and will be carried into effect: Goddard, 7th ed., pp. 157, 158; Gale on Easements, 9th ed., p. 78.

In the present case I am of opinion that, having regard to the form of the grant and reservation giving the right of way over the 6 feet, and reserving the right of way over the 2½ feet, there is an implied grant sufficient to support the right of way to the 2½ feet.

An easement must be connected with the enjoyment of the dominant tenement: Gale on Easements, pp. 17, 18; *Ackroyd* v. *Smith*, 10 C.B. 164. In that case the right of way was granted *for all purposes*, whether connected with the user of the land or not, and an attempt had been made to create an easement in gross and to assign it. The case is discussed in Goddard's Laws of Easements, 7th ed., pp. 14, 15. It was held, on demurrer, that a right unconnected with the enjoyment or occupation of land cannot be annexed as an incident to it, and that an easement appendant to a house or land cannot be granted away and made a right in gross.

Counsel did not cite, and I have been unable to find to the present, an express authority, either in England or here, deciding that where the grant is "for the party of the first part" (leaving out the remainder of the clause for the present) it is valid to create an easement in respect of lands adjoining the servient tenement, though not described. There are certain American cases which so hold.

In *Lathrop* v. *Elsner* (1892), 93 Mich. 599, the right was claimed through mesne conveyance from one King. King was the owner of 50 acres of land, the title to 25 of which now vested in the plaintiff. The remaining 25 was in the defendant, subject to the alleged easement. By the deed there in question, the 25 acres abutting upon the highway were conveyed, King retaining 25 acres in the rear, and the deed contained the language following after the description of the property, "reserving from said grant a perpetual right of way for a private way through on the south side of said lot." The Court held that the view taken by the trial Judge, that the roadway was in gross and not appurtenant to the land retained by the grantor, should not prevail, and it was held that the words created an easement appurtenant to the excepted land, which should pass by the conveyance, and was not personal to the grantor.

ONT.
S. C.
MILLER
v.
TIPLING.
Clute, J.

In *Dennis* v. *Wilson* (1871), 107 Mass. 591, the facts are very like the present. The owner of a lot of land adjoining a highway sold and conveyed part of it, excepting and reserving, without any words of inheritance, a right of way extending over the highway along the line of division between the part sold and the rest of the land, for a distance less than the whole depth of the lot. Held, that the right was appurtenant to the rest of the land, whether or not it was limited to the grantor's life. In that case both derived title from one Jenkins. "Being owner of the whole tract, Jenkins conveyed the south part, which is now the defendant's, 'excepting and reserving a right of way to pass and repass over said land, with teams and otherwise, on the northerly side of said premises, not exceeding 8 rods from said old Worcester road.'" At the trial the Judge ruled that this right of way was appurtenant to the remaining lands of Jenkins, and passed with the land to the plaintiff. That was the question before the Court. Wells, J., in giving judgment, said (p. 592): "In this case, Jenkins conveyed to Rice part of his entire tract of land. The right of way, excepted and reserved, extended from the highway in front, along the line of division, for a specified distance, less than the whole depth of the lots. As the grantor could have no occasion, apparently, to use such a way for any other purpose than for access to and egress from his remaining land, the inference would seem to be inevitable that it was for that use that both parties must have understood and intended the way to be held."

That applies, in my opinion, with full force to the present case. The defendant's predecessors in title owned the adjoining land. Having regard to the facts in this case, of what that land was, both parties must have understood the position perfectly, and it appears to me that the natural inference is that the reservation of the right of way was to the land unsold, owned by the grantor; and, this being so, when a reservation was made "to the party of the first part," that was a reservation of the right of way to all of the land adjoining owned by him, including the "L." The subsequent words were not intended to cut down this reservation, but to make it clear that, in case he sold or rented the property immediately to the north, the owners or occupants would also be entitled to the right of way.

It was also contended in the *Dennis* case that the want of words of limitation to heirs and assigns not only limited the right to

the life of the party to whom the reservation was made, but made it personal to him; but it was held that the right was appurtenant to the land. In the present case I think it clear that the easement, being appurtenant to the land, would pass by a grant of the land from Atkinson to the defendant, and the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 5, sub-secs. 2 and 3, and sec. 15, applies.

It is clear, I think, from the authorities, that if the defendant has a right of way over his lands, including the "L," the change in the method of using the land for a workshop and a garage would not deprive him of this right of way.

Allan v. *Gomme* (1840), 11 Ad. & E. 759, 113 E.R 602, has often been quoted to support the view that the right to use the way is confined to the use of it to the dominant tenement in the condition in which the said tenement was at the time of the grant. The rule, however, has been laid down differently in different cases.

In *Finch* v. *Great Western R. Co.*, 5 Ex. D. 254, the Court was of opinion that *Allan* v. *Gomme* established no general rule, but turned on the construction of the particular deed referred to, and that the principle is established, that "where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant."

In *White* v. *Grand Hotel Eastbourne Limited*, [1913] 1 Ch. 113, 114, 116 (in appeal to the House of Lords, *Grand Hotel Eastbourne Limited* v. *White* (1913), 110 L.T.R. 209), where the dominant tenement had been converted from a private dwelling-house to an hotel, the Court seemed unwilling to treat *Allan* v. *Gomme* as a binding authority and accepted the law as laid down in *Finch* v. *Great Western R. Co.*

See also Gale on Easements, 9th ed., pp. 328-330, where these and other authorities are considered; and *Harris* v. *Flower & Sons Limited* (1904), 90 L.T.R. 669, [1904] W.N. 106, where the building used was partly on adjoining lands. This decision was reversed in appeal. Their Lordships observed that there was no dispute as to the law. The question was, what was the true inference from the undisputed facts? In their opinion, the true inference was, that the defendant was intending to make an excessive user of the right of way: [1904] W.N. 180, 91 L.T.R. 816.

ONT.
S. C.
MILLER
v.
TIPLING.
Clute, J.

In *Telfer* v. *Jacobs*, 16 O.R. 35, it is held that, where a right of way is granted as appurtenant to certain land, there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it is appurtenant, by every part owner of the property, but such part ownership confers no right further to burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed.

See *Wood* v. *Saunders* (1875), L.R. 10 Ch. 582; see also *Keith* v. *Twentieth Century Club Limited* (1904), 90 L.T.R. 775, where it was held that, as the relation of the members of the club was that of customers, and not sublessees, tenants, or friends, upon the true construction of the deed the company could not authorise such user.

In the present case the stalls of the garage were each separately leased. The occupants were in fact tenants, and the case would be no different from that where an owner of land, having a right of way thereto, built cottages thereon, in which case each tenant would have a right to use the way to the cottage leased by him.

In Washburn's Easements and Servitudes, 4th ed., p. 35, it is said that, "where one granted land to another, which adjoined other lands which belonged to him, and reserved in his deed a right of way across the parcel granted, in favour of his other lands, and at the same time gave to the parcel granted a right of way across these other lands of the grantor, it was held that he thereby created rights of way appurtenant to both the parcels, which passed with these parcels in the subsequent conveyances thereof, whether mentioned or not in the deed as existing easements;" citing *Brown* v. *Thissell* (1850), 6 Cush. (60 Mass.) 254.

The burden of a right of way must not be increased: a right of way to or from Blackacre does not include a right of way to or from a place beyond Blackacre: Gale on Easements, 9th ed., p. 333; *Colchester* v. *Roberts* (1839), 4 M. & W. 769, 774, 150 E.R. 1632; *Skull* v. *Glenister*, 16 C.B. (N.S.) 81.

A right of way does not extend to lands subsequently purchased: Gale, p. 333; and *Purdom* v. *Robinson*, 30 Can. S.C.R. 64, where it was held that a right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purpose in respect to any other property.

After the best consideration I can give to this case and a careful reading of the authorities cited, and many others, my opinion is that the case turns upon the construction of the grant, and that construction should be based upon the surrounding circumstances to shew the meaning of the parties. The deed in question contained a grant of the right of way over 6 feet, and reserved the right of way to the defendant's predecessor in title over 2½ feet. I am of opinion that this created an easement for the benefit of and appurtenant to the whole of the land owned by the grantor Atkinson, and that this right to such easement passed to the defendant as appurtenant to the land, and also by virtue of the statute; that the use of the right of way extended to the southerly portion and garage, and was within the defendant's right as appurtenant to the land; and that the words in the deed "and to the owners or occupiers thereof" were by way of further assurance, and were not intended to limit the right of way expressly given to the grantor.

I would allow the appeal. The defendant is entitled to use the right of way as appurtenant to the whole of the lands still remaining in Atkinson upon his sale to the defendant, and such right passed to the defendant. The defendant should have the costs below, and of this appeal.

Appeal dismissed; CLUTE, J., *dissenting*.

KAUFMAN v. RUR. MUN. OF BAILDON.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., and Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

TAXES (§ III A—105)—OWNER AND LESSEE BOTH OWING TAXES—SEIZURE OF LESSEE'S SHARE OF CROP—POWER OF MUNICIPAL COUNCIL TO APPLY PROCEEDS ON LESSEE'S TAXES—POWER BY RESOLUTION.

Where the owner of certain land has leased and sublet other land, under a crop payment lease, and his share of the crop has been seized and the proceeds applied in payment of the taxes due on the leased property, the council of the municipality has power under the Rural Municipality Act, R.S.S. 1909, c. 87, by agreement, to apply the proceeds of such seizure in payment of the lessee's taxes due on other land. Such power may be exercised by resolution.

APPEAL from the trial judgment in an action for taxes. Affirmed. Statement.

W. A. Beynon, for appellant.

G. S. Haig for respondent.

The judgment of the court was delivered by

SASK.

C. A.

KAUFMAN v. RUR. MUN. OF BAILDON.

Newlands, J.A.

NEWLANDS, J.A.:—In this case the facts are as follows:—The plaintiff is the owner of the east half of section twenty-two, township thirteen, range twenty-seven, west of the second meridian, which land is situate within the defendant municipality.

In the spring of 1915 the plaintiff leased from one Everson certain other lands situate in the same municipality. This he sub-let to one Houseman on a half-crop lease.

Everson was in arrears in payment of the taxes on the land leased by him to the plaintiff, and the defendant municipality seized the whole of the crop on this land for Everson's taxes. Houseman was in possession of the land and farming it, and the bailiff left Houseman in charge of the crop after seizure. Houseman, it appears, was in rather stringent circumstances financially, and the defendant municipality, fearing they would have to support him or grant him relief, accepted from him the value of half the crop instead of the whole of it; the total crop sold for $160. This left $80 in the hands of the municipality to apply on Everson's taxes and it was so applied. The plaintiff then approached the municipality and claimed that this $80 belonged to him, and that it should be paid to him as it was agreed that he should get half the crop from Houseman. The council apparently disputed his claim, but, on his agreement to pay for the threshing, which he subsequently did, they passed the following resolution:—

Copy of resolution passed by the council of the R. M. Baildon No. 131 on Dec. 13th, 1915:

Moved by Daly that the $80 paid by Robert Houseman on S.W. 35-13-27-W-2 be transferred to S.E. ¼ of 22-13-27-W-2 if Kaufman pays the balance. (Sgd.) A. DUNLOP, Sec'y-Treas., R.M. 131.

Carried.

At this time, there was owing, by way of arrears of taxes on the plaintiff's land, $111.36. Subsequent to this, only two payments of taxes were made by or on behalf of the plaintiff. One payment of $100 which he made in 1917 and in payment of current taxes only, and a further payment of $50. With this $50 there was no instruction as to how it was to be applied. The north-east quarter of 22 appears to have been the plaintiff's homestead, and it had been his custom to keep the taxes paid up in full on the homestead, and to allow the arrears to stand on the pre-emption, being the south-east quarter and the one referred to in the resolution. When the secretary of the defendant municipality

received the $50, he applied $28.20 of it in payment of the current taxes on the north-east quarter of 22, which paid the taxes on that quarter to the end of 1916. The balance, $21.80, he applied on the arrears outstanding against the south-east quarter of 22.

Instead of applying only $21.80 in payment of these arrears, the secretary-treasurer should have applied the whole, or such part of it as was necessary to pay the arrears.

By s. 307 of the Rural Municipality Act (R.S.S. 1909, c. 87) it is provided that:—

> 307. In case any person pays only a portion of the taxes due by him and such person does not as provided in the next preceding section signify the manner in which such taxes are to be applied, the treasurer shall first apply such taxes in payment of any arrears due by such person and the remainder of the taxes so paid, if any, shall be as nearly as may be proportionately divided in payment of the several taxes levied for the currrnt year.

If, therefore, the $80 had been applied on the plaintiff's taxes on the south-east quarter of 22, the $50 would have paid up the balance of the arrears and the agreement entered into between the council and plaintiff would have been completed.

The only questions for decision in this case are: Did the council have power to enter into this agreement, and, if so, could those powers be exercised by resolution; and, if both these questions are decided in favour of the plaintiff, did he comply with the resolution by paying the arrears in the following year?

It is not only within the power of the council, but it is their duty to collect taxes. Both plaintiff and Everson owed taxes. When they seized plaintiff's property on Everson's land, they could have applied the proceeds either in payment of plaintiff's or Everson's taxes. They first applied it in payment of Everson's taxes, but, subsequently, agreed to apply it in payment of plaintiff's taxes if he would pay for the threshing. I can see no reason why they could not make this agreement. Everson would have no right to complain. He had paid nothing, and would suffer no loss. If the council had applied the proceeds of this seizure in payment of Everson's taxes, then plaintiff could have collected this amount from him. He, therefore, cannot complain of the agreement made by the council. The municipality lost nothing, as they retained the money for what was due by plaintiff and did not release Everson.

The agreement was, therefore, in my opinion within the powers of the municipality.

SASK.

C. A.

KAUFMAN v. RUR. MUN. OF BAILDON.

Newlands, J.A.

It being within their powers, the next question is: Could these powers be exercised by resolution?

This is answered by s. 187 of the Rural Municipality Act, which provides that, unless otherwise provided, the municipality may exercise the duties and powers conferred upon it either by resolution or by-law. There being no provision in the Act requiring a by-law in a case like the present, the powers were properly exercised by resolution.

Finally, did the plaintiff comply with the agreement? He was to pay for the threshing and pay up the arrears. He paid for the threshing, but did not pay up the arrears until the following year. The resolution had not been rescinded, and, at the time the arrears were paid, no change had been made in the circumstances of the parties. I think there was a sufficient compliance with the resolution.

The defendants contend that the $80 was never transferred from Everson's land to plaintiff's, and that the Trust Company of Winnipeg on May 10, 1917, paid the balance of the taxes due on Everson's land, thereby getting the benefit of the credit of $80. As this was after the payment by defendant of the arrears, and, therefore, after the time the defendants should have carried out the terms of the resolution, it cannot, to my mind, affect this case.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

ONT.

S. C.

MAHONEY v. CITY OF GUELPH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. July 15, 1918.

MUNICIPAL CORPORATIONS (§ II C—217)—WORK AUTHORIZED BY BOARD OF COMMISSIONERS—NEGLIGENCE OF ENGINEER IN CARRYING OUT WORK—INJURY TO MEMBER OF BOARD—DAMAGES.

A member of a municipal council or board of commissioners which has directed work to be done by its engineer, who from curiosity or from any other motive is present when the work is being done, and is injured owing to the negligence or want of skill of the engineer, may recover from the corporation damages for the injuries sustained.

[*Mahoney* v. *City of Guelph*, 41 D.L.R. 60, reversed.]

Statement.

An appeal by the plaintiff from the judgment of Clute, J., 41 D.L.R. 60, 41 O.L.R. 308, dismissing the action without costs.

Sir George Gibbons, K.C., and *V. H. Hattin*, for appellant.

I. F. Hellmuth, K.C., and *P. Kerwin*, for respondent.

ONT.

S. C.

MAHONEY v. CITY OF GUELPH.

Meredith, C.J.O.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 17th December, 1917, which was directed to be entered by Clute, J., after the trial of the action before him sitting without a jury at Guelph on the 11th day of that month: 41 D.L.R. 60.

The action is brought to recover damages for injuries sustained by the appellant owing, as he alleges, to the negligence of an employee of the respondent—its engineer—in the performance of his duties.

The appellant was the mayor of Guelph and a member of a commission, appointed under the authority of sec. 4 of ch. 90 of the statutes of 1911 (1 Geo. V.)

That section empowered the council to pass a by-law to place in the hands of a commission, among other things, the following "matters concerning city works:"—

(4) To instruct the city engineer in the discharge of his duties with respect to sewers, streets, drains, thoroughfares and bridges, and to report to the council from time to time on all matters connected with the performance by the engineer of his duties in the matters aforesaid.

(7) To have charge of the execution and carrying out of all works connected with sewers, drains, highways and bridges authorised by the council and the expenditure of all moneys appropriated by the council for the said purposes.

A by-law for these purposes was passed by the council on the 8th January, 1912, after having been assented to by the electors as required by the statute.

The statute makes applicable, *mutatis mutandis*, the provisions of secs. 40 to 46, both inclusive, of the Municipal Waterworks Act, and the amendments to that Act, with the proviso that, notwithstanding these provisions, "the council shall possess its powers and authority to determine, and incidental to such determination what works and improvements in respect of sewers, streets, thoroughfares and bridges shall be undertaken and made, and the expenses thereof, and to carry out the provisions of the Municipal Act with respect thereto, but in respect of the execution and carrying out of the improvements and repairs so determined upon by the council the commissioners shall have and exercise the said powers and authority conferred under the Municipal Waterworks Act."

ONT.

S. C.

MAHONEY v. CITY OF GUELPH.

Meredith, C.J.O.

The Municipal Waterworks Act referred to is R.S.O. 1897, ch. 235, and, by sub-sec. 2 of sec. 40, it is provided that "all the powers, rights, authorities, or immunities which, under this Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, and the council thenceforth during the continuance of the board of commissioners shall have no authority in respect of such works;" and sub-sec. 4 of sec. 40 provides that "nothing herein contained shall be construed to divest the council of its authority with reference to the providing of moneys required in respect of such works, and the treasurer of the municipality shall, upon the written certificate of the commissioners, pay out any moneys so provided."

The engineer was appointed by by-law passed on the 19th day of July, 1915, and by it it is provided that he "shall perform all duties appropriate to the office of city engineer and such as have heretofore been performed by the city engineer of Guelph, including the duties which have heretofore been prescribed by by-laws or resolutions of the council which have been heretofore passed and duties to be prescribed by any resolutions to be hereafter passed by the council and any resolution or direction of the board of commissioners of sewage and public works . . ."

In the spring of 1916, a freshet occurred in the river Speed, which passes through Guelph, and fears were entertained that a bridge in the city, crossing that river, would be carried away by the flood. This having come to the attention of the city engineer, and having been communicated by him to the board, a meeting of the board was held, and the engineer having recommended that, as a means for the protection of the bridge, a dam in the river should be blown up, the board approved of the recommendation and instructed the engineer to proceed with the work. The engineer proceeded with the work, employing in it tools and appliances belonging to the respondent and workmen in its employment.

Two attempts to blow up the dam were made on the same day. The first was unsuccessful, and the injuries of the appellant, who was present on both occasions, were sustained owing to his having been struck by a piece of cement which was thrown by the force of

ONT.

S. C.

MAHONEY v. CITY OF GUELPH.

Meredith, C.J.O.

the second explosion. No attempt was made to prevent detached parts of the cement, of which the dam was composed, from flying wherever the force of the explosion would carry them. This might and ought as found by the trial Judge to have been done by placing a covering over the place where the explosives were set; nor were proper steps taken to see that a crowd of persons who to the number of 100 had assembled to witness the operation that was going on were either warned of the danger they might incur from the result of the explosion or to remove them from the danger-area, beyond seeing that they left the bridge on which they were standing, and went back from 150 to 175 feet from the place where the explosives were set. The engineer appears to have thought that at that distance they were in no danger. The learned trial Judge has found that in this also the engineer was negligent.

These findings of the trial Judge are supported by the evidence, and the case must therefore be dealt with on the hypothesis that the appellant's injuries were caused by the negligence of the engineer. The view of the trial Judge was that, although a person on the highway who was injured by flying débris could have maintained an action against the respondent for the recovery of damages for the injuries he had sustained, the appellant could not do so.

It is difficult for me to ascertain the exact legal ground upon which that conclusion was based. One of the reasons assigned for the conclusion is (41 O.L.R. at p. 313) that the appellant, at the instance of the engineer, "requested the people to move back from the danger-area," and therefore "knew there was danger, and exercised his own judgment where he would go to be free from that danger. In other words, in that sense he took the risk, believing that he was in safety where he was."

The learned trial Judge also was of opinion (pp. 313, 314) that the appellant, as a member of the board, had charge of the execution and the carrying out of the work that was going on, that he was bound to see that due care was taken; "and, being injured by reason of that want of care and protection, he became the victim of his own negligence in the sense, not that he had full knowledge of the risk which he ran in the place where he was at the time of the accident, but that from his position and overcharge of the work he cannot take advantage of the oversight or negligence of a person who is subject to his authority, and thereby render the defendant liable."

ONT.

S. C.

MAHONEY v. CITY OF GUELPH.

Meredith, C.J.O.

The learned trial Judge appears to have treated the appellant as if he had been a superintendent in charge for his employer of the work of blowing up the dam; but, with respect, I am of opinion that that is an erroneous view of the position of the appellant as a member of the board. He was in no sense an employee of the respondent, and occupied no different position with regard to the work that was being done than a member of the municipal council would have occupied had there been no board, and the work was being done under the direction of the council.

It is abundantly clear upon the evidence that what the members of the board did was merely to approve of the recommendation of the engineer that the dam should be blown up, leaving entirely to him the selection of the means by which that should be accomplished and the carrying out of the work. The engineer was an officer of the respondent, and it was his duty as such, under the provisions of the by-law by which he was appointed, to carry out the directions of the board as to matters which, under the provisions of the by-law by which it was constituted, were committed to its charge; and, having been, as has been found, guilty of negligence in the performance of those duties, the respondent is answerable for the consequences of that negligence.

I do not know whether the learned trial Judge was of opinion that the maxim *volenti non fit injuria* applied. What he says leads me to think that he was. But the maxim has no application where there is not a full appreciation of the risk that is being run, and therefore no application to the case at bar, it having been found that the appellant had not a full appreciation of the risk that he ran in being where he was standing when he was injured.

I know of no reason why a member of a municipal council which has directed work to be done by its engineer, who from curiosity or from any other motive is present when the work is being done and is injured owing to the negligence or want of skill of the engineer in doing it, may not recover from the corporation damages for the injuries he has sustained; and, if he may, there is no reason why a member of a board to which the council has delegated the performance of its duties may not, in the like circumstances, recover.

The learned counsel for the respondent invoked the doctrine of common employment, but that doctrine can have no application,

because, as I have said, the appellant was in no sense an employee of the respondent.

It was argued by counsel that the appellant, having undertaken the duty of keeping back the people on one side of the river, was a mere volunteer and could not recover for injuries sustained by him owing to the negligence of the engineer, and in support of that contention *Degg* v. *Midland R. Co.* (1857), 1 H. & N. 773, 156 E.R. 1413, and *Potter* v. *Faulkner* (1861), 1 B. & S. 800, 121 E.R. 911, were relied on. These cases have, in my opinion, no application. It is pointed out in *Hayward* v. *Drury Lane Theatre Limited*, [1917] 2 K.B. 899, 906, that there is a distinction to be made between the case of a mere volunteer and a case "when the injured person voluntarily assists the master's servants in a service in which he has a common interest with the master and by the invitation or with the acquiescence of the master or his servant acting within the scope of his employment. He is not a mere volunteer and can recover if he is injured by the negligence of the master's servants." There are also expressions of opinion in the same case that the doctrine of common employment does not extend to cases where there is no contractual relation between the master of the negligent person and the injured person.

In the case at bar there was no contractual relation between the appellant and the respondent, and the appellant, as a member of the board, had a common interest with the respondent in the work that was being done, and what he did in undertaking to keep the people back was done by the invitation and with the acquiescence of the engineer acting within the scope of his employment.

I doubt, however, whether it is necessary for the appellant's case to rely upon that ground. The appellant was not a volunteer or a trespasser in any sense. The work that was being done was being done under the direction of the board of which he was a member, and he had a right to take such part as he might think necessary in the doing of the work. There is, however, no ground for thinking that, beyond undertaking to keep the people back on one side of the river, he took any part in the doing of the work. All that was left entirely to the engineer, who frankly admitted his responsibility for the manner in which it was being done, and that neither the appellant nor any member of the board had any knowledge of the effect of the explosives that were used or the extent of

ONT.
S. C.
MAHONEY v. CITY OF GUELPH.
Meredith, C.J.O.

the risk that was run from injury being occasioned by the flying débris—beyond this, that he and they apprehended that there would be the danger of the débris being thrown out by the explosion, but as to the extent of the danger-area they had no idea.

Upon the whole, I am of opinion that the appeal should be allowed with costs and the judgment be reversed, and there be substituted for it a judgment for the appellant for the amount at which the damages were contingently assessed, with costs.

Appeal allowed.

SASK.
C. A.

THEATRE AMUSEMENT Co., Ltd. v. SQUIRES et al.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 7, 1918.

SALE (§ I C—17)—LIEN NOTE—AFFIDAVIT OF BONA FIDES—NOT COMPLYING WITH STATUTE—EFFECT—REGISTRATION—LIEN NOTES AND CONDITIONAL SALES OF GOODS ACT, R.S.S. 1909, c. 145.

A clause in an affidavit of *bona fides* required to be filed with a lien note, "that the copy of the within agreement truly sets forth the agreement between the parties mentioned therein, and that the agreement therein set forth *in bona fides* and not to protect the goods in question against the creditors of the said buyer or bailee," does not comply with s. 2 (3) of the Act respecting Lien Notes and Conditional Sales of Goods (R.S.S. 1909, c. 145), and the lien note cannot properly be registered, and therefore under s. 1 of the Act cannot be set up against judgments or executions against a purchaser or bailee.

Statement.

APPEAL from the judgment of the trial judge in an interpleader action to determine to whom and in what proportion certain moneys in the sheriff's hands should be paid out. Reversed.

C. E. Gregory, K.C., for appellants Reid, Plisson and Squires; *H. J. Schull*, for respondent company; *P. M. Anderson*, for defendant wage-earners.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—The first question to be considered in this case is whether the affidavit of *bona fides* filed with the plaintiff's lien note sufficiently complies with the statute.

The statutory provisions are contained in s. 2 (3) of c. 145 of R.S.S., and are as follows:—

(3) Every such agreement or a true copy thereof shall upon every such registration be accompanied by an affidavit of the seller or bailor or his agent stating that the written agreement annexed thereto truly sets forth the agreement entered into between the parties and that the said agreement was entered into *bonâ fide* and not for the purpose of protecting the goods mentioned therein against the creditors of the buyer or bailee.

The affidavit in question contains the following clause:—

That the copy of the within agreement truly sets forth the agreement between the parties mentioned therein, and that the agreement therein set

SASK.

C. A.

THEATRE AMUSEMENT CO. LTD. v. SQUIRES.

Haultain, C.J.S.

forth in *bonâ fide* and not to protect the goods in question against the creditors of the said buyer or bailee.

There is, obviously, a clerical error here. It might have been intended to use "is" instead of "in," but it is most probable that the words "was entered into" were left out by mistake. Such an error in an affidavit is, in my opinion, fatal. The statute requires a certain statement to be made under oath, and it cannot be said that such a statement has been made in this case. It might be fairly argued that the person who drew up this affidavit intended to use other words, but that argument cannot be advanced in favour of the person who subscribed and swore to the affidavit in the form in which it appears.

The case of *Emerson* v. *Bannerman* (1891), 19 Can. S.C.R. 1, 2, cited by the trial judge in his reasons for judgment, does not, in my opinion, apply to the facts of this case. In that case, it was held that a slight variation from a statutory form of affidavit of *bona fides* not affecting the substance or calculated to mislead did not avoid a bill of sale.

I would, therefore, hold that the affidavit in question does not satisfy the statutory requirements, and that, consequently, the plaintiff's lien note cannot be set up against judgments or executions against the purchaser or bailee Findlay. This finding applies to the defendant Plisson as well as the defendant Squires. The fact that his execution was placed in the sheriff's hands after the goods had been seized under the first execution does not make any difference. See Creditors Relief Act (R.S.S. c. 63, 3 (*a*).)

I now come to the claim of the defendant Reid for rent. In the first place it may be observed that the landlord, Reid, had only a right of distraint on the chattels in question, in respect of Findlay's interest in them, under his conditional purchase from the plaintiff, by virtue of the provisions of an Act respecting Distress for Rent and Extra Judicial Seizure (R.S.S. c. 51, s. 4). The fact that the plaintiff's lien note was not properly registered does not bring a landlord within the protection of s. 1 of an Act respecting Lien Notes and Conditional Sales of Goods (R.S.S. c. 145, s. 1).

The property in question was sold under an order of the court, and the proceeds, therefore, represent the interests of both the lien-holder and the purchaser (the plaintiff company and Findlay). The proceeds, therefore, may be said to consist of two funds:

SASK.

C. A.

THEATRE AMUSEMENT CO. LTD. v. SQUIRES.

Haultain, C.J.S.

fund A representing in amount the amount of the lien-holders' claim, and the balance or fund B, the interest of the purchaser Findlay. So far as fund A is concerned the landlord has no right or interest in it. But the plaintiff (lien-holder) cannot set up his right of property against execution creditors as already shewn, so fund B must be held available for the payment of wage-earners and execution creditors, and the wage-earners are entitled to payment in priority to execution creditors.

Under s. 18 of the Creditors Relief Act, wage-earners are entitled to be paid

> Out of the moneys levied out of the property of a debtor the amount of wages or salary due to them by such execution debtor—in priority to the claims of the other creditors of the execution debtor.

As the lien-holder cannot set up his right of property against the execution creditors, the money levied in the case must be considered to have been levied out of the property of the debtor.

The balance of fund A, if any, will belong to the lien-holder.

As regards fund B, the landlord has the first claim, and after the landlord has been paid, the balance of the fund will be available for the wage-earners and execution creditors if they have not been fully paid out of fund A, otherwise the balance will belong to the purchaser.

It was contended on behalf of the plaintiff that the landlord, by handing over the keys to the sheriff, abandoned his distraint. I do not think that there was any abandonment. The sheriff was entitled to seize the goods in respect of the lien-holders' interest in them, although he could not interfere with the landlord's distraint on the tenant's interest in them. The goods might reasonably be presumed to be in the joint custody of the landlord and the sheriff, each representing a different interest.

The judgment appealed from will be, therefore, set aside, and judgment entered in accordance with the foregoing.

In view of the pleadings in the issue, the judgment and notice of appeal, I would not allow costs to any of the parties to the issue and there should be no order as to costs of this appeal.

Newlands, J.A. Elwood, J.A.

NEWLANDS and ELWOOD, JJ.A., concurred with Haultain, C.J.S.

Lamont, J.A.

LAMONT, J.A.:—On May 23, 1917, the plaintiffs herein sold to one W. B. Findlay the equipment necessary for a moving picture theatre for the sum of $3,450, receiving $1,650 cash, and a lien note

on the equipment sold for $1,800. Findlay rented a building from the defendant Reid, and placing the said equipment therein conducted the premises as a theatre, under the name of Rex Theatre. The business did not prosper. In September, 1917, Findlay was indebted to the defendant Reid in the sum of $833.32 for rent due September 1. He was also indebted to a number of employees who had been engaged to carry on the business. He was also indebted to the plaintiffs in the amount of their lien note. On September 24, Reid made a seizure of the equipment in question for rent. On October 1 he made a further seizure for another month's rent. On October 2 the plaintiffs took out an injunction restraining Reid from selling the equipment seized. On October 3, Cora Squires, an employee, obtained a judgment against W. B. Findlay for $85.35, and issued execution thereon and placed the same in the hands of the sheriff, who, on the same day, went to the theatre and purported to make a seizure of the equipment covered by the lien note, which the defendant Reid, to the sheriff's knowledge, had already under seizure for rent. Reid's bailiff was in actual physical possession when the sheriff purported to seize. The defendant Reid did not abandon his seizure, but an arrangement was arrived at by which Reid handed over the keys of the building to the sheriff, who was to keep charge of the goods. On October 30, the equipment seized was sold, under an order of the court, to the defendant Reid for $2,300, which sum Reid paid to the sheriff. Subsequently, another employee obtained judgment against Findlay and lodged an execution for the amount thereof with the sheriff. In addition, several other employees of the theatre lodged claims with the sheriff for wages due them. An interpleader issue was then directed to determine to whom and in what proportion the moneys in the sheriff's hands should be paid out. The District Court Judge, who tried the issue, held that the claim of the plaintiffs under their lien note was a valid one against all defendants, and directed that they be paid out of the moneys the amount of their lien note and interest and costs. He also stated that he would determine the question between the wage-earners and the landlord on an application in chambers, if the parties could not agree as to the form of the order. From that decision Reid appeals.

As the ownership of the equipment for which the lien note was given remained in the plaintiffs, all that Reid could seize was the

SASK.

C. A.

THEATRE AMUSEMENT CO. LTD. v. SQUIRES.

Lamont, J.A.

tenant's interest therein, which, but for the injunction, he could have sold to satisfy his claim for rent. The tenant's interest was a right to have the entire property in the goods upon paying off the plaintiff's lien. This right passed to the landlord to the extent of his claim when he seized for rent. Reid was entitled to pay the lien note and hold the goods seized as a first security for the amount of the lien paid and his own claim for rent. The goods having been sold for $2,300, the tenant's interest therein liable for rent was the difference between that sum and the amount of the lien note. On that interest the execution creditors had no claim, the landlord's seizure having been made before there was any execution against the tenant in the sheriff's hands.

In 14 Hals., 53, the law is stated as follows:—

106. When a landlord who has a claim for rent due against his tenant has distrained and is in possession of the goods, the sheriff will not be entitled to levy upon them in the event of a writ of *fieri facias* issuing against the tenant.

As against the execution creditors and wage-earners, therefore, the landlord is, in my opinion, entitled to the entire sum for which the goods were sold, less sufficient to pay the lien note, as his claim for rent amounted to more than the value of the tenant's interest. In paying over to the sheriff the purchase-money, Reid might, in my opinion, have retained the amount to which he was entitled thereout. That is, all he was called upon to pay over was the amount sufficient to meet the lien note and interest thereon.

In *Ingraham* v. *McKay* (1912), 8 D.L.R. 132, 46 N.S.R. 518, the goods of a tenant were seized under execution. The landlord put in his claim for rent. By an arrangement between the landlord and the sheriff, the goods were sold upon the premises for $455, without the rent being first paid. The rent amounted to $195. the landlord was the purchaser. In paying for the goods he gave two cheques, one for $260 and one for $195. This latter cheque, he contended, the sheriff was not to cash, but to return to him in payment of the rent, and he countermanded payment of it. The sheriff sued thereon. The court *en banc* held that he could not recover, as the landlord was entitled to retain the rent out of the purchase-money.

The execution creditors, not being entitled to participate in the sum which Reid was entitled to retain, are they entitled to participate in the sum held by the sheriff to cover the lien note?

The answer to that question depends on whether or not the

lien note was valid as against them. The execution creditors contend that it is not; for the reason that the plaintiffs have failed to comply with sub-s. 3 of s. 2 of c. 145 of R.S.C., which reads as follows:—

(3) Every such agreement or a true copy thereof shall upon every such registration be accompanied by an affidavit of the seller or bailor or his agent stating that the written agreement annexed thereto truly sets forth the agreement entered into between the parties and that the said agreement was entered into *bonâ fide* and not for the purpose of protecting the goods mentioned therein against the creditors of the buyer or bailee.

The affidavit made on behalf of the plaintiffs, in pretended compliance with these statutory provisions, reads as follows:—

That the copy of the within agreement truly sets forth the agreement between the parties mentioned therein, and that the agreement therein set forth in *bonâ fide* and not to protect the goods in question against the creditors of the said buyer or bailee.

This affidavit does not comply with the requirements of sub-s. 3. It does not state that "the agreement was entered into *bonâ fide*." It does not even state—as, perhaps, it was intended by the draftsman to state—that "the agreement therein set forth *is bonâ fide*." the word "in" is used instead of the word "is." It is true that where the meaning clearly appears from the context, an affidavit will not be vitiated by mere grammatical or clerical errors, nor by omission of words not material to the sense. 2 Corp. Jur. 351-2. *Emerson* v. *Bannerman*, 19 Can. S.C.R. 1, 2.

Can it be said that the omission of the plaintiffs to comply with the requirements of the sub-section above cited amounts to no more than a clerical error or the omission of words not material to the sense? In my opinion it cannot. The statute requires that the seller, or his agent, in his affidavit, shall pledge his oath that "the agreement was entered into *bonâ fide*." That is not an unessential or unimportant part of the affidavit; it is one of the material parts thereof.

In *Mason* v. *Lindsay* (1902), 4 O.L.R. 365, at 370, Meredith, C.J., says:—

The legislation does not permit of the court holding that anything other than that which it has prescribed as necessary shall be a compliance with the statute, even though what is done is in the opinion of the court as effective for the end which the legislature intended to attain as that which it has required to be done to protect the common law right of the owner of the chattel.

See also *Aricinski* v. *Arnold* (1906), 6 Terr. L.R. 240.

SASK.

C. A.

THEATRE AMUSEMENT CO. LTD. v. SQUIRES.

Lamont, J.A.

The affidavit not complying with the statutory requirement, the plaintiffs' lien note could not properly be registered. The plaintiffs, therefore, under s. 1 of the Act Respecting Lien Notes and Conditional Sales of Goods could not set up any right of property in the goods or right of possession thereto as against the execution creditors of Findlay. The statutory restriction, however, operates only in favour of a purchaser or mortgagee of or from buyer of the goods in good faith for valuable consideration and in favour of judgments, executions or attachments against such purchaser. As the purchaser's landlord is not mentioned in the section, he does not obtain any benefit from the failure of the conditional vendor to register his lien note.

The plaintiffs not being permitted to set up their right of property or right of possession to the goods seized, the court must deal with such goods, so far as the executions are concerned, on the footing that they are the goods of Findlay, and the moneys received therefrom as being moneys levied out of the property of an execution debtor. This has the effect of allowing the other employees of Findlay to participate in the distribution of the moneys, as s. 18 of the Creditors Relief Act provides that persons in the employment of the execution debtor at the time the sheriff enters in his book a notice or memorandum of his levy, or within one month prior thereto, who file with the sheriff their claims for wages or salary in the manner provided by the Act, shall be entitled to be paid out of the moneys levied out of the property of the debtor the amount of wages or salary due them, not exceeding three months' wages or salary, in priority to the claims of the other creditors of the execution debtor and shall be entitled to share *pro rata* with such other creditors as to the residue (if any) of the claims.

Had the plaintiffs' lien note been properly registered, they would have been entitled to be paid the full amount thereof in priority to all claimants. As they failed to do this, and as the statute, on such failure, permits execution creditors and wage-earners to obtain priority, the plaintiffs must suffer for their failure to observe the statutory requirements.

The moneys in the sheriff's hands should, therefore, in my opinion, be distributed as follows:—(1) All over and above the amount due to the plaintiffs on their lien note should be paid to

SASK.

C. A.

THEATRE AMUSEMENT CO. LTD. v. SQUIRES.

Lamont, J A.

the defendant Reid, up to the amount due him for rent; (2) claims for wages by employees up to 3 months' wages; (3) execution creditors for the amount of their executions, and employees for the balance of their wages; (4) the balance should be paid to the plaintiffs.

The appeal should, therefore, be allowed with costs, the judgment below set aside and judgment entered for distribution as I have indicated. As Reid is the only one who appealed, he alone is entitled to costs in appeal. As all parties succeeded to some extent in the issue, I would allow no costs thereof.

Appeal allowed.

ONT.

S. C.

FORSYTH v. WALPOLE FARMERS MUTUAL FIRE ASSURANCE CO.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins, and Ferguson, JJ.A. June 14, 1918.

INSURANCE (§ III D—65)—CONTENTS OF BARN—APPLICATION—SPECIAL CLAUSE IN—CONSTRUCTION OF POLICY.

An insurance company insured the plaintiff to the extent of $1,600 against fire in respect of the ordinary contents of a barn. The barn and contents were destroyed by fire, the loss being admitted to be $850.

The company contended that by reason of a term in the application for the insurance that "not more than two-thirds of the cash value of any building or personal property will be insured by this company" its liability was limited to two-thirds of the value of the property destroyed, the application forming part of the contract. The court held that it was unnecessary to consider whether the application was part of the contract or not. The policy insured against loss or damage to the extent of $1,600 to be estimated "according to the true and actual cash value of the property at the time the same shall happen." The assured having applied for $1,600 insurance and having by his application indicated his acceptance of the condition that the company would not insure more than two-thirds of the value, was entitled to rely on this condition and to treat the contract as based on the fact that the amount of insurance granted was within the two-thirds limit.

[*Youlden* v. *London Guarantee and Accident Co.* (1913), 12 D.L.R. 433, 28 O.L.R. 161; *Town of Arnprior* v. *United States Fidelity and Guaranty Co.* (1913), 12 D.L.R. 630, (1914) 20 D.L.R. 929, 30 O.L.R. 618; *Sharkey* v. *Yorkshire Insurance Co.* (1916), 54 Can. S.C.R. 92, 32 D.L.R. 711; *Beury* v. *Canada National Fire Ins. Co.* (1917), 37 D.L.R. 105, 39 O.L.R. 343, considered.]

Statement.

APPEAL from the judgment of Latchford, J. on an action upon a fire insurance policy. Affirmed.

The judgment appealed from is as follows:—

LATCHFORD, J.:—Action upon a policy of insurance issued by the defendants to the plaintiff on the 26th August, 1916, insuring him against loss by fire on the "ordinary contents" of a barn to the extent of $1,600 and on certain live stock to the extent of $600.

ONT.

S. C.

FORSYTH v. WALPOLE FARMERS MUTUAL FIRE ASSURANCE CO.

On the 11th December, 1916, during the currency of the policy, the barn was burned. Its contents were then, it is admitted, of the actual cash value of $850.

At the trial the plaintiff contended that the defendants were liable to him for the damages which he sustained by reason of the burning of certain stacks of hay, about 100 tons in all, not in the barn, but piled near it. His contention was based on what he understood the defendants' agent to have represented, that hay stacked as this was, within 80 feet of the barn, was to be regarded as covered by the policy.

I rejected this part of the plaintiff's claim. Hay stacked outside the barn could not, in my opinion, be considered to be included in the word "contents."

The defendants do not deny liability, but they say it is limited to two-thirds of the value of the property destroyed. They base this limitation on a term in the application printed on the form signed by the plaintiff on the 10th July, 1916, which is in the following words:—

"Not more than two-thirds of the cash value of any building or personal property will be insured by this company in connection with any other company or otherwise."

The policy refers to the application as forming and making part of the policy.

By sec. 156(3) of the Insurance Act, R.S.O. 1914, ch. 183, the "application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract."

It is not pleaded or proved that the application contained any misrepresentation whatsoever.

The case therefore falls to be considered upon the terms of the contract expressed by the policy.

No proof was given that $1,600 was more than two-thirds of the value of the contents of the barn at the time the insurance was effected.

The defendants had the right, under the application, to limit their liability to two-thirds of the amount of the loss.

The insurance was against loss or damage by fire, "such loss or

damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen, and shall not exceed the said amount insured, nor the value of the interest of the assured in the said property."

The contract, instead of placing a two-thirds limitation on its liability for loss, expressly fixes that liability at the "actual cash value of the property destroyed," and that value, it is conceded, is $850.

Although not pleaded, it appears that, by signing a premium note, when applying for the insurance, the plaintiff became, under sec. 123 of the Act, a member of the defendants as a mutual insurance company. No by-law of the company was proved before me. An extract from a by-law of the company, not verified in any way, and not admitted as authentic by the plaintiff or his counsel, has recently been sent to me. It states, like the application, that "not more than two-thirds of the value of any building or other property will be insured by the company." As I have observed, there is no evidence that more than such value was insured in this case. Then again the defendants are confusing the value of the property insured with the loss which they agreed to pay.

The actual cash value of the contents of the barn destroyed by fire is conceded to be $850. There will be judgment for the plaintiff for that amount, with costs on the High Court scale, without set-off.

T. J. Agar, for appellants.

R. S. Colter, for respondent.

HODGINS, J.A.:—I do not think that, upon the wording of the insurance contract herein, the question chiefly argued really arises. That question was, whether the provision in the application limiting the insurance to two-thirds of the cash value controlled the operative words of the policy, because in the latter were contained the words, "the said application forms and is made part of this policy." It is not necessary to consider whether the whole of the application is, notwithstanding the provisions of the Ontario Insurance Act, by that reference incorporated as part and parcel of the policy. If that point had to be expressly decided, it would be proper to deal again with the difficulties caused by the Supreme Court decisions which are referred to and discussed by

ONT.

S. C.

FORSYTH v. WALPOLE FARMERS MUTUAL FIRE ASSURANCE CO.

Hodgins, J.A.

this Court in the cases of *Youlden* v. *London Guarantee and Accident Co.* (1913), 28 O.L.R. 161, 12 D.L.R. 433, and *Town of Arnprior* v. *United States Fidelity and Guaranty Co.* (1914), 30 O.L.R. 618, 12 D.L.R. 630, 20 D.L.R. 929. These difficulties are not cleared up by *Sharkey* v. *Yorkshire Ins. Co.* (1916), 54 Can. S.C.R. 92, 32 D.L.R. 711, though that case is a step in the right direction, as is recognised, though not with much effusion, in *Beury* v. *Canada National Fire Insurance Co.* (1917), 39 O.L.R. 343, 37 D.L.R. 105. But, if the application is looked at, there is really no inconsistency. In it the respondent applies for insurance, to the extent of $1,600, upon the ordinary contents of his barn. Very few of the questions asked are answered, and little information is given. No statement of the cash value appears in the application. Hence, when reading the clause relied on in the application, namely, "Not more than two-thirds of the cash value of any building or personal property will be insured by this company in connection with any other company or otherwise," there is nothing to convey the impression that the request for $1,600 is beyond the amount for which an insurance could or would be granted, or that, when the policy is issued, the amount insured will not be within the prescribed limit.

The policy insures against loss or damage to the extent of $1,600, to be estimated "according to" (not "as") "the true and actual cash value of the said property at the time the same shall happen," and on its back is printed the following statutory condition:—

"8. After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application."

I think that the assured, having applied for $1,600 insurance on the contents of his barn, and having by his application indicated his acceptance of the condition that the company would not insure more than two-thirds of the value—the by-law says "estimated value"—is entitled to rely on this condition and to treat the company's contract as based upon the fact that the amount of insurance which he applied for and which was granted was within the two-thirds limit. There is in fact nothing in the application to controvert or weaken this position; and so the case may be decided upon the terms of the policy, without necessitating

ONT.

S. C.

FORSYTH v. WALPOLE FARMERS MUTUAL FIRE ASSURANCE CO.

the consideration of whether the application is really made part of the agreement.

It was argued that, as the respondent was a policy-holder, and therefore a member of the appellant body, he, at all events, could not claim more than two-thirds of the loss.

The by-law, as I have pointed out, restricts the company from insuring more than two-thirds of the "estimated value," and there is no proof that $1,600 exceeded that estimated value. By-law 14 requires all applications for insurance to be passed upon and approved or rejected by a majority of the directors present at any meeting; and this, no doubt, was done before the policy was issued.

Hodgins, J.A.

The appellants having failed to prove that they insured for more than two-thirds of the cash value or estimated value, and having agreed by their policy to pay the loss according to the true and actual cash value of the property at the time the loss happens, I think the appeal must be dismissed.

MACLAREN and MAGEE, JJ.A., agreed with Hodgins, J.A.

Maclaren, J.A.
Magee, J.A.
Ferguson, J.A.

FERGUSON, J.A.:—The appellants cannot succeed unless we sustain their contention that the Court should read the application into or along with the policy of insurance, for the purpose of defining and thereby limiting the obligation assumed by the appellants under the wording of the policy.

It is stated on the face of the policy that the "said application forms and is made part of this policy."

The paragraph of the policy setting out the obligation of the company, is in the following words:—

"Now this policy witnesseth that the Walpole Farmers Mutual Fire Assurance Company, for and in consideration of the premises, insure the said property against loss or damage by fire or lightning to the amount aforesaid, such loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen, and shall not exceed the said amount insured, nor the value of the interest of the assured in the said property."

The application is not attached to the policy, but the appellants seek to read into the policy the following words taken from the application: "Not more than two-thirds of the cash value of any building or personal property will be insured by this company in connection with any other company or otherwise."

ONT.

S. C.

FORSYTH v. WALPOLE FARMERS MUTUAL FIRE ASSURANCE CO.

Ferguson, J.A.

The appellants contend that, these provisions being read together, the company's liability is limited to two-thirds of the plaintiff's actual loss. The trial Judge directed judgment to be entered for the full amount of the actual loss. The respondent, while disputing the correctness of the appellants' contention as to the true interpretation of these documents, takes the position that, by the provisions of sub-secs. 1 and 3 of sec. 156, and sub-sec. 1 of sec. 193, of the Ontario Insurance Act, R.S.O. 1914, ch. 183, this Court is prohibited from looking at or considering the application. The sections relied upon read as follows:—

"156.—(1) Subject to the provisions of section 193 all the terms and conditions of the contract of insurance shall be set out in full on the face or back of the policy or by writing securely attached to it when issued, and unless so set out no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect shall be valid or admissible in evidence to the prejudice of the assured or beneficiary."

"(3) The proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract."

"193.—(1) On the face of a policy of fire insurance there shall appear the name of the insurer, the name of the assured, the name of the person or persons to whom the insurance money is payable, the premium or other consideration for the insurance, the subject-matter of the insurance, the maximum amount or amounts which the insurer contracts to pay, the event on the happening of which payment is to be made, and the term of the insurance."

The provisions of these sections seem to me to be plain and positive. As stated by Anglin, J., in *Sharkey* v. *Yorkshire Insurance Co.*, 32 D.L.R. 711 at 716, the directions of sub-sec. 1 of sec. 156, and of sub-sec. 1 of sec. 193, are explicit, and the prohibitions of sub-sec. 3 of sec. 156 express.

For these reasons, I am of the opinion that we cannot, in this case, consider the application, but must determine the rights of the company by the language of the policy itself, unaided by anything in the application.

I would dismiss the appeal with costs. *Appeal dismissed.*

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT Co.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. October 8, 1918.

SALE (§ I D—20)—RELIANCE ON SKILL OF VENDOR—CONDITION—ACCEPTANCE AND RETENTION—REPRESENTATIONS BY AGENT—NOT COMPLYING WITH ORDER—RIGHT TO REJECT—AGENT'S AUTHORITY.

A purchaser having made known to the vendors the purpose for which he required a gas traction engine, so as to shew them that he was relying on their skill and ability to furnish him with one reasonably fit for his purpose, signed an order for "one of your Big Four 30 h.-p. gas traction engines." The agreement provided that the order was "made upon the express condition that" it "contains all the terms and conditions of the sale . . . and cannot in any manner be changed, altered or modified without the written consent of the officers" of the company.

When the vendor's agent concluded a three days' trial of the engine, under the contract, the purchaser was not satisfied with its performance. The agent, however, represented that the engine would get better with wear and that if it was not right the company would make it right, and upon this representation the purchaser was induced to settle for the purchase price. The court held on the evidence that the vendors did not deliver such an engine as was called for by the order, the one delivered being incapable of developing the rated horse-power, and the purchaser was justified in rejecting it. Also that the vendors by their conduct were estopped from denying the agent's authority to make the representations which he made.

Statement.

APPEAL from a decision of the Supreme Court of Saskatchewan *en banc* (1918), 38 D.L.R. 528, 11 S.L.R. 11, reversing the judgment on the trial in favour of the plaintiff. Reversed.

C. E. Gregory, K.C., for appellant; *G. F. Henderson*, K.C., and *Fleming*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The appellant's order to the respondents was for "one of your big four 30 h.-p. gas traction engines."

The jury found that the engine was not capable of developing its rated horse-power; that the appellant made known to the respondents the particular purpose for which he required the engine so as to shew them that he was relying on their skill and ability to furnish him with an engine suitable for his purpose; that the engine was not reasonably fit for that purpose, being defective by reason of its lack of horse-power. There was evidence on which the jury could make these findings.

I do not myself understand how it can be maintained that the appellant was not ordering a 30 h.-p. engine. Elwood, J., thinks that if the order was not for "a" 30 h.-p. engine, but for "your" 30 h.-p. engine, the latter did not need to be a 30 h.-p. engine; in fact, that the respondents' 30 h.-p. engines were not necessarily of 30 h.-p. This seems to me rather a strained meaning to put on so slight a difference of language and to be one that would not readily occur to ordinary persons dealing with the respondents.

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Fitzpatrick, C.J.

Reading the order with the findings of the jury, I come to the conclusion that the respondents did not deliver such an engine as was called for by the order.

This really disposes of the case, for it eliminates the difficulties presented by the conditions of the contract which were what troubled the learned judge who rendered the judgment appealed from. Elwood, J., after pointing out that it was only after receiving certain assurances and representations from the respondents' agent that the appellant consented to sign exhibits 1 and 2 and to pay $600 and sign the notes, says:—

> Those representations were untrue. I am therefore of opinion that the appellant's acceptance is not binding upon him and it did not constitute him a purchaser of the engine.

Having found, however, that the engine was the one ordered, the judge thinks that the agent had no authority to change the contract, as he would be doing, by making the representations he did because clause 8 of the contract provides that the order

> contains all the terms and conditions of the sale and purchase of said engine and cannot, in any manner, be changed, altered or modified without the written consent of the officers of the said company.

The judge points out that under the authority of *Wallis & Son* v. *Pratt & Haynes*, [1911] A.C. 394, and many other authorities, the appellant would have been entitled to recover damages, if what the respondents had delivered had been something different from what was ordered.

I am entirely in agreement with the judge except that, as above stated, I am of opinion that the engine delivered was not such as was called for by the order.

It is a consequence of these differing premises that it follows that the conditions of sale have no application.

I would allow the appeal and restore the judgment on trial.

Davies, J.

DAVIES, J. (dissenting):—In this case I have the misfortune to differ from my colleagues, being of the opinion that the appeal should be dismissed and the judgment of the appeal court confirmed.

I was satisfied at the conclusion of the argument that the whole case turned upon the question whether Winterhalt, the expert who was sent by the company to give the machine purchased by Schofield, the plaintiff, the actual trial provided for by the written contract of sale, had any authority to make anew

contract, as it is alleged he did, or to in any way alter the original written one signed and made between the company and the plaintiff.

A full study of that contract has satisfied me that he had no such power and that the statements he made to the plaintiff, and on which the latter says he relied, could in no wise alter or change that written contract. The contract, in fact, expressly provides for just such a case as the one before us of a subordinate officer or agent of the company altering or attempting to alter, in any way, the contract of sale made by the company.

Clause 8 states that the order and agreement

> contains all the terms and conditions of the sale and purchase of the said engine, fixtures and equipment, and cannot, in any manner, be changed, altered or modified without the written consent of the officers of the company.

It is not contended that any such consent was obtained to the alleged changes made in the contract by Winterhalt, the expert sent to give the engine and machine the trial provided for by the contract, and I am unable to find how these representations can constitute a new contract or in any way bind the company.

After Winterhalt had given the engine the trial which was accepted by all parties as the equivalent of the three days' trial stipulated for in the contract, the plaintiff signed the satisfaction paper certifying that the company's expert had "properly put in order, adjusted and started my model Big Four '30' Gas Traction Engine so that everything works satisfactorily to me." He also paid the agent $600 and signed the notes for the balance of the purchase money, and relying as he said upon Winterhalt's statements, did not return the machine to the company within the time stipulated in the contract if it was found at the trial of the machine not to develop the horse-power or to do the work it was guaranteed to do.

At the time these documents were signed the evidence of the plaintiff as to the effect that the engine was not working properly in that it apparently did not develop sufficient horse-power to do the work it was supposed to do.

Plaintiff, with full knowledge of these facts, signed the satisfaction certificate and the notes and paid the cash, $600, to Winterhalt, and when asked at the trial why he did so, said:—

> From the guarantee he told me that the company would stand behind

CAN.
S. C.
SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.
Davies, J.

the engine and make it right if it was not right, and that it would develop more power with use. "Oh, yes," he said, "it would develop more power with use, after it got smoothed up."

It seems to me, therefore, that his whole case rests upon these statements and promises of Winterhalt.

If, in the face of the express stipulations of the written contract, it could be successfully contended that Winterhalt had such power to bind the company and alter the contract made by them the plaintiff would have gone a long way to establish his case.

If he had no such power, and it seems to me clearly and beyond reasonable doubt that he had not, then plaintiff must fail.

I am specially impressed with the reasons for judgment given by Newlands, J., with which I concur, and would dismiss this appeal with costs.

Idington, J.

IDINGTON, J.:—It seems to me that this case presents a system of doing business which has been devised to deprive respondent's customers of all rights save such as it may graciously recognize.

It has framed an order for intending purchasers of any of its 30 horse-power engines to sign as the first step in purchasing.

The order is for a shipment of such engine to a point named for the purpose of trying it there for three days. Then an agent of the respondent is to meet there the intending purchaser and demonstrate on land selected by him the efficiency of the engine.

The experienced agent who fails to demonstrate the cardinal facts of the whole transaction (*a*)

that the engine will develop its rated horse-power at the draw-bar (*b*) that the engine, if rated at 30 or more horse-power will furnish ample and steady power to drive any 36-inch cylinder threshing machine, complete with self-feeder, weigher and blower,

from any cause whatsoever, must be possessed of such adroitness as to ingratiate himself with the customer and persuade him that such demonstrations have taken place and that he is satisfied and has no longer any excuse for delaying the handing over of the cash and notes stipulated for.

If he happen to have some doubts, the agent may represent to him "that the engine would get better with wear and that if it was not right the company would make it right," and thereby get, as the agent in question herein, by such representations got, $600 in cash and promissory notes to the amount of $3,150, and take his

departure carrying with him also a certificate got by the same means.

The only thing then supposed to be left in the contract to which the purchaser can look is the following:—

Sixth.—It is mutually agreed that said engine, fixtures and equipment are purchased upon the following warranty only, viz.:

(a) Should any parts (except electrical parts) prove defective within one year from the date of purchase of said engine on account of inferior material or workmanship, and such parts be returned to the Big Four Tractor Works, Winnipeg, Manitoba, transportation prepaid thereon, and be found by the company to be defective on account of inferior material or workmanship, said company will furnish new parts in lieu of such defective parts on board cars at Big Four Tractor Works, Winnipeg, Manitoba.

(b) Should any of the hardened cut steel bevel gears on said engine break or wear out within five years from the date of the purchase of said engine, said company, after satisfactory proof upon demand therefor, will replace them by delivering such parts on board cars at Big Four Tractor Works, Winnipeg, Manitoba.

(c) Should the engine frame break or wear out within 5 years from the date of said purchase, said company will, after satisfactory proof, upon demand therefor, replace said engine frame by delivering the same on board cars at Big Four Tractor Works, Winnipeg, Manitoba.

It is to be observed that none of these provisions cover any possible defect, involving the discovery of any original defect after settlement procured by the blandishment of the agent bringing it about. In such event the respondent falls back upon the provisions of clause 8, which is as follows:—

It is further agreed that this order and agreement is given and accepted and the sale and purchase of said engine, fixtures and equipment are made upon the express condition that this order and agreement contains all the terms and conditions of the sale and purchase of said engine, fixtures and equipment and cannot, in any manner, be changed, altered or modified without the written consent of the officers of the said company, and that the sending of any person by the company to repair or operate said engine or the remaining of the person sent to start said engine, after the expiration of said three days' trial, shall in no manner waive, modify or annul any of the terms or conditions hereof. The company shall not be responsible for any delay in shipping said engine caused by accidents, strikes or other unavoidable circumstances, and that this order and agreement is not to be binding upon the company until approved by the said company by a duly authorized representative thereof signing the same.

And when, as will presently appear, some engine may have failed to fulfil the expectations of the respondent, and the acceptance thereof induced by the assurances of the demonstrating agent is relied upon in an action as herein occurred, the respondent by virtue of said clause whenever it suits its purpose repudiates all

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Idington, J.

liability and claims such agent had no authority to give such assurances.

It, therefore, becomes important in this case to know if such a claim of want of authority is in fact true.

We have the evidence of one Cole, examined under a commission on behalf of respondent, which seems entirely to destroy this pretension. He tells of nineteen years' experience and that he had been in the employment of respondent since 1912, which antedates the representation relied upon by appellant as given by Winterhalt, another agent engaged by respondent. He further speaks as follows:—

Q.—State, Mr. Cole, your connection with the defendant company and your duties as such. A.—I have to deliver new—I deliver new outfits, go out and deliver and demonstrate them and, well we are what are commonly called troubleshooters or experts. If a man has any trouble with his engine we are supposed to go and adjust it, repair them, etc.

Q. Your time, then, is largely taken up in first demonstrating new engines and then going around and clearing up troubles that inexperienced operators may have with the engines? A. Yes, sir.

Q. In doing so do you ever find that the trouble is caused from the engine itself, or is it always, in your opinion, with the inexperienced operators? A. It is not always with the inexperienced operators. You know, building the number of engines we do, one will occasionally get by the shop.

Q. And that is the reason why they hire somebody to repair such engines so they will operate? A. Yes, sir. But I should judge that three-quarters of the trouble is from inexperienced operators.

Q. Mr. Cole, you were asked the question if you didn't state to the plaintiff after you had finished your repairs on his engine that if he got into any more trouble the company would take care of him, I wish you would state what authority you had, and what authority you had at that time from the company, in the nature of your employment, to make representations to people as to what the company would do for them, if you had any authority? A. Well, it is customary when a man goes out, if the purchaser has had trouble, and he goes out and he is a little sore, to tell them that the company will take care of them, because they always do, as in this case they sent Hill back. I was working on another job and they sent Hill.

Q. I understand. If a man sends in a complaint, the company sends a man to take care of the trouble? A. Yes, sir.

Q. It is the custom of the company to keep all their engines in working order? A. Yes, sir.

Q. In fact, you have got no authority from the company to tell a man that they will take care of him? A. Yes, we have that authority, to assure a man that he will be taken care of.

Q. You know that that is the custom of the company to take care of them? A. Yes, sir.

Q. And you just assumed that they would do so in this instance? A. Yes, sir.

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Idington, J.

Q. And you were correct, so far as you know, in assuming that? A. Yes, sir.

The latter part of this examination was in re-examination and evidently intended to evoke a reply denying authority.

It requires considerable assurance to stoutly contend in face of this evidence that there was no authority from the respondent to Winterhalt, (who was engaged in exactly the same capacity as Cole had occupied for years,) when he gave the assurances which induced the acceptance of the engine in question after only a two days' instead of three days' trial, and the giving by appellant of the cash and notes in question herein. But there is further evidence in the case from which it would be the fair inference that such assurances were fully authorized notwithstanding the terms written in the contract for all the appellant had to do when the engine in question broke down a few days after the settlement with Winterhalt and he had gone was to notify the local selling agents of the fact, and as, of course, the head office at Winnipeg was informed and, without any demur on its part, sent this Mr. Cole to the appellant's place to see and remedy what was wrong, and he did so accordingly and sent a report to the head office of his having done so to appellant's satisfaction. And, again, something much more serious went wrong and the like course was pursued with the like results which cost hundreds of dollars. Yet there was not the slightest effort at repudiation or appearance of the respondent resting upon the contractual provisions now relied upon. Can there be a doubt that these ready responses were pursuant to the assurances given by Winterhalt, and later by Cole himself repeated, I think, and in part fulfilment thereof? What had to be rectified did not fall within the terms I have quoted above from the contract.

Or is the form of contract supposed to prohibit not only agents from making some unwarranted contract, but also preclude the possibility of any later contractual relations between the parties thereto, unless reduced to writing?

If the latter alternative is relied upon it fails, for the twofold reason that it is beyond the range of the meaning that ordinarily would be attached to the language used, and in the next place that the system adopted holds out to the public those experts as possessing the power of giving such assurances.

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Idington, J.

Another suggestion occurs to me, that it might be held fraudulent to devise such a trap for capturing the unwary.

As fraud has been rejected by the jury in the sense in which it was submitted I need not follow the suggestion. Its rejection, however, renders it all the more incumbent upon respondent to observe in an honourable manner the obligations resting upon one so holding out its agent to the public, and I do not think a contract made some months before does preclude respondent from later on adopting another system than that contemplated thereby, or the other party from reaping the benefit and relying upon it.

The respondent, after observing the assurances given by responding to the calls I have already referred to, on a third occasion refused to do so, when it became imperatively necessary to stand behind its written and verbal contracts, and its engine in question when that collapsed as it did a short time later.

The appellant, having failed to get any proper result, consulted solicitors who, as such, wrote respondent and pointed out to it the history of failures, and a second time, on June 10, 1913, pointing out that fact and the failure of the last attempt of respondent's experts to make the engine serviceable and that it had never given satisfaction and had proven so unsatisfactory that they must demand its replacement by an engine properly fitted for the purpose.

In this they intimated that, if not notified what was to be done, their client would draw the engine to Webb and leave it there.

Respondent replied from Winnipeg on June 24, asking them to furnish proof that they were the duly authorized attorneys to act for Mr. Schofield. Until then they would not go into the matter in detail.

Appellant wired confirmation of their authority and got in reply letter of June 30, written in an abusive and insolent tone, and threatening suit when his first note fell due. No answer was made to the suggestion of drawing the engine to Webb to leave it there as would be in accord with what the written agreement provided for.

The evidence of Harriston, an expert, who seems to have been well qualified for his task, and who is admitted on argument before us to have discovered what was wrong with the engine in the con-

dition in which Cole had left it, tells how he proceeded. It would seem, from Harriston's inspection, that he took the engine apart and found that a piston in use in one of the cylinders which Cole, on behalf of respondent, had substituted for the first one was far too tight to work at all usefully and that 25% of the supposed 30 horse-power was thereby to be deducted from what was intended.

Needless for me to go into further detail. It is only necessary to do so thus far to shew exactly the nature of the legal problems that have arisen as the result of the circuitous scheme of business which puts forward for use a rigorous form of contract designed on the one hand, if possible, on occasion to shelter the respondent from all risk of liability or responsibility for anything but the demonstration of the specified horse-power as above quoted, and, on the other hand, securing approbation by instructing its agents to give the assurances of its standing behind the engine and maintaining its efficiency to do the work expected of it, yet abandon customer, agent, and all else if too troublesome.

Can such a scheme become successful in law with such findings of fact as the answers of the jury to the questions submitted to them furnish? And specially when read in light of the evidence I have referred to and quoted in part? I cannot think so.

The questions submitted to the jury and their answers are as follows:—

Q. Did the defendant's agent, Luce, represent to the plaintiff (*a*) that this engine in question was a simple engine that any one could run after three days' experience? A. Yes. (*b*) That it would draw eight breaking ploughs on the plaintiff's land? A. Yes.

Q. If so, were either of these representations false, and if so, which? A. Yes (*a*).

Q. If false, did Luce know they were false? Or were they made recklessly, careless whether they were true or not? A. No.

Q. Was the plaintiff induced to enter into the contract by either of these representations? A. Yes.

Q. Did the plaintiff accept the machine? A. Yes.

Q. Was the engine capable of developing its rated horse-power? (*a*) As delivered? A. No. (*b*) After Cole repaired it. A. No.

Q. Did Winterhalt represent to the plaintiff that the engine would get better with wear and that if it was not right the company would make it right? A. Yes.

Q. If so, were said representations or either of them made fraudulently? A. No.

Q. Were the moneys paid and notes given as a result of these representations or were they given because the plaintiff was then satisfied with the engine with the exception that it did not pull as well on kerosene as gasoline? A. Because of representations made.

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Idington, J.

Q. Did the plaintiff make known to the defendants the particular purpose for which he required the engine so as to shew that he was relying on their skill and ability to furnish him with an engine suitable for his purpose? A. Yes.

Q. Was the engine reasonably fit for that purpose? (*a*) As delivered? A. No. (*b*) After being repaired by Cole? A. No.

Q. If not, wherein was it defective? A. Lack of horse-power.

Q. If the engine was not reasonably fit for the purposes for which it was purchased, what damage did the plaintiff suffer thereby? A. Recovery of notes as they stand.

Q. Was the engine retained by the plaintiff as the engine delivered under the contract? A. Yes, kept by reason of the representations made.

It seems to me that despite all the attempts by the written contract to deprive appellant of any remedy, that the assurances of the agent were duly authorized, and were so acted upon after getting the fruits thereof by the respondent, in its subsequent dealings with the appellant in relation thereto as to estop it from setting up the prior contract or anything restricting the appellant from asserting his right to rely upon said assurances.

It is not the mere collecting agent or expert demonstrator's authority which, doubtless, was what was had in view in making the provisions against agents' variations now relied upon, that has to be passed upon, but the power of the head office in Canada to contract save in writing that is in question.

I have no doubt as a result of a perusal of the evidence bearing thereon that it had ample power and was held out to the public as having ample power to do such acts as to rescind the written contract now relied upon, to accept at any time a return of the engine, the property in which had never passed out of respondent, and in short to do anything it pleased relative thereto without a single piece of writing being used.

Assuming that the head office in and for Canada had such power to deal with the matter, there can be no doubt of the result for it first directed its minor agents to give such assurances, acted upon them, led appellant to believe they were valid, and by virtue thereof presumed to make over, as it were, a good part of the engine which had been destroyed by the instructions of the respondent's agent having been followed.

In short the destruction of the machine resulted directly from the appellant's reliance upon the assurances given and his being induced thereby to trust respondent in its pretended and ineffective attempts at their fulfilment, without using adequate care and skill therein. Had he been bound and told to rely upon the letter

of the writing, that destruction probably would have been averted by his calling in an expert such as Mr. Harrison when he would in all probability have got a more thorough examination of it, discovered the difficulty and had it rectified instead of having the engine so destroyed, as the result of trusting to the good faith of respondent.

Corporations, as well as men, may so act that their conduct will contractually bind them in the ordinary course of business. The respondent's conduct has been such as to be a ratification of what it knew had been contracted for even if the agent had no prior authority.

In any event, the written contract has never been observed by it in demonstrating as its terms require the existence of 30 horse-power when that was to have been done. And that stands good yet unless displaced by a settlement improperly obtained if one can give heed to such contention as set up. And the more especially is that the case where respondent is estopped for the reasons I have set forth in trying to take advantage of part of its contract, excluding all else.

In either of these views I take it I need not dwell upon the questions which otherwise might arise under the Sale of Goods Act, or under the law apart therefrom, if different.

I see no difficulty such as the trial judge found in giving relief in way of rescission of the contract and directing the return of the notes and money if that a more appropriate remedy than what he applied.

The facts are stated, and the law that suits them will maintain the action and the alternative prayer for relief other than damages if found appropriate will be open to the court.

I would, therefore, allow the appeal with costs of the appellate court and here, and direct judgment accordingly in such form as desired.

Anglin, J.

ANGLIN, J.:—The plaintiff sues for the return of cash and notes given by him as the purchase price of a traction engine from the defendant company—necessarily, I take it, on the basis of rescission of the contract of sale—and, in the alternative, for damages for breach of warranty as to the capacity and fitness of the engine. The defendant counterclaims for judgment on the notes.

The trial judge held the plaintiff not entitled to rescission, but, while he gave the defendant judgment on its counterclaim,

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Anglin, J.

presumably on the footing that the plaintiff should be held to have accepted the engine and was not entitled to rescission, which, indeed, the learned judge says was not claimed, on the jury's findings he held the plaintiff entitled to damages in an amount equal to that represented by the notes and directed a set-off, presumably, though he does not so put it, as Newlands, J., says, "on the implied warranty of fitness."

On appeal, the judgment for damages was reversed by the Supreme Court *en banc*, which held, as I understand the opinions delivered by Elwood and Newlands, JJ., that, although the plaintiff's giving of the cash and notes, after what was held to have been accepted by him as the 3 days' demonstration trial provided for by the contract, did not amount to a binding acceptance of the engine because induced (as found by the jury upon sufficient evidence) by a misrepresentation and an unfulfilled assurance of the agent who obtained them, his acceptance of the engine and its fulfilment of the requirements of the contract as to capacity were established as against him by his failure to return it under a provision of the contract making his retention of it for more than 2 days after the completion of the demonstration test

proof conclusive that said engine and equipment fulfilled the *warranty* in every respect and shall constitute an acceptance and purchase, etc.

On the ground that the contract in express terms precluded any implied warranty of fitness under the Saskatchewan Sale of Goods Act (R.S.S. 1909, c. 147, s. 16), and contained no express collateral warranty thereof, the court further held that an action would not lie for breach of warranty.

Recovery on the ground of deceit, if otherwise open, was precluded by the jury's findings negativing fraud. Although this relief was not demanded in the statement of claim it would seem to have been treated as open to the plaintiff in the Appellate Division, had a case been made for it.

There is nothing to indicate anything in the nature of mistake or surprise on the part of the plaintiff in making the contract for the purchase of a "30 h.-p." tractor engine from the defendant, or fraud or over-reaching inducing his execution of it, it was, therefore, when executed, clearly binding upon him according to its terms.

The jury, having found upon more than a mere scintilla of evidence that the engine delivered by the defendants was not

capable of developing 30 h.-p., and the Appellate Court having accepted that finding, the case must be disposed of on the assumption that it is correct. I am, with respect, unable to assent to the view expressed by the judges of the Appellate Division that it was nevertheless the engine ordered. Not only was "30 h.-p." part of the description of the engine sold, but the contract expressly provided that the purchaser should not be bound to accept the engine unless after three days' trial in field work it should be demonstrated that it would develop 30 h.-p. at the draw-bar. Unless that condition of the sale was fulfilled the purchaser was entitled to reject the engine. Under such a contract I am unable to understand how it can be said that

the h.-p. the engine would develop was quite immaterial, so long as it was one of the defendants' "engines" known as "their big four 30 h.-p. gas tractor engines."

With respect, it seems to me that undue weight had been given to the word "your" and the vital words of the description, "30 h.-p.," emphasized by the express stipulation making it a condition of the sale that the engine should answer to them, have been denied the importance which the contracting parties so clearly attached to them. In my opinion, the engine delivered was not that contracted for, and on that ground alone the plaintiff would be entitled to succeed unless the peculiar provision of the contract, which made his retention of it for more than two days after the demonstration test "proof conclusive" that it answered the description and "an acceptance and purchase of it," or undue delay in repudiating after he became or should have been aware that it did not fulfil the condition of sale as to horse-power, and that the company could not, or would not, make it do so, had terminated his right of rejection.

When the defendants' agent, Winterhalt, concluded what appears to have been accepted as a 3 days' trial of the engine under the contract, according to the weight of the evidence the plaintiff was not satisfied with its performance. This is implied in the jury's answer to the 9th question. Winterhalt, however, represented that the engine would get better with wear, and assured the plaintiff that if it was not right the company would make it right. The jury has found that this representation and this assurance induced the plaintiff to settle for the purchase price, although not satisfied with the demonstration of the engine's

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Anglin, J.

capacity, by paying the $600 in cash and giving notes for the balance of $3,150. The jury did not explicitly find that the representation was untrue and that the assurance had not been fulfilled, but both these facts are implied in their answers and are proper conclusions from the evidence.

I agree with Elwood, J., that, although the jury negatived fraud on the part of Winterhalt, having regard to the relations between the plaintiff and the defendant company the latter cannot take advantage of a settlement so procured without implementing its agent's assurance. But I cannot understand why the plaintiff's retention of the engine, beyond the 2 days after the completion of the demonstration test, and until he finally rejected it, undoubtedly induced by the same representation and assurance, should bind him and constitute an acceptance of it if the giving of the $600 and the notes did not. In my opinion, both are on the same footing.

The defendants invoke a provision of the contract to negative Winterhalt's authority as an agent to make any representation or give any assurance which would involve a departure from its express terms. Apart from the statement of their own agent, Cole, that it was customary for the company's agents and that they were authorized to give assurances to purchasers that the company would look after the engine and make it run satisfactorily, we have the indisputable facts that, when notified by the plaintiff that the engine had broken down, the company, without any demur, protest or reservation of rights, sent its employees, Cole and Hill, on two distinct occasions, to make extensive repairs and replacements of parts. It acted as it might have been expected that it would act in recognition of the obligation which Winterhalt's assurance would entail, and the plaintiff may well have understood in attempted fulfilment of it, although it is, of course, quite possible that in doing so the company did not intend thereby to admit any liability to the plaintiff or to take a position in any wise inconsistent with its right to recover from him the purchase price of the engine. What occurred, however, prevents his retention and user of the engine being invoked as evidence of acceptance. On the whole I think it is the safer conclusion on this branch of the case that there never was a binding acceptance of the engine by the plaintiff, that he was entitled to reject it, and that he sufficiently manifested his election to do so.

Moreover, although the contract treats the development of 30 h.-p. as a condition of the sale it also speaks of this term as a warranty in clause 5, whereby retention of the engine for more than 2 days after the demonstration test is made "proof conclusive that said engine and equipment fulfilled the *warranty* in every respect." The only term of the contract which could be regarded as "the warranty" referred to is the stipulation

(a) That the engine will develop its rated horse-power at the draw-bar.

(b) That the engine, if rated at 30 or more horse-power will furnish ample and steady power to drive any 36-inch cylinder threshing machine, complete with self-feeder, weigher and blower.

The company, having in its own contract treated this term as a warranty as well as a condition, cannot complain if it be so dealt with now. As a warranty it was not fulfilled, and the plaintiff would be entitled to the full measure of damages which its breach entailed. The judgment of the trial judge might be supported on this ground also.

I find it unnecessary to consider a question much argued, viz., whether the terms of the contract exclude an implied warranty of fitness under the Sale of Goods Act arising from the fact found by the jury that the

plaintiff made known to the defendants the particular purpose for which he required the engine so as to shew that he was relying on their skill and ability to furnish him with an engine suitable for this purpose.

For these reasons, though not without some hesitation due to the acknowledgments of satisfaction signed by the plaintiff, and his stupid plasticity, I concur in the allowance of this appeal.

Brodeur, J.

BRODEUR, J.:—This is a case concerning the sale of a gasoline tractor engine for the sum of $3,750. The action was instituted by the purchaser for the reimbursement of the money which he had paid on account for the recovery and of some notes which he had given, claiming that the machinery in question was not suitable for the purpose for which it was purchased and had not the horse-power called for.

The order for the machinery was in writing and was addressed to the respondent company, asking for "one of your big four 30 h.-p. gas tractor engines." Much reliance is being put on the words "one of your big four engines" by the respondent company and by the judges of the Supreme Court *en banc*. They do not seem to attach much importance to the words "thirty horse-power."

It seems to me, however, with due deference, as if the horse-

CAN.

S. C.

SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

Brodeur, J.

power of the machine was of the greatest importance. This respondent company is manufacturing engines of different classes and different strength, and when they undertake to sell one of their engines which they call "thirty horse-power," they are bound, as a condition of their contract, to deliver an engine capable of developing that quantity of horse-power. The word "your" in the description of the machinery does not alter that condition.

The company has sent on several occasions their experts or agents to try the machine and to develop that quantity of horse-power. They have never been able to reach the strength they had contracted for. However, after the trial had been made by one of their experts, it was found that the machine was not absolutely suitable; but it was represented to the purchaser that by and by the situation would improve and the machinery would develop the necessary power.

The purchaser, then, on the strength of those representations, agreed to give his note and to pay a certain sum of money. And a few days after, during the same week, it was found that the machinery would not work.

New experts were sent by the company, but with no practical result. At last the respondent had to give up the use of the machine, and is now suing for the recovery of his notes and of the money which he had paid.

The findings of the jury were all in favour of the appellant, and, in fact, the only ground that is relied upon by the company is that by a provision of the contract the company was not responsible for any representation which could be made by their agents.

I fully realize that on some occasions those provisions may be essential in order to prevent fraud; but in this case no such suggestion appears from the evidence and from the action of the appellant. On the contrary, he seems to have taken almost in every instance the word of the company or its representative. He seems to have acted with the most honest intent, and it is a pity to see that the company is now trying to take advantage of a provision in its contract which should have been in only to meet some other cases or circumstances.

The company knew the purpose for which Schofield required the engine and he has certainly relied on their skill and ability to furnish him with an engine suitable for that purpose. The engine not

having developed the quantity of horse-power for which it was sold, the respondent company has certainly not fulfilled its contract.

It is true that there was a settlement made; but that settlement was obtained by continuous representations that the machine would develop the horse-power they contracted for. This engine, it was claimed, would get better with wear, etc. As a question of fact, the company sent after that settlement some experts to try and make it right. They have never succeeded, and it seems to me that the machine, having never been fit for the purpose for which it was purchased, and the settlement having been obtained under certain representations which proved absolutely incorrect, the respondent cannot avail itself of that settlement and the plaintiff should succeed.

The appeal should be allowed with costs of this court and of the court below. *Appeal allowed.*

FAIRWEATHER v. McCULLOUGH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. July 15, 1918.

CONTRACTS (§ I C—14)—CARRIED INTO EXECUTION—ILLEGAL CONSIDERATION—RECOVERY BACK OF PROPERTY.

Where the consideration upon which an agreement to give money or property or a security is illegal, *e.g.*, the stifling of a criminal prosecution, the money or property cannot be recovered back or the security set aside at the instance of the person who has agreed to give it, on the ground of the illegality of the transaction, if it is no longer executory but has been carried into execution.

[*Wood* v. *Adams* (1905), 10 O.L.R. 631; *Jones* v. *Merionethshire Permanent Building Society*, [1892] 1 Ch. 173, referred to.]

Statement.

APPEAL from the judgment of Masten, J., dismissing an action for a declaration that a chattel mortgage was invalid and for consequent relief. Affirmed.

The judgment appealed from was as follows:—

The plaintiff is the widow of Arthur W. Fairweather, who died in the city of Toronto on or about the 17th January, 1917. The defendants are hay-merchants, carrying on business in the city of Toronto.

Prior to the 9th October, 1916, Arthur W. Fairweather was employed by the defendants as a salesman of hay in the city of Toronto, and it further appears from the evidence that he also made collections from the customers of his employers. In August,

ONT.
S. C.
FAIR-WEATHER v. MC-CULLOUGH.

1916, difficulties appeared. On the one hand, the plaintiff alleges that at that date her late husband was liable to arrest on account of having received moneys, or, rather, of having stolen moneys, to express it in strict form. The defendants, on the other hand, allege that, at that date, while there was a shortage of $696 in connection with hay supplied to customers through the agency of Fairweather, and for which they were unable to obtain the price, yet in their view at the present time that deficit arose from carelessness, bad management, and lack of records kept by Fairweather in connection with his transaction of the business for them, and that it was in consequence of these things, and not of any criminal act on his part, that the resulting loss had arisen to them. They said that they did not then and do not now think Fairweather had been guilty of theft. I should note, however, at that point, that it does clearly appear that one customer had telephoned them that an account which Fairweather asserted was still outstanding had actually been paid. That was the telephone communication received by McCullough & Muir from their customer. Whether payment had or had not been made to Fairweather by this customer has not been established. Nor does it appear, if the amount of this account was received by Fairweather, whether the money so received was or was not handed over on some other account to the defendants. But there was at that time a considerable sum which the defendants ought to have received in connection with hay supplied by them to customers through the agency of Fairweather, regarding which he could give no satisfactory account, either as to what part had been received by him, or by whom the balance, if any, was owing. This being the situation in August, the matter was discussed between him and the defendant Muir, and Muir made his rounds with him when he was visiting his customers, and some small sums were obtained in this way. But, the matter being discussed between Muir and McCullough, McCullough gave directions that the employment of Fairweather should at once be stopped, that he should no longer have the privilege of selling hay for the firm, or of collecting any moneys, until the difficulties which I have already referred to had been adjusted. That, according to my recollection of the evidence, took place on the 9th August. The effect of the testimony, as I understand it, is this, that Fairweather said no-

thing to his wife on the 9th or up till the 11th; that circumstance is not stated in so many words by any witness, but the wife says the first she heard of the matter was on the 11th August, 1916. She was at that time living at Balmy Beach with her mother. The flat which she and her husband had occupied in Parkdale was locked up, and they were boarding with the wife's parents.

On that day, she says, her husband called her up about noon and asked her to come into town, saying that he would meet her at the corner of King and Yonge streets. She says he did meet her, and they went out to Parkdale, and in the course of conversation she learned the source of his difficulties and worries, and he told her: "I am in trouble with my account with McCullough & Muir; they are going to arrest me." She says this was dragged out of him, piece by piece. She says they went up as far as Sunnyside, and walked back to the apartment, and he asked her, as the result of their conversation, to put up her furniture as security, saying, "They are going to arrest me if I do not give security." Of course there were only the two of them together, the husband and the wife; and, the husband being dead, this statement made by him to her cannot, in the nature of things, be corroborated or contradicted by any one; it is obvious, therefore, that no contradiction could be expected, or any further light be thrown upon it than by her statement, but I have no reason to doubt that the statement was so made by Fairweather to his wife.

In the apartment they met, after considerable delay, Mr. Kirkpatrick, the solicitor, and the two defendants. I pause here to refer to the position of Mr. Kirkpatrick: he was the solicitor, the customary solicitor, for the defendants. The account given of the transaction in the evidence is that in this particular case Fairweather said to McCullough & Muir that he was desirous of giving security in order that he might have an opportunity of getting in this money and straightening up the difficulties. And, after the three of them had visited the apartment, during the morning of the 11th, Mr. Fairweather asked the two defendants, McCullough and Muir, for the name of a lawyer, and they, naturally enough, gave him the name of Mr. Kirkpatrick, who was their customary adviser. In that way Mr. Kirkpatrick came into the transaction, and drafted the mortgage for Fairweather. Fair-

ONT.
S. C.
FAIR-WEATHER v. MC-CULLOUGH.

weather had the mortgage with him, or Kirkpatrick brought it there, I am not sure which, and the particulars of the furniture which was to be covered by the chattel mortgage were filled in, and they were there for some time. There is no assumption in any way on the part of anybody that Kirkpatrick was acting for the plaintiff, Mrs. Fairweather. She made it perfectly plain that she was there without advice, and she suggested that perhaps she ought to have an opportunity of further consideration and advice. I take it that that was a matter of some importance. I refer to it at this juncture only for the purpose of making clear the position, that Kirkpatrick was not in any way assuming to act for Mrs. Fairweather, and did not assume to owe any duty or obligation to her; his only duty or obligation was, I take it, a joint duty and obligation. He himself assumed that he was acting for McCullough & Muir, at the expense of Fairweather, on Fairweather's instructions. That was his testimony, but he was in no sense acting for Mrs. Fairweather. Then, on Mrs. Fairweather's suggestion that she ought, perhaps, to have a lawyer, Mr. McCullough said that there had been too much time wasted, and no further time ought to be allowed.

It is perfectly plain to my mind, and I so find on the evidence, that Mrs. Fairweather did understand the transaction at the time she signed the mortgage. She knew perfectly well what a mortgage was; she knew her goods were being pledged to secure a debt which she did not owe, and in respect to which the obligation was wholly that of her husband. I think she was entirely competent to understand, and did understand fully, the nature of the transaction.

The document was then signed. I should record the fact that it appears that Mrs. Fairweather desired that her husband should be continued in his employment as a salesman for the defendants' firm. It will be borne in mind that he had been at that time deprived of his employment. The evidence further shews that he was specially experienced in this business of selling hay; no doubt he had a line of customers around the city whom he was able to visit, and the opportunities for employment as a salesman in that particular line of business are said to be not at all extensive. It was perfectly natural, therefore, that Mrs. Fairweather should desire that he be retained in his employment, and also it was

perfectly natural that the defendants should desire to retain him, because I have no doubt they were honest in their statement that they thought some part of this money was still owing to them from various people, and the only way in which they would follow up the business and succeed in making collections would be with the aid of Fairweather himself, and, consequently, it was to the mutual advantage of both that he should be continued in his employment. That was stipulated for by Mrs. Fairweather, and I find it as a fact; she was unable to say that it was not, and others say it was done. It is corroborated by the fact that subsequently a written document covering such appointment was signed.

Then, subsequently, and in October, Mrs. Fairweather paid the interest on the loan. My recollection of the testimony is that she got the money from her husband to do that, but she insisted on making the payment, in order to see that the interest ($7) was actually paid; and no complaint appears to have been made at that time in regard to the mortgage, or in regard to the fact that it was an unrighteous transaction, or one that ought to be set aside. Neither was any complaint made at any time afterwards until in or about the end of 1917, when the defendants proposed to realise upon their security; then, for the first time, this claim was made.

In the meantime, however, in October, 1916, and afterwards in May, 1917, Mrs. Walker (the plaintiff's mother) had communication with Mr. Muir. The substantial part of what she says is that she considered it to be a curious sort of justice "if a firm and their lawyer can take a little, inexperienced girl, and back her up against the wall, so to speak, and say, 'Your husband owes nearly $700, and unless you give us a mortgage on your wedding presents we are going to arrest him and put him in gaol.'" She says Mr. Muir said to her over the telephone: "Well, Mrs. Walker, it may look like that to you, but we certainly wish we had never taken the mortgage; we wish we had arrested him as we first intended to, and as Mr. McCullough would have done at the first if I had not asked for a little time." That testimony, being tendered, was objected to by Mr. Cameron; and, in my view, as tendered, and at that stage of the trial, was not admissible, because it was an attempt to give the view entertained

ONT.

S. C.

FAIRWEATHER v. McCULLOUGH.

at a later stage by Muir. The evidence was admitted, subject to objection, and I retain the view which I entertained at the time, that, at that point in the trial, it was not admissible evidence.

The evidence of the father, Mr. Walker, was to the effect that he had an interview with Mr. McCullough in May, 1917, in which he said that his daughter had no business to be dragged into the business at all, that she had nothing to do with it; that McCullough said, "Well, perhaps not," but he would see Muir about it, and afterwards he said, "If she had not come to his rescue we would have arrested him," referring to Fairweather. Now, had that evidence been tendered in reply to the statement made by McCullough and Muir that they never had any idea of arresting him, I think it would have been admissible in reply, strictly. The evidence is on the record now, and I think perhaps may be referred to, and I merely mention this fact parenthetically, because it may be of value in case of an appeal in this case.

Now, coming to the findings of fact respectively asked for by Mr. Grant and Mr. Cameron, some of them have already been covered by what I have said. It was sworn to by the plaintiff in her testimony that, in the course of the discussion at the flat, she said, "If I do not sign the document, what will happen?" Or, as I have noted it, "I don't know what to do, what if I don't?" And the answer was, "It all depends on how much you think of your husband." I do not know that that answer is entirely relevant, but I find that that conversation did take place. I find that the plaintiff did desire or suggest that she ought to have more time, or an opportunity of consulting counsel; I would not put it as strongly as that she actually asked for it, but she suggested that that should be done, and she was put off, and no opportunity was afforded her, and she was urged to sign at once. That is as far as I find definitely in respect to the findings asked for by Mr. Grant. I find that there was no discussion at the meeting in the apartment as to an actual prosecution, neither was there any agreement to stifle a prosecution at that time. The transaction was colourless as far as stifling a prosecution was concerned. The emphasis appears to have been laid entirely on other phases of the matter.

I have not dealt fully or specifically with the phase of the matter relating to duress, because I am going to reserve that point. I

shall deal with the other points in the case now, but I shall reserve that point. I have not sufficiently considered the cases cited to me, and I may possibly supplement what I have already said on the facts.

I can now state some of the findings with respect to the matter of the husband and wife, but I think I have already covered that. Perhaps I have already covered it fully; but, in case I have not done so, I add that the plaintiff was aware of the value, nature, and effect of the mortgage, and entirely comprehended what its meaning and effect was. I also find that she was not, from the standpoint of husband and wife, under her husband's influence; when I say that I mean that I think she was probably the stronger character of the two. I have never seen the husband: but I think, from the testimony as given, that she was the leading character in their married life, and that he did not exercise any special influence over her. That, however, I am saying without in any way interfering with the findings I may make with respect to the natural desire of a wife to save her husband from disgrace or arrest, or anything of that sort.

Then there are some of the points in the argument with which I can deal at the present time. I am clearly of the opinion, having regard to the decisions in *Macdonald* v. *Fox* (1917), 39 O.L.R. 261, 35 D.L.R. 198, and *Hutchinson* v. *Standard Bank of Canada* (1917), 36 D.L.R. 378, 39 O.L.R. 286, that, so far as the plaintiff's claim here is based on the presumption of invalidity in a transaction between husband and wife, the plaintiff cannot succeed. The cases cited by Mr. Grant in support of his application seem to have been very fully considered by the Court of Appeal in the case of *Howes* v. *Bishop*, [1909] 2 K.B. 390, and the rule seems to be clearly established by that case and by our own Appellate Division, following the Privy Council in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, that there is no presumption of invalidity in a transaction between husband and wife—that the wife is not in need of independent advice if she understands the transaction.

Doing away with or rejecting the contention of the plaintiff that this transaction was attackable on the ground of the relationship of husband and wife, does not at all interfere with what I take to have been the principal ground urged on the part of the plaintiff, namely, the doctrine put forward in *Williams* v. *Bayley*

ONT.

S. C.

FAIR-WEATHER v. MC-CULLOUGH.

(1866), L.R. 1 H.L. 200; and the plaintiff's claim in that regard is the point which I propose to reserve and consider further.

There is one other legal phase of the matter which I deal with at the present time, namely, that there was no agreement to stifle a prosecution. There was, in truth, no prosecution pending. It is very questionable, indeed, whether any prosecution could have succeeded, or whether any prosecution ought properly to have been brought. But, whether there was or not, I am perfectly clear, as to what took place at the Willard Apartments, where the mortgage was signed, and also earlier between the husband and the wife, that there was no agreement, expressed or implied, on the part of the defendants, to stifle a prosecution. They were at liberty, so far as I can see, notwithstanding anything that took place, to launch, if they chose, any proceedings they thought proper the day after this took place. And therefore that phase of the case is also dealt with and disposed of at the present time, reserving, however, as I say, for further consideration, the question of undue influence or pressure, or duress, as illustrated in the case of *Williams* v. *Bayley* and succeeding cases.

May 2. MASTEN, J.:—This action was tried before me at the Toronto non-jury sittings on the 24th April. On the morning of the 25th April, I reviewed the evidence and gave judgment against the several contentions of the defendants except on the issue as to whether the execution of the chattel mortgage complained of was the result of undue influence or pressure on the plaintiff.

The facts present difficulty, and I have given them careful consideration. I might have announced my conclusion in a few words by stating that I find that the plaintiff fully understood the meaning and effect of the security now attacked, that its execution and delivery were the acts of her own free will, and that she did nor entertain any idea of repudiating the mortgage for 8 months, nor until the defendants sought to enforce it after the death of her husband; but the nature of the action itself, and the thorough manner in which it was presented by counsel for the parties, merit, I think, a fuller statement of my views.

The plaintiff is a young woman, not long married, who was, at the time when these events happened, living with her husband at the house of her parents in the outskirts of the city. He

telephoned her on the morning of the 11th August, 1916, asking her to meet him in town. She met him; and, according to her evidence, which cannot be disproved, he then, for the first time, told her that he was in difficulties, that his accounts were short more than $690, that he was in danger of criminal prosecution, and that his employment by the defendants had been cancelled until the difficulties were adjusted. He requested her to aid him by giving the defendants security by way of a chattel mortgage on her furniture for the repayment to them of the deficiency. The chattel mortgage had already been drafted. They went to the apartments formerly occupied by them, where the furniture was. There they were joined, some time afterwards, by the defendants and by Mr. Kirkpatrick, a solicitor who acted for the husband and for the defendants, but who did not assume to act for the plaintiff. The plaintiff had no independent advice; and, on her suggesting that perhaps she ought to have independent advice and have time for consideration, one of the defendants said that "too much time had already been wasted." In the end, she signed the document, at about 4 o'clock in the afternoon.

On the other hand, I find that it is by no means established that the husband had been guilty of any criminal offence. He may have stolen the whole or some part of the $696 referred to in the evidence; but whether he did or not remains unproved. The utmost that is established is, that he himself made up a statement shewing the sum of $696 as the value of hay sold by him in regard to which he could give no satisfactory account, and that one of the customers of the defendants telephoned asserting that he had paid to the husband the account which he had turned in as an unpaid account.

The defendants stated in the witness-box that they did not then, and do not now, think that Fairweather was dishonest; and that they hoped, with his aid, to collect a considerable portion of the deficiency from their customers, believing that his accounts had merely became confused. In these circumstances, I think the defendants would have been ill-advised had they arrested him—and they positively deny any intention to prosecute him criminally.

Without making any express finding to that effect, I incline to the view that the defendants never formed any determination

ONT.
S. C.
FAIR-WEATHER v. MC-CULLOUGH.

to arrest the plaintiff's husband. I have no doubt that it was present to their minds that he was in great straits and that he might well be liable to a criminal prosecution. There is no evidence that the defendants ever made threats of prosecution to the husband—though the fact that he expressed to his wife, the plaintiff, the conviction that, unless he was able to give security, he would be arrested, might infer such a threat; but this may have been the result of his own fears, and not of any threat on the part of the defendants.

In making these findings, I have taken into consideration as though admissible in reply the evidence of Mr. and Mrs. Walker.

I find that, in applying to his wife to give the security in question, the husband was influenced by two motives: first, to avoid criminal prosecution, which he feared; and, second, to secure his retention by the defendants in his employment. I find that the wife, in giving the security, was influenced by the same motives.

I find that the husband, in applying to the wife to give this security and in stating to her the danger in which he stood, was acting in his own behalf and not as the agent of the defendants.

I find that the defendants did not, at the interview at the Willard Apartments, on the 11th August, 1916, when the chattel mortgage was signed, or at any other time, threaten the plaintiff with the arrest of her husband.

I find that the plaintiff, though young, is a highly intelligent person, of very considerable force of character. I find that she thoroughly understood both her own ownership of the chattels pledged by the chattel mortgage and the nature and effect of the security which she was giving. I find that she did not execute the mortgage as a result of undue influence or pressure.

At the close of the argument I was much impressed with the circumstance that the plaintiff was taken by surprise and had not the opportunity for obtaining independent advice or for deliberation; but the effect of this circumstance is substantially modified, in my view, by the fact that, so far as the evidence goes, no complaint was made by her in respect to the giving of this security until the present action was launched—some 8 months later—and until after the husband's death; also by the circumstance that, the chattel mortgage having been given in August and the first instalment of interest falling due in October, the plaintiff insisted

upon the prompt payment of the interest, and took control of the making of such payment. This happened after she had had full opportunity for deliberation and for obtaining advice. Even assuming that the husband exercised undue influence, which, I find, was not the case, the plaintiff could succeed only if the defendants were aware, at the time when this security was given, that such undue influence had been exercised: *Cobbett* v. *Brock* (1855), 20 Beav. 524, 52 E.R. 706; *Bunbury* v. *Hibernian Bank*, [1908] 1 I.R. 261. There is no evidence of such knowledge on their part.

In these circumstances, I think the case comes within the law as stated by the Court of Appeal in the case of *McClatchie* v. *Haslam* (1891), 65 L.T.R. 691. In that case case Lindley, L.J., says (p. 693) that the judgment below, which was in favour of the wife, arose from a misapprehension of the law laid down in *Williams* v. *Bayley*, L.R. 1 H.L. 200; and he adds:—

"It is not the law that, if a lady makes a sacrifice to get her husband out of a scrape, she can necessarily impeach the security which she gives, even although the result is to 'stifle a prosecution.'"

Bowen, L.J., says (p. 693):—

"Kekewich, J., has pointed out that the true nature of the transaction is one that cannot stand in equity, if a wife gives security to get her husband out of a difficulty when she knows the difficulty may result in the criminal prosecution of himself. In such a case that security never could be enforced against the wife. To my mind that is rather too strong a proposition to lay down as a rigid rule of law. I think that you must look at the pressure in each case, as a question of fact."

And Fry, L.J., says (p. 694), referring to the views of Kekewich, J.:—

"Now, I do not accept that as the law of England. I think it is quite possible that the directors may know that the man is liable to prosecution; the wife may know the same; and if she, of her own will, makes a sacrifice for the purpose of protecting her husband, that is not pressure and that is not a bargain."

The expression of the Court in the case of *Williams* v. *Bayley*, L.R. 1 H.L. 200, must be read in the light of the facts of that case and also of the views which I have just quoted.

ONT.

S. C.

FAIR-WEATHER v. MC-CULLOUGH.

It is laid down in the cases and in the text-books that there is in equity no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction, whether by way of agreement or by way of gift. The question to be decided in each case is, whether the party was a free and voluntary agent. In the absence of any special relation from which influence is presumed, the burden of proof is on the person impeaching the transaction, and he must shew affirmatively that pressure or undue influence was employed: Pollock on Contracts, 8th ed., p. 640 *et seq.*

There is no presumption in law against the validity of this security; and my conclusions of fact are, that the plaintiff was a free and voluntary agent, and that she has failed to shew affirmatively that the defendants procured her to execute the mortgage complained of through pressure or undue influence.

The plaintiff's action must, in my opinion, be dismissed. Costs will follow the result.

Gideon Grant and *L. C. Smith*, for appellant.

D. O. Cameron, for respondents.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of Masten, J., dated the 2nd May, 1918, pronounced after the trial of the action before him, sitting without a jury, at Toronto on the previous 24th April.

Contrary to my first impression, I have come to the conclusion that the appellant is not entitled to succeed.

She brings her action to set aside a chattel mortgage given by her to the respondents, and she bases her claim to that relief on the ground that she executed the mortgage "through the duress, undue influence, and misrepresentation of, not only the defendants, but also of her husband, and without independent and competent advice and without full knowledge of the facts and of the transaction into which she entered."

The ground mostly relied upon on the argument before us, viz., that the mortgage was given to stifle the prosecution of the husband for the theft of money of the respondents, who were his employers, is not clearly taken in the pleadings, though perhaps the allegations of the 4th paragraph of the statement of claim are sufficient to entitle the appellant to rely upon it.

It is settled law that where the consideration upon which an agreement to give money or property or a security is illegal, e.g., the stifling of a criminal prosecution, the money or property cannot be recovered back or the security be set aside at the instance of the person who has agreed to give it, on the ground of the illegality of the transaction, if it is no longer executory but has been carried into execution.

As the Chancellor points out in *Wood* v. *Adams* (1905), 10 O.L.R. 631, 637, 638, it was plainly laid down by Lindley, L.J., in *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, 182, that a plaintiff is "not entitled to relief in a court of equity on the ground of the illegality of his own conduct. In order to obtain relief in equity he must prove not only that the transaction is illegal, but something more: he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. If, on the other hand, he can go further and shew pressure or undue influence, so as to bring himself within the doctrine applicable to transactions of that kind, then he is entitled to relief in equity, although the transaction may be illegal upon the ground that it is meant to stifle a prosecution."

The appellant cannot, therefore, succeed, unless one or other of the other grounds upon which she bases her claim to relief is made out.

If she has established that in the giving of the mortgage she was not a free agent, but gave it because of threats by the respondents that they would prosecute her husband criminally if she did not give it, she is entitled to succeed. The learned Judge has found against her on this branch of the case, and the appellant failed to satisfy me that his conclusion is wrong. His view was that the appellant was a free agent in the transaction, and that there was no agreement, express or implied, that, in consideration of the giving of the mortgage, they would not prosecute her husband. The onus of proving duress was upon the appellant; and it is clear upon her own testimony that the suggestion that she should give the security came from her husband, and that she acquiesced in it without having ever met the respondents or heard anything from them in respect of it—that she fully appreciated what the giving of it meant is also, I think, clear.

ONT.

S. C.

FAIR-WEATHER v. MC-CULLOUGH.

Meredith, C.J.O.

The only suggestion of pressure or duress is referred to in the reasons for judgment delivered on the 25th April, *supra*. The learned Judge finds that, on the occasion when the mortgage was executed, the appellant said, "If I do not sign the document what will happen?" or, "I don't know what to do, what if I don't?" and that one of the respondents answered, "It all depends on how much you think of your husband;" and, on the appellant's suggestion that she ought, perhaps, to have a lawyer, the respondent McCullough having said that "there had been too much time wasted, and no further time ought to be allowed."

I agree with the learned trial Judge that what was said did not amount to a threat to prosecute if the mortgage was not signed, or warrant a finding in favour of the appellant on the issue as to pressure or duress.

Upon the whole, I am of opinion that, if the findings of fact stand—and I see no reason for disturbing them—the conclusion of the trial Judge that the appellant was "a free and voluntary agent" in the transaction, and that she failed to shew affirmatively that the respondents procured her to execute the mortgage through pressure or undue influence, was right, and it follows that his judgment must be affirmed and the appeal be dismissed with costs. *Appeal dismissed.*

B. C.

C. A.

Re DOMINION TRUST Co. and BOYCE and MACPHERSON.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips, and Eberts, JJ.A. November 5, 1918.

COMPANIES (§ V F—313)—SHAREHOLDER IN OLD COMPANY—SETTLED ON LIST OF CONTRIBUTORIES IN NEW COMPANY—AGREEMENT—SHARES NOT FULLY PAID UP—PETITION TO WIND-UP OLD COMPANY.

The petitioner was the holder of shares in the Dominion Trust Company Limited (the old company), and was entitled by agreement between the companies and the Act ratifying same (c. 89 of B.C. stats. 1913) to exchange them for shares in the Dominion Trust Company (the new company), a company incorporated by Act of the Dominion Parliament, created to take over the business and assets of the old company. The petitioner had not applied for and had not been allotted shares in the new company in exchange for his shares in the old company, but had been settled on the list of contributories of the new company on the assumption that he had exchanged his shares in the old for shares in the new company. The shares of the petitioner were not fully paid up. The court held that he had the right under the British Columbia Companies Act, the provisions of which applied to the old company, to petition for the winding-up of the said company on the ground that it was just and equitable to make such order.

[*Re Dominion Trusts Co. and Allen* (1917), 37 D.L.R. 251, referred to.]

B. C.

C. A.

RE DOMINION TRUST CO. AND BOYCE AND MACPHERSON.

Macdonald, C.J.A.

APPEAL by a shareholder from an order of Murphy, J., granting the petition of another shareholder that a company be wound up. Affirmed.

J. A. MacInnes, for appellant.

Charles Wilson, K.C., for respondent.

MACDONALD, C. J. A.:—The difficulties and complications which have already arisen, and which may hereafter arise, out of the agreement between the two companies and the Act ratifying same, being c. 89 of the Acts of the Legislature, 1913, make it desirable that I should confine the expression of my opinions to the narrowest limits consistent with the decision of this appeal.

The petitioner, the holder of shares in this company, was by such agreement entitled to exchange them for shares in the Dominion Trust Co., a company incorporated by Act of the Dominion Parliament created to take over the business and assets of this company. One of the principal questions involved in this appeal turns on whether or not the petitioner made such exchange, or, to be more precise, ceased to be a shareholder of this company. For convenience, I shall hereinafter refer to this company as the "old company," and to the Dominion Trust Co. as the "new company."

The appellant's counsel argued that because the petitioner had been settled on the list of contributories of the new company in liquidation, the proper inference to be drawn from that fact was that he had become by exchange of shares a shareholder of that company before the date of the order to wind it up, and, therefore before that date, he ceased to be a shareholder of the old company.

It is conceded that the shares upon which he was settled on the list in the new company are the shares upon which he assumes to qualify as a petitioner for the winding-up of the old company.

It would appear from the reasons for judgment that counsel on both sides substantially conceded in the court below that the petitioner had not applied for and had not been allotted shares in the new company in exchange for his shares in the old company, and was, therefore, in this respect in the same position as were the respondents in *Re Dominion Trusts Company* and *Allen* (1917), 37 D.L.R. 251, 24 B.C.R. 450, in which this court held that such respondents were not shareholders in the new company.

The petitioner may, by reason of estoppel of record, be liable

B. C.

C. A.

RE DOMINION TRUST CO. AND BOYCE AND MACPHERSON.

Macdonald, C.J.A.

to contribute to the assets of the new company for the payment of its liabilities, but that circumstance does not prove that he ceased to be a shareholder of the old company. There is no sufficient evidence that he did, in fact, cease to be such shareholder.

Now, while the agreement aforesaid divested the old company of the beneficial ownership in all its assets, and vested the same in the new company, there is a clause in the said agreement saving the rights of creditors of the old company. This fact is sufficient to meet the contention that a winding-up of the old company would be futile, and also is sufficient to meet the other contention of the appellants that because the new company was by said agreement and Act made liable for the debts and obligations of the old company, that that circumstance had some bearing on the petitioner's right to petition, or on the discretion of the court to make the winding-up order.

The petitioner's shares were not fully paid up. Therefore, he falls within the definition of contributory, and a contributory has the right under the B. C. Companies Act, the provisions of which apply to the old company, to petition for a winding-up order on several grounds, one being the ground upon which the order appealed from was made, namely, that it was "just and equitable" to make the order.

The petitioner is in a peculiar position. He is on the new company's list of contributories on the ill-founded assumption that he had exchanged his shares in the old for shares in the new company, and he has now the carriage of an order, one of the contemplated consequences of which will put him on the list of contributories in the winding-up of the old company in respect of the very same shares. But this circumstance cannot, in my opinion, curtail his right to petition for the winding-up of this company.

It was suggested by appellant's counsel that the petition herein was promoted by the liquidator of the new company. He appeared by counsel on this appeal in support of the order without objection from the appellant's counsel, and while he may have no *locus standi* as a party to these proceedings, this is now immaterial. The liquidator of the new company has the right to call upon the directors or liquidator of the old company, to exercise their or his powers under the Company's Act; on his behalf to get in the uncalled capital available to him: see dictum of Kekewich, J., in

Sadler v. *Worley*, [1894] 2 Ch. 170, at 175. My decision herein is, however, founded on the strength of the petitioner's status alone.

Then it is argued that because the agreement and Act aforesaid limit the rights of shareholders in the old company to the privilege of exchanging their shares for shares in the new company, the shareholders' right to petition is taken away. I do not think so. I agree with Murphy, J. Rights *qua* shareholders, only, are taken away. A contributory's liability is not affected, then why should his right to petition be?

Macdonald, C.J.A.

To sum up. The petitioner was, in my opinion, a contributory in relation to the Dominion Trust Co.—the old company. No proof of assets is necessary, but if it were, it appears that the company had in fact both assets and liabilities. The objects for which the company was incorporated have ceased to exist. In these circumstances, it is just and equitable that the company be wound up. As to how the words "just and equitable" have been applied in other cases I refer to those mentioned in Palmer's Company Law, 10th ed., p. 391. This company having outlived its objects, the petitioner is within his right in seeking to have it wound up.

I would therefore dismiss the appeal.

MARTIN, J. A. dismissed the appeal.

Martin, J.A.

GALLIHER, J. A.:—I would dismiss the appeal for the reasons given by the trial judge.

Galliher, J.A.

McPHILLIPS, J. A.:—In my opinion, Murphy, J., arrived at the right conclusion and the appeal should be dismissed. It is clear that the respondent, the petitioner, established his right to petition for the winding-up under s. 188 of the Companies Act. Whatever may have occurred in connection with proceedings taken to place him on the list of contributories of the new company, *i.e.*, on the list of contributories of the Dominion Trust Co. (c. 89 statutes of Canada, 1912) cannot be held to affect the right to a winding-up under the Companies Act (c. 39 R.S.B.C. 1911). The legislation, both federal and provincial, in its terms, in no way, by statute, operated to change the status of the shareholders of either company, insofar as winding-up proceedings are concerned. It became necessary for the shareholders of the Dominion Trust Co. to do some conscious act to transfer their shares into shares of the new company, the Dominion Trust Co; and even when that

McPhillips, J.A.

B. C.

C. A.

RE DOMINION TRUST CO. AND BOYCE AND MACPHERSON.

McPhillips, J.A.

was effectively done, the question as to what sum was due and payable upon shares would be determined by the state of accounts, *i.e.*, as to what sum had been paid up thereon. Possibly, where there was an effective transfer from the old company to the new, the sum remaining due thereon can be said to be the property of the new company subject, however, to winding-up proceedings of the old company if such should take place. The only way this could be obviated by the new company would be for it to pay all the liabilities of the old company—as provided in the agreement set forth in the schedule to the Dominion Trust Company Act, 1913—that not being done, it is only in the furtherance of natural justice to the creditors of the old company that any assets of the old company should be made available to pay the debts of the old company and it would be only the surplus (if any) of such assets or property that the new company would become eventually entitled to. The judgment of this court in *Re Dominion Trusts Co., and Allen*, 37 D.L.R. 251, 24 B.C.R. 450, passes upon this point—see in particular at pp. 265-6, when I had occasion to deal with this question. The debts of the old company not having been paid, and a sufficient case being made out for winding-up, it is right and proper that a winding-up be had. It is only necessary to read ss. 24 and 26 of the Dominion Trust Company Act, 1913, to see that all proper saving clauses were enacted to admit of saving the rights of creditors and admit of winding-up proceedings. In the winding-up proceedings primarily, any moneys due upon their shares by the shareholders of the old company may be made, and shall be made, where necessity requires it, available in the liquidation to discharge the debts of the old company. That any of the shareholders have effectively taken steps to become shareholders in the new company by reason of their holdings in the old company creates no hindrance to these winding-up proceedings. The whole scheme, as covered by the legislation, is capable of being worked out. In the agreement set forth in the schedule to the Dominion Trust Company Act, 1913 (p. 596, 3 Geo. V., B.C. statutes), we find this clause:—

The new company shall deliver to each shareholder of the old company, in exchange for and upon the delivery of a certificate with endorsed transfer thereof duly executed or share warrant for fully paid shares in the capital stock of the old company, a certificate representing an equivalent number of fully paid shares of the capital stock of the new company. No certificate for

B. C.

C. A.

RE DOMINION TRUST CO. AND BOYCE AND MACPHERSON.

McPhillips, J.A.

shares in the capital stock of the new company not fully paid or in respect of which there is any sum due for premium shall be issued until all sums due on said shares, whether for premium or otherwise, shall have been fully paid.

It will be seen that where shareholders of the old company do take steps to become members of the new company, they only become entitled to a certificate for the shares when fully paid, and they may become fully paid by reason of the winding-up proceedings of the old company. It is plain to me that all is workable under the existing legislation. It is idle contention, though, with deference to all contrary opinion, to now say that, because of steps being taken by members of the old company in pursuance of the legislation to become members of the new company, that, in such cases, no effective winding-up proceedings can be taken against those shareholders who were shareholders in the old company and who have become shareholders in the new company in respect of these shares, although not fully paid. For the purpose of winding-up proceedings they still are members of the old company, and whatever moneys they may pay in respect of the shares not fully paid, will constitute and must be treated as payment in respect of the shares. To illustrate matters, take the case of a member of the old company holding one share upon which 50% has been paid up, he wishing to become a member of the new company would execute a transfer of the share and be entitled to a share in the new company paid up to the same extent, not to be delivered out of course as we have seen until fully paid. That in the course of things a winding-up takes place of either the old or new company cannot change or alter this position, if the old company was without debts, nevertheless, there might be a winding-up, and no necessity would arise to call up moneys due in respect of the shares not fully paid, but with debts, the shareholder cannot escape being placed upon the list of contributories of the old company—that position was preserved by the legislation and all is workable. In the liquidation proceedings of the new company, the shareholder in the old company who has elected to become a member of the new company in respect of this share in the old company not fully paid, can only, in the final result, be called upon to pay to the liquidator of the new company such sum only (if any) that remains due and owing upon the shares not called up in the winding-up proceedings of the old company. It may

B. C.
C. A.
RE DOMINION TRUST CO. AND BOYCE AND MACPHERSON.

be that I have gone somewhat further afield than is requisite *to cast a horoscope*, that is what I have last said was the expression of "a legal proposition . . . . (not) a necessary step to the judgment": *Davidson* v. *McRobb*, [1918] A.C. 304, Lord Dunedin at p. 322. The "legal proposition" though in short compass in this appeal is—that the petitioner established the right to apply for the winding-up of the old company—The Dominion Trust Company, Limited—and winding-up proceedings were preserved by the legislation which has been referred to.

McPhillips, J.A.

I would, therefore, as before stated, dismiss the appeal.

Eberts, J.A.

EBERTS, J. A., dismissed the appeal. *Appeal dismissed.*

ONT.
S. C.

ORTH v. HAMILTON, GRIMSBY and BEAMSVILLE ELECTRIC R. CO.

Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., and Kelly, J. May 17, 1918.

NEGLIGENCE (§ II C—95)—RAILWAY ENGINE—CROSSING TRACK IN FRONT OF—REASONABLE CARE—CIRCUMSTANCES OF CASE—QUESTION FOR JURY.

A person about to cross a track in front of an engine or car running on rails must exercise reasonable care. What is reasonable care depends on the circumstances of each case and is a matter to be determined by the jury.

Statement.

APPEAL by the plaintiff from the judgment of Latchford, J., at the trial, upon the findings of a jury, dismissing the action with costs.

The action was brought to recover damages for personal injuries sustained by the plaintiff and injury to his automobile in a collision between his automobile and a car of the defendants at a crossing of the defendants' railway.

T. S. Elmore, for appellant.

S. F. Washington, K.C., and *A. H. Gibson*, for respondents.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—Collision between an electric car of the respondents and the appellant's motor-car, where a road crosses the respondents' right of way. The stone-road from which the cross-road leads is parallel to the right of way. The cross-road itself makes an acute angle with the stone-road, so that, in order to make the turn into it, if coming from the south, it is necessary to swerve towards the ditch on the east and make a wide circle, bringing the motor almost facing the direction whence it came.

The collision occurred on a dark night, and the questions and answers of the jury are as follows:—

"1. Was the accident to the plaintiff caused by the negligence of the defendants? A. Yes.

"2. If so, in what did such negligence consist? A. In our estimation according to the evidence that there was no light on the front of the car at the time of the accident.

"3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. We think he did not use enough care.

"4. If so, in what did such want of care consist? A. In not stopping dead at before a dangerous crossing.

"5. What damages did the plaintiff sustain by reason of the accident? A. $500."

It appears from the plan that there is practically nothing to obstruct the view either up or down the right of way of any one desirous of crossing. The appellant, however, did not see the car, and he and his motor were injured.

While the Courts have consistently refrained from tying themselves down to the formula of "stop, look, and listen," as expressing the whole duty of reasonable care, it is only because the extent of the care required depends entirely on the particular conditions of each case.

Lord Atkinson in *Grand Trunk R. Co.* v. *McAlpine*, [1913] A.C. 838, 13 D.L.R. 618 at 623, says: "Whether, in a case of this character" (a crossing case) "the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence, are questions of fact to be decided in each case on the facts proved in that case."

Lord Sumner in *Rex* v. *Broad*, [1915] A.C. 1110, gives an explanation of why this must be so. He speaks (p. 1114) of the position of the driver of a railway engine and a motor-cyclist at a crossing as that "of persons using a highway in common, who come swiftly and unexpectedly upon one another at a point where, in a greater or less degree, each may expect to meet other persons and must therefore use reasonable care to announce his approach, and to keep out of their way." "The fact" (he adds) "that one ran upon rails while the other used the ordinary road surface, and that one was only crossing the highway transversely instead of proceeding along it lengthwise, cannot make the position a different one in point of law."

ONT.

S. C.

ORTH v. HAMILTON, GRIMSBY AND BEAMSVILLE ELECTRIC R.W. CO.

Hodgins, J.A.

Without multiplying authorities I may also refer to *Grand Trunk R.W. Co.* v. *Hainer*, (1905) 36 Can. S.C.R. 180, and to the rule as stated by Mulock, C.J., speaking for the Appellate Division, in *Ramsay* v. *Toronto R. Co.*, (1913) 17 D.L.R. 220 at p. 234, 30 O.L.R. 127, 17 Can. Ry. Cas. 6: "The duty of a person about to cross a railway track is not to be guilty of negligence, which is another way of saying that he must exercise reasonable care. In each case what is reasonable care is a question to be decided by the jury, according to the facts of the case."

The facts of this case as presented to the jury were that the appellant said that, when driving along the stone-road, he did not see the car nor its lights, and that, when he turned, he did not hear the car nor see either the car or its head-light. The direction of his gaze is somewhat indicated by the position of the waiting shed, the outline of which he did see. That stands across the track, and is not at all in the direction from which the car would approach. Evidence was given that the appellant, while on the stone-road, passed the car and turned to cross ahead of it; that its inside lights were visible; and it was suggested that the noise of the motor drowned the sound of the approaching car. On the question of the head-light, 2 or 3 witnesses gave positive testimony as to its being bright; one Crain was in the car and saw the appellant on the stone-road by its light, and others who boarded the car a short time before noticed the light. The night was dark and the appellant muffled up.

Under these circumstances, the jury may well have thought that looking was not enough, and that, on a dark night, at a dangerous crossing, necessitating a wide curve to negotiate it, reasonable care demanded a stop, as listening might be useless if the motor was in motion.

The answers must be viewed in the light of the circumstances as presented to the jury. Their finding that the appellant did not use enough care and should have stopped dead at a dangerous crossing indicates that they fully appreciated the circumstances which apparently to their minds demanded something more than what was done.

This is sufficient to dispose of the case. Otherwise there would be great difficulty in upholding the answer of the jury that the respondents were guilty of negligence in that there was no

light in front of the car at the time of the accident. This, unless read as limited to the very time of collision, as it is literally expressed, would be a finding in the teeth of 3 witnesses at least, in addition to the motorman—all independent—one of whom saw the light and by it identified the appellant's car on the stone-road, and the other two who boarded the car about a mile away and saw the head-light then burning brightly. There is no positive evidence that it was not lit—nothing except by the appellant and others who did not see its light. If the light went out just before the collision, there is nothing to make that negligence on the part of the respondents.

I would dismiss the appeal. *Appeal dismissed.*

GEALL v. DOMINION CREOSOTING Co.
SALTER v. DOMINION CREOSOTING Co.

Supreme Court of Canada, Anglin, J., in Chambers. October 21, 1918.

COSTS (§ I—14)—BONDS TO SECURE—APPLICATION FOR SPECIAL LEAVE TO APPEAL—LEAVE REFUSED—ACTION ON BONDS—EXECUTION REMEDIES NOT EXHAUSTED.

As a term of obtaining a stay of proceedings under a judgment, to permit applications for special leave to appeal being made to the Judicial Committee, the respondents filed bonds securing payment of the debt and costs, the obligation being void if such special leave should not be granted and the respondents should pay such damages and costs as awarded.

The court held that it was not incumbent upon the applicants to shew that they had exhausted their remedies against the respondents by execution before taking any step towards recovery upon the bonds, the leave having been refused and the debt and costs being unpaid.

[See *Geall and Salter* v. *Dominion Creosoting Co.* (1917), 39 D.L.R. 242.]

Statement.

MOTION before a judge in chambers for delivery out of bonds, to put the same in suit, securing payment of the debt and costs as awarded by the judgments of the Supreme Court, these bonds having been filed as a term of obtaining a stay of proceedings to permit of a[illegible]lications for special leave to appeal being made to the Judicial Committee of the Privy Council.

Harold Fisher, for the motion; *Alex. Hill, contra.*

Anglin, J.

ANGLIN, J.:—As a term of obtaining a stay of proceedings under the judgments of this court in these cases to permit of applications for special leave to appeal being made to the Judicial Committee the defendants filed bonds securing payment of the debts and costs.

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Anglin, J.

The condition of each of the bonds so filed is that if special leave to appeal should not be granted and the defendants should pay such damages and costs as had been awarded the obligation should be void, otherwise it should remain in full force and effect.

The plaintiffs now apply on notice for delivery out of these bonds to put the same in suit. They allege and establish by affidavits that special leave to appeal to the Privy Council has been applied for and refused and that the debts and costs acknowledged by the bonds to have been awarded to the plaintiffs remain unpaid. In opposing the application counsel for the defendants contends that it is incumbent upon the applicants to shew that they have exhausted their remedies against the defendants by execution before taking any step towards recovery upon the bonds. With that contention I am unable to agree. The condition upon which the obligation under the bonds was to be avoided has not been fulfilled. The default necessary to establish the liability of the surety, according to its terms, has been proved, subject, of course, to any other defences that may be open. Daniell's Chan. Practice, 6th ed., p. 1931, 8th ed., p. 1624 and note (*t*). To require the judgment creditor to issue executions and obtain a return of *nulla bona* as a condition of permitting them to put the bonds in suit might involve the incurring of needless expense and entail prejudicial delay. Any possible interest of the surety can be fully protected by the exercise of the discretion of the court which may try any actions upon the bonds over the costs thereof. The motion should be granted and the costs of it, so far as I have power so to direct should be costs in the actions which it is proposed to bring.

Motion granted.

Re SOLVANG.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and Hyndman, JJ. December 8, 1918.

ALIENS (§ II—14)—STATUS OF PERSONS NATURALIZED UNDER R.S.C. 1906, c. 77, s. 24.

The Naturalization Act, R.S.C. 1906, c. 77, s. 24, bestows upon persons naturalized under it the status of British subjects, and not merely the rights incidental to British subjects.

This status continues to exist not only while such person is physically within Canada, but so long as he does not reside in his original country.

[See annotation 23 D.L.R. 375.]

Statement.

APPLICATION by way of *habeas corpus* to secure the release from military service of an alien who had been naturalized under the Naturalization Act, R.S.C. 1906; the application was referred to the Appellate Division. Refused.

J. E. Varley, for appellant; *James Muir*, for respondent.

The judgment of the court was delivered by

Stuart, J.

STUART, J.:—Owing to the end of the war this case is now probably only of academic interest, so far as the applicant is concerned. But, it has aspects which give it a wider interest, and which may reappear in other circumstances hereafter. It is, therefore, desirable that the point raised by the application should be decided.

Solvang was a Norwegian who was naturalized under the old Naturalization Act prior to January 1, 1918. Aside from the particular objection raised on his behalf, he came within the terms of the Military Service Act and was called up for service thereunder. He was granted leave of absence but through his solicitor made the present application to me by way of *habeas corpus* in order to secure his release. I referred the matter to the Appellate Division, where counsel appeared for the applicant and for the Department of Justice.

The contention advanced by the applicant was that, under the terms of the Naturalization Act, c. 77, R.S.C. 1906, he was a British subject, if at all, only "within Canada" and that inasmuch as from the preamble of the Military Service Act, it was obviously intended to send him overseas for military duty, he would not, after he arrived there, be a British subject at all and was, therefore, not subject to the Act and not liable to be called up for service. A second contention was also advanced viz., that the Naturalization Act, in any case, did not specifically declare that those naturalized

ALTA.

S. C.

RE SOLVANG.

Stuart, J.

under it thereby became British subjects, but merely bestowed upon them the rights of British subjects.

S. 2 of the Military Service Act, 1917, contains the words "every male British subject" in the enumeration of those to whom it was to apply. Unless, therefore, the applicant can properly be said to be a British subject the Act obviously would not apply to him.

The material section of the Naturalization Act, that is s. 24, reads as follows:—

An alien, to whom a certificate of naturalization is granted, shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural born British subject is entitled or subject within Canada, with this qualification that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty or convention to that effect.

In my opinion, the second contention, above referred to, that the applicant never really became a British subject, even within Canada, is not well founded. It seems to me to be logically impossible to make any other inference from the general wording of s. 24 and from the general terms of the whole Act than this that parliament intended to bestow and did in effect bestow upon the persons naturalized under it the status of British subjects, at least within Canada. For example, s. 25 reads thus:—

A special certificate of naturalization in form E may in manner aforesaid be granted to any person with respect to whose nationality, *as a British subject*, a doubt exists.

2. Such certificate may specify that the grant thereof is made for the purpose of quieting doubts as to the rights of such person *to be deemed a British subject*.

3. The grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted *was not previously a British subject*.

Then the regular certificate which is authorized to be used in the usual cases in form C. and which was issued no doubt to the applicant, certifies that the person named "has become naturalized as a British subject."

The special words of s. 24 which make a limitation with respect to any period of time during which the person may be physically within the limits of the foreign state of which he had previously been a subject also very clearly indicate that it is actual status which is being conferred and not merely the rights incident to the

status; because it says that during that period he shall *not be deemed to be a British subject* unless certain conditions exist. Surely the inevitable inference from this is that it was intended when he is elsewhere, and at least when within Canada, he *shall* be deemed to be a British subject.

Just at this point, it may be proper to observe that it was clearly not intended that the "deeming" or rather that the refraining to "deem" should be done by any other than judicial or administrative authorities who are bound by the statute, that is, by Canadian authorities. Parliament could not have intended to be declaring what external authorities in other countries should be bound to do or to refrain from doing.

The second contention is, therefore, in my opinion, untenable.

The main contention, however, still remains to be considered and it presents some interesting features, which have already been the subject of considerable discussion.

Upon the argument, it seems to have been assumed that the meaning of s. 24 above quoted, is that the naturalized person is to be considered a British subject only while he is physically "within Canada." It was also, I think, assumed that the Parliament of Canada in thus, supposedly, limiting the meaning of its own words, was acting with a consciousness of its own position as a subordinate legislature. But the first thing that comes to light when one proceeds to examine the matter with more care is that s. 24 is a reproduction, *ipsissimis verbis*, of the corresponding portion of s. 7 of the Naturalization Act, 1870, of the United Kingdom with the substitution, merely, of the word "Canada" for the words "United Kingdom." It is, therefore, obvious that if the proper interpretation of s. 24 is the narrow one above suggested, then a similarly narrow interpretation ought to be put upon s. 7 of the British Act of 1870. For, though one can easily discern the existence of a possibility that the Parliament of the United Kingdom might not feel so conscious of limitations upon its power as that of Canada, and while it, undoubtedly, is not legally subject to certain limitations by which the latter is confined, yet, in view of the peculiar phraseology adopted by the British Act, I can see no reason why this should make any difference in the interpretation which should be put upon it.

The very question which is raised in this case has, in fact, been

ALTA.
S. C.
RE SOLVANG.
Stuart, J.

much discussed with respect to the British Act itself. It has not, indeed, come up squarely for decision in any reported case so far as I can discover, but it has been the subject of much attention by writers of text books and in law journals and it has been incidentally referred to in some of the cases.

The crux of the matter seems to lie in the two views which seem to be possible with regard to the meaning to be given to the words "within Canada" or "within the United Kingdom." According to the narrower view, it was intended by the Acts to refer to the physical presence of the person in Canada or the United Kingdom. According to the broader view, what is meant is "by the courts and other authorities within Canada" or "The United Kingdom." Piggott in his work on "Nationality," part 1, c. VIII., discusses the matter at much length, but after pointing out the difficulties which he considers surround either view, he ventures upon no final opinion, although the impression left upon the reader's mind is, I think, that he rather favors the wider interpretation.

The matter is also discussed at length by a writer in Law Quarterly Review, vol. 30, p. 433, Mr. F. B. Edwards. This writer presents very strong arguments for the adoption of the wider interpretation. I think the arguments there presented are practically conclusive. It is not necessary to repeat them here in detail. Suffice it to say that the strongest argument seems to rest upon the words of the limitation contained in the two sections as follows:—

> With this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty or convention to that effect.

I quote and adopt as sound the words of the writer of the article referred to:—

> The immediate suggestion is that since the clause declares that a naturalized alien shall not, when within his former state in the circumstances described, be deemed to be a British subject, such person *when out of his former state*, or even when within it if it does not claim him as one of its nationals, must be regarded as a British subject.

It seems to me that this is the only logical inference which can be drawn from the words of the qualification or proviso. It has, otherwise, no sensible purpose or meaning. As the writer referred to points out, when the legislature desired to refer to the actual physical whereabouts of the person it readily found apt words to

express its meaning in the phrase "when within the limits of the foreign state."

It must be observed, however, that there may still be distinctions between the rights of natural born British subjects and naturalized British subjects as pointed out in the article referred to.

Re Bourgoise (1889), 41 Ch.D. 310, is perhaps the case which comes nearest to a definite expression of opinion on the subject so far as the British statute is concerned, although what was said on the exact point was perhaps only a dictum. There a Frenchman had been granted a certificate of naturalization, had married an English woman and had returned to France where two children were born. He had died and the French courts had appointed a guardian. Then application was made in the English courts to appoint another guardian. The question of the nationality of the children was involved and this depended or was supposed to depend to some extent upon the nationality of the father. Kay, J., refused to interfere with the French guardianship and gave as a reason that the father was not in France a British subject. Referring to the certificate of naturalization granted to the father he said (p. 317):—

> Therefore, it is not a certificate of naturalization absolutely to all intents and purposes, but, practically, it amounts to a certificate of naturalization, *so long and so long only as the subject of it does not reside in his original country, France,* unless by the law of France the certificate makes him cease to be a French subject to all intents and purposes.

The writer in the Law Quarterly Review even criticizes the length to which Kay, J., extended the meaning of the qualification, but with this we have no concern here.

The view adopted by the writer referred to and at least suggested by Kay, J., in respect of the British Act, is much strengthened with respect to the Canadian Act by a reference to s. 11, where the use of the phrase "within Canada" cannot possibly, owing to the matter which is being dealt with, be considered as referring to physical presence of the person within Canada. It is his physical absence from Canada that is being considered.

Even the Parliament of the United Kingdom could not enact laws which the authorities of foreign states would be bound to recognize. The Naturalization Act of 1870 was one which the judicial and executive authorities of the United Kingdom would, of course, be bound by. But whether it would be binding upon the courts of self-governing dominions might be questionable inas-

ALTA.
S. C.
RE SOLVANG.
Stuart, J.

much as it seems, by its very words, to be confined to the effect to be given, within the United Kingdom, to the certificate of naturalization issued under it. Similarly, it seems to me that all executive and judicial authorities in Canada are bound, when exercising their functions, which they can do only "within Canada," to give effect to the words of s. 24 of the Canadian Act in question. If the applicant here had been naturalized in the United Kingdom he could, as it seems to me, with as much reason, have raised precisely the same objection to being sent to France as he has raised here, because the Military Service Acts in Great Britain seem to be also limited in their terms to "British subjects." But I have no doubt that the objection would not there have been listened to for a moment. The courts there would have said, if the view I have adopted as to the meaning of s. 7 of the British Act is correct, as I think it is, "in these courts you are deemed to be subject to all the obligations of a British subject, whether you remain within the United Kingdom or are sent beyond its limits to France." So here, I think we are bound to look upon the applicant and to deal with him and his rights and obligations in the same way.

It is, of course, possible to argue that the British courts might properly give the wider interpretation, which I have adopted, to s. 7 of their Act, while we here, in Canada, ought to adopt the narrower one with respect to s. 24 of ours. But when the words of the two Acts are exactly the same, I see no reason, whatever, for adopting, for Canada, the narrower interpretation. It is a question of status. There is no question at all involved of enacting a law, which will have a binding effect upon anybody outside of Canada. As Piggott's Nationality says, part 1, p. 203:—

> The decree on the petition, whether it be of legitimacy or illegitimacy, of validity or invalidity of marriage, of the right or absence of right to be deemed a British subject is, from its nature, a judgment of status, and, as such, entitled to universal recognition.

He means, of course, that, according to international comity, judgments as to status rendered in the court of the domicile are accepted by all foreign courts. But this is only by comity, and there is no question at all of either the Act or the judgment under it having, in any other sense, the force of law in foreign countries, or of an attempt to pass legislation with an extra-territorial effect. Even if the applicant had gone to France, still, if his status came

up in a Canadian court as being involved in any litigation as to his rights or obligations, I think a Canadian court should assign to him the status of a British subject, simply because upon the proper interpretation of s. 24 we are directed to do so.

With respect to the case of *Rex* v. *Francis; Ex parte Markwald*, [1918] 1 K.B. 617, 620, to which we were referred by the applicant, there are one or two observations which ought to be made. In the first place, it is clearly distinguishable, because the statute of Australia under which Markwald had been naturalized did not contain the qualifying clause with respect to a return to the country of origin which has furnished the chief reason for giving the wider interpretation to the British and Canadian Acts. At least, it does not appear in the extract from the Act printed in the report, and though the complete Act is not available here, it seems to me certain that, if it had contained elsewhere any such qualification, it would have been referred to in the case. No such reference is made. Then, in the next place, it is quite conceivable that if the matter had come up for adjudication in Australia while Markwald was domiciled there, though temporarily absent in England, the courts of Australia would have adjudged that they were bound by the terms of the Act to assign to him the status of a British subject and yet, that the British courts, not having any such judgment of an Australian court before them and, therefore, not being bound by any reasons of comity and not being directly subject to the authority of the legislature of the Australian Commonwealth, should have felt themselves at liberty to say that, for their purposes and in the United Kingdom, they would not assign to him the status of a British subject. Moreover, I would venture with respect to suggest that, even as matters stood, the court took, perhaps, too narrow a view of the effect of the legislation there in question.

The case of *Ah Sheung* v. *Lindberg*, [1906] V.L.R. 323, brought up the present subject incidentally. A Chinaman had been naturalized under the laws of the State of Victoria. He had then left the colony and, on returning, was held up by an attempted application of the immigration laws. By writ of *habeas corpus* he was brought before the court. Many points, irrelevant here, came up. But the following passage from the judgment of Cussen, J., is interesting as shewing the views of him self and the authorities quoted by him upon the matter here involved:—

ALTA.

S. C.

RE SOLVANG.

Stuart, J.

Of course, the Victorian legislature can only make laws in and for Victoria, but it by no means follows that a status conferred by a Victorian law is to have no extra-territorial recognition. The Imperial Act, 10 & 11 Vict., c. 83, appears to recognize the power of the colonial legislature to grant naturalization only within the limits of the respective colonies. Accordingly, in 1863, a circular was issued from the Foreign Office by Lord John Russell, to the effect that the rights conferred by colonial naturalization must be taken to be limited to the precincts of the colony. It appears, however, that in 1863 the opinion of the law officers of the Crown was taken on this subject, and that, according to their view, a foreigner duly naturalized in a British colony is entitled, as a subject of the Queen in that colony, to the protection of the British government in every other State but that in which he was born, and to which he owes a natural allegiance: Cockburn on Nationality, pp. 37 and 38; and, adds Sir Alexander Cockburn:—"This would seem to be the sounder view. Had Don Pacifico been naturalized at Gibraltar, instead of having been born there, he would not have been the less entitled to British protection." See, also, the note to the Aliens Act, 1890. Subsequently s. 16 of the English Naturalization Act, 1870, provided that all laws, etc., which shall be duly made by the legislature of any British possession, "for imparting to any person the privileges or any of the privileges of naturalization to be enjoyed by such person within the limits of such possession shall within such limits have the force of law." Hall (Foreign Jurisdiction, pp. 28, 29), however, points out that the Naturalization Act does not appear to have been read in the sense that colonial naturalization is only operative within the colony, and that it has been the practice to issue passports to the holders of colonial certificates of naturalization, and to protect them in all foreign countries other than their country of origin.

The High Court of Australia in dealing with the case in appeal, 4 C.L.R. 951, did not find it necessary to discuss the subject.

I have made the quotation from the judgment of Cussen, J., in order to answer the objection that the applicant here might not, if sent abroad, be entitled to the diplomatic protection of the British government. That, in any case, is not a matter of law. But I entertain not the slightest doubt that, especially after this judgment as to his status by a Canadian court, and beyond all question even without it the British government would exercise to the full any influence it possessed to protect him as actively as it would in the case of a natural born British subject.

I think, therefore, the application should be dismissed but without costs. *Application dismissed.*

DOMINION PAPER BOX Co. v. CROWN TAILORING Co.

ONT.

S. C.

Ontario Supreme Court, Maclaren, J.A., Lennox, J., Ferguson, J.A. and Rose, J. March 1, 1918.

CONTRACTS (§ V C—402)—REPUDIATION—MISREPRESENTATION OF AGENT—IMPLIED CONDITION OF FITNESS—SEVERAL ARTICLES EACH ONE OF WHICH MUST BE OF CERTAIN QUALITY—RETAINING SOME AND REJECTING OTHERS.

The right to repudiate a contract for the purchase of goods on the ground of misrepresentation is a right to repudiate the contract as a whole. The purchaser cannot repudiate as to part and affirm as to part. But if through the agent of the manufacturer the purchaser makes known the purpose for which the goods are required, and if the purchaser relies on the skill of the manufacturer to furnish goods reasonably fit for that purpose, so that there is an implied condition that the goods shall be fit for the purpose, the purchaser is entitled to reject the goods if the condition is broken, and where the sale is of a number of articles each one of which must be of the kind and quality ordered, the purchaser may accept some and reject the others upon finding that they are not suitable for the purpose required.

The fact that there was a breach of the condition in respect of those rejected will not support a claim for general damages.

[*Molling* v. *Dean* (1901), 18 Times L.R. 217, followed; *Hopkins* v. *Jannison* (1914), 18 D.L.R. 88, 30 O.L.R. 305, referred to.]

Statement.

AN appeal by the plaintiffs and a cross-appeal by the defendants from the judgment of one of the Judges of the County Court of the County of York, who tried the action without a jury, and found in favour of the plaintiffs, but for the recovery of $105 only, and refused to award the defendants damages upon their counterclaim.

The following statement of the facts is taken from the judgment of ROSE, J.:—

The defendants, who are manufacturers of clothing which they ship by express to customers in various parts of Canada, ordered from the plaintiffs 19,000 paper boxes for use in their business. The plaintiffs made and delivered to the defendants 8,500 boxes. The defendants used some of these, and then, finding they were not strong enough for the purpose for which they had ordered them, returned to the plaintiffs what remained on hand, except so many as the defendants thought they would need pending the delivery to them of boxes of a somewhat different type which they had ordered from another manufacturer, at the same time sending to the plaintiffs a cheque for the price, as they computed it, of the boxes used or retained. The plaintiffs refused

ONT.

S. C.

DOMINION PAPER BOX CO. LIMITED v. CROWN TAILORING CO. LIMITED.

to accept the cheque or to acknowledge the defendants' right to reject the boxes, and sued in the County Court for the price of the boxes delivered and for damages for breach of contract. The defendants, besides denying that the boxes delivered were such as they were bound to accept, alleged that they had suffered loss by reason of the plaintiffs' breach of contract to deliver boxes fit for the purpose for which the boxes in question were intended; and, although they did not put upon the record a formal counterclaim for such damages, they gave evidence in support of their allegation, and, at the trial, asked leave to amend so as formally to present their counterclaim. The leave was not expressly granted or refused, and the motion was renewed before us.

The learned trial Judge gave judgment in favour of the plaintiffs for $105 and costs. The way in which this amount was arrived at does not appear; probably, the intention was to award the price of the boxes used or kept by the defendants, which, according to the plaintiffs' evidence, would be, at the contract rate, $99.87.

The plaintiffs appeal, claiming that they have established their right to payment for all the boxes delivered and to damages for the defendants' refusal to accept the whole number ordered; and the defendants cross-appeal against the judgment for $105, and against the refusal of the trial Judge to give them damages upon their counterclaim.

Before ordering the boxes from the plaintiffs, the defendants had been using boxes procured from another manufacturer. The price of these boxes was advanced, and the defendants asked the plaintiffs to quote prices for such boxes as they required. The plaintiffs sent a salesman, Skinner, to see the defendants. Skinner made more than one visit; the defendants told him that they required boxes of two sizes, the one to contain a suit of clothes and the other a pair of trousers, to be shipped by express to any part of Canada. Skinner left with the defendants specimens of the plaintiffs' boxes of the respective sizes, and assured them that these boxes were suitable for the purpose specified. He also told them that such boxes were being used for the same purpose by another clothier, whom he named, and who was known to the defendants to be carrying on a very large business of a character similar to their own. This last statement was not quite correct, in that the

other clothier mentioned, some considerable time previously, had ceased to use boxes for shipment to distant places, and recently had ceased even to use them for shipment within Ontario. He was still using them, but only for delivery in Toronto.

The defendants were, at first, skeptical about the strength of the boxes, but finally, as the trial Judge finds, and, as I think, correctly finds, upon the evidence, they accepted Skinner's assurance, and, relying upon his judgment, gave him the order.

As soon as the defendants began to use the boxes, it became apparent that they were not fit for use as containers for clothes sent by express to distant places; many of them were broken in transit, and in some instances the clothes were damaged. The defendants, therefore, as has been mentioned, returned most of those that they had on hand and announced that they would not accept any more of those that had been ordered. After some negotiations, to which it is unnecessary to refer, this action was brought.

M. H. Ludwig, K.C., for plaintiffs.

R. D. Moorhead, for defendants.

ROSE, J. (after setting out the facts as above):—Many points are made by the plaintiffs in their attack upon the judgment. First, it is said that the contract was in writing, and that parol evidence is inadmissible to add to that writing any term, such as a warranty or condition that the boxes would be fit for a particular purpose. This point, I think, need not be discussed; for, in my view, the contract is not in writing. What is pointed to as the contract is a memorandum made by Skinner and marked "O.K." and initialled by an officer of the defendants, shewing certain quantities, sizes, and prices of, and certain words to be printed upon, certain articles, not named in the memorandum, but which we know to be the boxes. There are also words indicating that the articles are to be taken within a certain time and are to be charged to the defendants. The memorandum is written upon the letter-paper of the defendants; the name of the plaintiffs does not appear. Looking at it, it is, to my mind, clear that it is merely a memorandum for the guidance of the manufacturer, and that it does not represent an attempt by the parties to put their agreement into writing.

Rose, J.

Secondly, it is said that the boxes would have been sufficient

ONT.

S. C.

DOMINION PAPER BOX CO. LIMITED v. CROWN TAILORING CO. LIMITED.

Rose, J.

for the purpose intended if the conditions of express traffic had remained as they were at the time the order was given; but that, owing to the congestion of railway business, much merchandise which was formerly shipped as freight is now shipped by express, with the result that the express cars are overcrowded and the packages are subjected to unusually hard treatment. The trial Judge thinks this *may* be true; but the evidence does not satisfy me that it *is* true; and I do not stop to consider what legal result would follow if the fact were established.

Thirdly, it is said that Skinner had no authority from the plaintiffs to make any representations or give any warranty; fourthly, that the sale was a sale by sample, and there is therefore no implied warranty or condition of fitness; and, finally, that, by electing to retain some of the boxes, after they had discovered the defect, the defendants lost any rights they might otherwise have had. These points will be considered together. Skinner's misrepresentation as to the use of the boxes by another dealer does not seem to have been fraudulent: it is not shewn that he knew that that other dealer, who was still buying the boxes, was using them only for local deliveries; but it was a material representation inducing the contract, and Skinner was the man put forward by the plaintiffs to negotiate the contract; so that the defendants were entitled to repudiate, upon learning the facts. They did set up the misrepresentation in their letter which accompanied the boxes returned to the plaintiffs. As at present advised, I think this right to repudiate because of the misrepresentation was a right to repudiate the contract as a whole; and that the defendants could not affirm as to part, as they did by retaining some of the goods, and repudiate as to the remainder. Therefore, I think they cannot rely upon the misrepresentation; and the inquiry seems to me to be narrowed down to a discussion of the effect of the breach of the alleged warranty or condition. Whether Skinner had or had not authority to warrant the boxes fit for the purpose intended seems to be immaterial. Through him the defendants made known to the manufacturer the purpose for which the boxes were to be used; and they relied upon the skill of the manufacturer to furnish boxes reasonably fit for that purpose; so that there was an implied condition that the goods should be fit for the purpose; and, that condition being broken, the defendants

had the right to reject the goods. This condition was implied because the case falls within the fourth rule in *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, rather than within the third rule: see *Ontario Sewer Pipe Co.* v. *Macdonald* (1910), 2 O.W.N. 483; *Hopkins* v. *Jannison* (1914), 30 O.L.R. 305, 18 D.L.R. 88.

The fact that a specimen box was exhibited does not seem to make any difference: the sale was not a "sale by sample" properly so called. The implied condition attaches even upon the sale of a specific article; and must equally attach upon the sale of an article like the one exhibited. So that, even if the boxes delivered were as good as the ones exhibited, which, upon the evidence, is doubtful, the defendants had the right to reject, and it does not seem that in the case of the sale of a number of articles, each one of which must be of the kind and quality ordered, the purchaser is bound to reject or retain all: see *Molling and Co.* v. *Dean and Son Limited* (1901), 18 Times L.R. 217. Therefore, I think the defendants were entitled to accept some, as they did, and to reject the others. The fact that there was a breach of the condition in respect of those rejected does not support the claim of general damages: such general damages are recoverable only where the property has passed: *Frye* v. *Milligan* (1885), 10 O.R. 509; and there is no evidence of special damage in respect of the boxes returned. It is unnecessary, therefore, to consider whether, if special damage were proved to have resulted from the breach of the implied condition, it would be recoverable notwithstanding the return of the goods: see *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44.

If I am correct in this, the only damages recoverable by the defendants are such damages as, treating the stipulation as to quality as a warranty, they can prove they have sustained by the breach of that stipulation in respect of the boxes used or retained; and I would allow them to amend their pleadings and would give them at their own risk a reference back to ascertain such damages and set them off against the plaintiffs' claim.

The judgment in favour of the plaintiffs ought to be reduced to $99.87, with costs in the County Court upon the appropriate scale; the plaintiffs' appeal, which is the main appeal, failing, the plaintiffs ought to pay the costs of it; there ought to be no costs specially taxed in respect of the cross-appeal, which did not materially add

ONT.

S. C.

DOMINION PAPER BOX CO. LIMITED v. CROWN TAILORING CO. LIMITED.

to the expense in this Court; and the costs of the reference back, if the defendants elect to take one, ought to be in the discretion of the County Court Judge.

MACLAREN and FERGUSON, JJ.A., agreed with ROSE, J.

LENNOX, J.:—I regret that I find myself unable to concur in the judgment of my learned brothers.

I am satisfied with the judgment of the learned Judge of the County Court, so far as it goes—if I varied it, it would be by allowing the plaintiffs' appeal.

LENNOX, J.

I have frequently had occasion, in connection with other cases, to consider *Molling and Co.* v. *Dean and Son Limited*, 18 Times L.R. 217; and, although I may be occasionally bound by it, I have not been able to discover satisfactory grounds in law on which to allow a litigant, after he is aware of all the facts, to adopt a contract in part and repudiate it in part. In any event, I am, with sincere respect, of opinion that it has no application in this case. As the judgment of my brothers is final in this case, no good purpose would be served by pointing out why I entertain a contrary view.

Judgment below varied as stated by ROSE, J.; LENNOX, J., *dissenting.*

MAN.

C. A.

FRASER v. CANADIAN NORTHERN R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. December 10, 1918.

RAILWAYS (§ II D—70)—INJURY TO ANIMALS AT LARGE—WILFUL ACT—NEGLIGENCE—MUNICIPAL BY-LAW.

Where the by-laws of a municipality permit the running at large of animals, it is neither negligence nor a wilful act or omission within the meaning of s. 294 (4) of the Railway Act for the owner to allow them to run at large, but if such animals are allowed to be at large within one-half mile of the intersection of the railway and a highway at rail level, the owner takes the risk of any damages that may be caused to them upon the intersection and if damage is caused to such animals, not upon the intersection, but upon the railway property beyond it, the railway company will be liable, unless it is established that the animals got at large through the negligence or wilful act or omission of the owner or his agent.

[*Anderson* v. *Canadian Northern R. Co.*, 35 D.L.R. 473, followed; see annotations 32 D.L.R. 397; 35 D.L.R. 481.]

APPEAL from the trial judgment in an action for damages for animals killed on a railway track. Reversed.

O. H. Clark, K.C., for appellant; *H. F. Maulson*, K. C., for respondent.

Perdue, C.J.M.

PERDUE, C.J.M. allowed the appeal.

Cameron, J.A.

CAMERON, J. A.;—In *Greenlaw* v. *Canadian Northern Ry. Co.* (1913), 12 D.L.R. 402, 23 Man. L.R. 410, it was held by this

court that where the by-laws of the municipality permit the running at large of animals, it is neither negligence nor a wilful act or omission within the meaning of s. 294 (4) of the Railway Act for him to allow them to run at large; and that where animals, being thus at large, get on the line of railway through a defective fence and are killed but not at an intersection the company is liable.

That decision was considered in *Koch* v. *G. T. P.* (1917), 32 D.L.R. 393, 21 Can Ry. Cas. 13, 10 S.L.R. 35, and apparently followed by the Supreme Court of Saskatchewan *in banc*, according to the report. (In that province there is a statute permitting the running at large of animals unless prohibited by the municipality.) But this was an error, as appears from the judgment of Newlands, J., in *Anderson* v. *C.N.R.* (1917), 35 D.L.R. 473, at 475, 10 S.L.R. 325. The case last named was tried before Elwood, J. who in his judgment, reported in 33 D.L.R. 418, says at p. 421:

> There is the express statutory enactment in s. 294 (1) of the Railway Act forbidding certain animals from being permitted to be at large upon the highway (which intersects a railway) within half-a-mile of such intersection. For ordinary purposes the animals have, except as mentioned in s. 4 (2) of c. 32 of 1915 (the Act of the province above referred to), the right to be on the highway, but, so far as the rights and liabilities under the Railway Act are concerned, they had no right to be there. I apprehend that no mere consent of the municipality or of the province could give them the right to be there as against the provisions of the Railway Act.

The judgment of Elwood, J., was affirmed by the full court in 1917, 35 D.L.R. 473, where it was held that it is not negligence to allow animals to run at large where a by-law or statute permits them to be at large, but animals when so allowed to run at large are at large by the wilful act of the owner. On appeal to the Supreme Court of Canada this view was upheld; see (1918), 43 D.L.R. 255. The present Chief Justice of that Court there held that the provincial legislation is not necessarily in conflict with the Railway Act, which simply means that if animals are allowed by their owner to be at large within one-half mile of the intersection, the owner takes the risk of any damage caused to them at the intersection, but if not upon the intersection but beyond it, then the company is liable, unless it shews that the animals "got at large through the negligence or wilful act or omission of the owner or his agent, etc." Idington, J., says: "I agree the legislation of the local legislature cannot invade the

MAN.

C. A.

FRASER v. CANADIAN NORTHERN R. CO.

Fullerton, J.A.

express declaration of parliament in a Railway Act such as that in question." On this question then it must be taken that the decision of this court in the *Greenlaw* case is no longer binding, and I agree with Fullerton, J. A., that it is impossible to distinguish this from the *Anderson* case.

FULLERTON, J. A.:—The action is brought to recover damages for injuries to a horse. The facts briefly are that the horse was let out of the stable on the plaintiff's premises into the yard. The gate was open and he went through it to the highway and along the highway to the railway crossing, where he got upon the property of the defendant and was injured. The distance from the gate to the crossing was between three-quarters and one mile. The evidence shews clearly that the horse got at large through the "wilful act" of the defendant within the meaning of s. 294 (4) of the Railway Act, R.S.C. 1906, c. 37.

The decision of the Supreme Court in *Anderson* v. *C.N.R.Co.*, 43 D.L.R. 255, is to my mind, conclusive of the present case. The important facts in the two cases are identical.

The Supreme Court there held that s. 294 of the Railway Act means that if animals are allowed by the owner to be at large within one-half a mile of the intersection of the railway and a highway at rail level, the owner takes the risk of any damages that may be caused to them upon the intersection, and if damage is caused to the animals, not upon the intersection, but upon the railway property beyond it, the railway company will be liable unless it be established that the animals "got at large through the negligence or wilful act or omission of the owner or his agent."

I would allow the appeal with costs, and dismiss the action with costs. *Appeal allowed.*

ONT.

S. C.

ROWAN v. TORONTO R. CO.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Kelly, JJ. May 30, 1918.

TRIAL (§ V A—272)—ONTARIO JUDICATURE ACT—JUDGE DIRECTING JURY TO ANSWER QUESTIONS—QUESTIONS SO ANSWERED NOT A VERDICT.

Under s. 61 of the Ontario Judicature Act, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him. The jury's answers to the questions so stated are not a verdict within the meaning of s. 35 (4) of the Act (R.S.O. 1914, c. 56).

ONT.

S. C.

ROWAN v. TORONTO R.W. CO.

APPEAL from the judgment of Middleton, J. Affirmed.

The judgment appealed from was as follows:—

This action was tried on the 3rd June, 1897, and at the trial, as fully set out in the Supreme Court reports, *Rowan* v. *Toronto R. Co.* (1899), 29 Can. S.C.R. 717, questions were submitted to the jury, and on the answers the trial Judge directed judgment to be entered for the defendants. This was affirmed upon appeal to the Court of Appeal; but in the Supreme Court of Canada that which had been regarded as a finding of contributory negligence in the Court below was not so treated; and, on the 3rd October, 1899, the appeal was allowed, and the judgments of the High Court and Court of Appeal were reversed, and it was directed "that judgment should be entered in favour of the appellant for $1,500."

The judgment clerk, having this judgment presented to him to carry into effect, settled a judgment, dated the 20th January, 1900, directing that the plaintiff recover $1,751.25.

This amount was arrived at by adding to the $1,500 interest from the date of the trial until the date of the judgment.

The defendants then moved to vary the minutes by reducing the amount to $1,500; this motion was heard by Sir William Meredith, then Chief Justice of the Common Pleas, in Chambers, on the 25th January, 1900, and his decision was reserved.

From what can be gathered from the papers and from his memory of what took place, I am satisfied that he thought the action of the judgment clerk was not warranted by the order of the Supreme Court of Canada, and he held his judgment in abeyance to allow an application to be made to the Supreme Court.

A motion was made to the Supreme Court for an order varying the judgment so as to make it direct payment of interest, or for an order declaring that the effect of the order as issued was to entitle the plaintiff to interest; but, on the 30th January, 1901, this motion was dismissed—the order reciting that the Supreme Court of Canada was *functus officio* and without jurisdiction.

Instead of the matter being again mentioned to the Chief Justice, it has remained in *statu quo* for more than 17 years, and is now renewed before me because the learned Chief Justice is now *functus officio*, not having delivered judgment within six weeks after his transfer to the Court of Appeal.

ONT.

S. C.

ROWAN v. TORONTO R.W. CO.

The delay for more than 17 years might well be treated as an abandonment of the claim.

But I entertain no doubt upon the question; and, in my view, the plaintiff has no right to the relief claimed.

The Supreme Court might well have so framed its order as to give interest from the date of the trial, for it had power to pronounce the judgment which in its view the trial Judge ought to have given, but it did not do so. The motion to vary the order asked variation upon the ground that the order did not give true expression to the real intention of the Court; and, as this was dismissed, it must be regarded as conclusively determined that the order as issued is what was meant.

The claim to interest is based upon certain clauses of the Judicature Act, which for convenience I refer to as they now stand, but which are in substance the same as the statute then in force.

Section 35 (4) of the Judicature Act (R.S.O. 1914, ch. 56) provides:—

"Unless otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceeding in the action including an appeal."

It is said there was a verdict in 1897, and the effect of this section is to make it carry interest.

There are three answers to this.

First, there was no verdict or judgment until the judgment of the Supreme Court. It is admitted that before this there was no judgment, but it is said that there was a verdict. Section 60 provides that a jury may give a general or a special verdict. Section 61 provides that "the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him; and the jury shall answer such questions, and shall not give any verdict." This makes it clear that under the statute the answers of the jury to questions of fact propounded by the Judge are not a verdict.

Secondly, the statutory provision gives interest only when the entry of judgment has been suspended by proceedings in the action in the nature of an appeal. There must have been an award in favour of the plaintiff, which has been kept in abeyance by some

appeal or similar application by the defendant. In such case the delay is not to prejudice the plaintiff, but here the plaintiff's first recovery was in the Supreme Court.

Thirdly, the statute applies only when the Court has made no order to the contrary. When the Supreme Court made an order, in 1900, that judgment be then entered to the effect that the plaintiff do then recover $1,500, it made an "order to the contrary."

The judgment clerk clearly added to the judgment of the Supreme Court the words "together with interest on the said sum from the date of the trial," and his action was, I think, contrary to the certificate of that Court.

Borthwick v. *Elderslie Steamship Co.*, [1905] 2 K.B. 516, is a decision to the same effect, but the statutory provisions upon which it is founded are not the same. Its importance here lies in the fact that when the action is dismissed in the first instance, but in appeal damages are given, it is for the appellate Court to give interest from the date of the trial, if in its opinion this should be done.

McLaren v. *Canada Central R. Co.* (1884), 10 P.R. (Ont.) 328, was a case in which there was a verdict, but the judgment was directed to be entered at a later date for the amount of the verdict. It was held that there was no right to interest between the verdict and judgment.

I should now direct that the minutes as settled be varied so as to reduce the recovery to $1,500 as of the date of the minutes.

To shew my appreciation of the diligence displayed in bringing this matter to a close, I give no costs.

Norman Sommerville and *V. H. Hattin*, for appellant.

Mulock, C.J.Ex.

MULOCK, C.J.Ex.:—Appeal from an order of Middleton, J. This was an action to recover damages for personal injuries, and was tried by a jury on the 3rd June, 1897. Questions were submitted to the jury and answers given, one of them fixing the damages at $1,500. The jury did not purport to render a verdict either general or special. The trial Judge directed judgment to be entered for the defendants, and the Court of Appeal affirmed the judgment, but the Supreme Court of Canada, by order dated the 3rd October, 1899, directed that the judgment of the trial Judge and of the Court of Appeal be reversed "and that judgment should be entered in favour of the appellant for $1,500." When the certificate of this order was presented to the judgment clerk of the High Court of Justice, on the 20th January, 1900, he

ONT.

S. C.

ROWAN v. TORONTO R.W. CO.

Mulock, C.J.Ex.

settled the order intended to give effect to the judgment of the Supreme Court by directing the defendants to pay to the plaintiff $1,751.25, the additional $251.25 being for interest on the $1,500 damages awarded by the jury, computed from the date of the trial. The defendants then moved before Sir William Meredith, then Chief Justice of the Common Pleas, to reduce the amount to $1,500, but he reserved judgment in order to enable the plaintiff to apply to the Supreme Court of Canada to amend its order by adding interest to the $1,500.

The Supreme Court, however, refused the application, on the ground that it was *functus officio*. Later, an application was made to Mr. Justice Middleton to vary the order of the judgment clerk by reducing the amount to $1,500, and this he ordered. The appeal is from such order.

I am of the opinion that the order of Mr. Justice Middleton was right. The Judicature Act, R.S.O. 1914, ch. 56, sec. 35, sub-sec. (4), declares that, "unless otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceeding in the action including an appeal." For a plaintiff to be entitled to recover interest after trial, under the provisions of this section, upon the damages awarded by the jury, it must appear either that a verdict has been rendered or judgment given in favour of the plaintiff. The plaintiff's counsel contended before us that the answers of the jury constituted a verdict. I am not able to accede to that view. Section 61 of the Judicature Act indicates that answers to questions and a verdict are not the same. That section reads as follows: "Upon a trial by jury, except in an action for libel, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him; and the jury shall answer such questions, and shall not give any verdict." Thus, where questions are submitted to the jury to be answered, there never can be a verdict. That having happened here, there was no verdict, nor was there any judgment in the plaintiff's favour until that of the Supreme Court, and the date of the order of the Supreme Court was the earliest moment from which the plaintiff was entitled to interest.

For this reason I think the appeal fails.

ONT.

S. C.

ROWAN v. TORONTO R.W. Co.

Mulock, C.J. Ex.

It was also argued before us that the order of the Supreme Court was the order which the trial Judge should have made on the 3rd June, 1897, and that therefore the plaintiff was entitled to amend the judgment entered below as of its date by directing payment to the plaintiff of the $1,500 mentioned in the order of the Supreme Court. This argument is based upon the theory that the order of an appellate Court is the order which the Court below must necessarily have made. Such is not, however, the law. The power of an appellate Court is not limited to correcting errors below. For example, where, pending an appeal, the law has been varied, the appellate Court may apply the new law, thus making an order which the Court below would not have been entitled to make: *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; *Borthwick* v. *Elderslie Steamship Co.*, [1905] 2 K.B. 516. It is the duty of the Court of Appeal to make such order, whether corrective or otherwise, as the case may require, and its order when made, unless otherwise provided, must be interpreted as determining the rights of the parties as of the date of the order. Here the Supreme Court, by its order of the 3rd October, 1899, determined that on that day, not on an earlier day, the plaintiff was entitled to judgment for $1,500.

The Supreme Court, if it had seen fit, might have awarded interest to the plaintiff. It did not do so; and the proper inference is, not that the Supreme Court omitted to make the order which the case called for, but that it did not consider the plaintiff under all the circumstances entitled to interest. Until the 3rd October, 1899, the plaintiff was not entitled to damages. On that day for the first time he became entitled to payment. The defendants' indebtedness to the plaintiff, as on that date and no other date, is *res judicata*, and it is not competent for the Court below to increase the amount found due to the plaintiff by the Supreme Court, by saying that the amount declared by the Supreme Court to be due on the 3rd October, 1899, became due on any earlier date.

For this reason also, the appeal fails, and should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—The facts of this case are fully and accurately set out in the reasons for judgment of Mr. Justice Middleton. The sole point for determination is, whether the jury's answers to

ONT.
S. C.
ROWAN
v.
TORONTO R.W. CO.
Riddell, J.

questions submitted to them by the trial Judge are "a verdict" rendered, within the meaning of sec. 35 (4) of the present Judicature Act.

We were much pressed by counsel on the effect of the history of the legislation on the subject of interest; but I am unable to derive much, if any, assistance from it.

The history of interest in the Courts in our Province may be considered as beginning with (1837) 7 Wm. IV. ch. 3.

Before going over the legislation, it may be well to examine the state of the existing law in respect to interest. There are two questions quite distinct from each other which were mixed together on the argument of this appeal, but which should be kept quite distinct: (1) the right of the jury to allow interest; and (2) the right to interest upon judgment.

The abhorrence of interest exhibited by the common law is well known. The Englishman whose customs became the common law had his full share of universal human nature which causes men to hate to pay more than they must. Of course Holy Writ was appealed to, and philosophy with its jargon of "barren metal," etc. Whatever the cause, there is an instinctive objection in the borrower to repay more than he borrowed. We have a long list of statutes concerning interest or usury, the object of which was the protection of the borrower, who was to be allowed to make all the money he could by the use of the loan, while the lender must be content with a certain fixed sum or none.

In theory a jury could and should allow interest where it was agreed to be paid if the contract were otherwise unexceptionable; but in no other case could interest be allowed. Such interest was part of the debt sued for; any interest allowed where not stipulated for must be in the nature of damages. Juries had been known, before being permitted to award interest in certain cases by legislation, to use substantial justice by increasing the damages; but that was what Blackstone calls "a kind of pious perjury," and was certainly against the law.

In England the statute of (1833) 3 & 4 Wm. IV. ch. 42, sec. 28 (Imp.), enacted that the jury might, "if they shall think fit," allow interest not exceeding the current rate upon "all debts or sums certain" from the time at which they were payable if payable by virtue of a written instrument at a certain time, or, if not,

from the time of demand in writing giving notice that interest would be claimed.

Section 29 allowed the jury to "give damages in the nature of interest, over and above the value of the goods," in cases of trover and trespass *de bonis asportatis*, and above the money recoverable on an assurance policy.

Our statute (1837) 7 Wm. IV. ch. 3 (U.C.) followed the English Act closely—sec. 20 corresponding to sec. 28 of the English Act and sec. 21 to sec. 29. It will be seen that, under this legislation, the jury, while they must give interest when it was lawfully stipulated for, were given a discretion to give "damages in the nature of interest" in certain cases of contract and a very few cases of tort: see *Morley* v. *Lake Shore and Michigan Southern R. Co.* (1892), 146 U.S. 162, at p. 168.

These provisions came forward in 1859 in the C.S.U.C. as ch. 43 (an Act respecting interest), and are found in the Common Law Procedure Act, R.S.O. 1877, ch. 50, as secs. 266, 267, 268—in the revision of 1887 in the Judicature Act, R.S.O. 1887, ch. 44, as secs. 85, 86, 87—and were all repealed by the Judicature Act, 1895, 58 Vict. ch. 12, sec. 192 (and schedule), but re-enacted as secs. 118, 119, 120 of that Act; then R.S.O. 1897, ch. 51, secs. 113, 114, 115; 3 & 4 Geo. V. ch. 19 and R.S.O. 1914, ch. 56, secs. 34, 35 (1), (2), (3)—and so we leave it.

This branch of the legislation has little to do with the present case, but the other branch is in a different position.

(2) At the common law, judgments did not bear interest at all, though sometimes by a side-wind the judgment creditor could be allowed interest on his judgment if the matter came into equity, e.g., *Godfrey* v. *Watson* (1747), 3 Atk. 517, 518, 26 E.R. 1098; *Lee* v. *Lingard* (1801), 1 East 401, 403, 102 E.R. 155; it was, however, admitted, even in equity, that the judgment was the *debitum recuperatum*, the stated damages between the parties.

But, comparatively early, there were statutory provisions to prevent injustice to the plaintiff from the defendant bringing a writ of error. The statutes 3 Hen. VII. ch. 10 and 19 Hen. VII. ch. 20 provided that on an unsuccessful proceeding in error to reverse a judgment for the plaintiff, the successful party should "recover his costs and damages, for his delay and wrongful vexation in the same, by discretion of the justice" (*sic*, but it should be "justices,"

ONT.

S. C.

ROWAN v. TORONTO R.W. CO.

Riddell, J.

as there was no Court of Error with only one judge) "before whom the writ of error is sued."

There was considerable fluctuation in opinion as to when such damages should be allowed, but it was at length settled that they would be allowed only when damages could be allowed in the action itself. The cases will be found in Tidd's Practice, 8th ed. vol. 2, pp. 1240 *sqq*. Never but once were such damages allowed in a case of tort: *Lonsdale* v. *Littledale* (1793), 2 H. Bl. 267, 126 E.R. 544; and that case was disapproved: *Becher* v. *Jones* (1810), 2 Camp. 428 (note), and cases cited 2 Tidd, p. 1241.

It was the practice to allow damages, where allowed at all, at the usual rate of interest, literally interest in the nature of damages.

The statute of (1837) 7 Wm. IV. ch. 3 (U.C.), by sec. 22, made a similar provision (the reason is quite explainable by the practice of "Appeal" and "Error," now of no importance and of none but antiquarian interest). Section 22 reads:—

"If any person shall sue out any Writ of Error or Appeal, upon any judgment whatsoever, given in any Court in any action personal, and the Court of Error or Appeal shall give judgment for the defendant in error, then interest shall be allowed by the Court of Error or Appeal, for such time as execution has been delayed by such Writ of Error or Appeal, for the delaying thereof."

This was carried into the (1859) C.S.U.C. as ch. 13, sec. 50:—

"When on an appeal against a Judgment in any action personal, the Court of Error and Appeal gives Judgment for the Defendant in error, interest shall be allowed by the Court for such time as execution has been delayed by the appeal."

Repealed by (1877) 40 Vict. ch. 7, sched. B., it reappears in substance as sec. 43 of the Court of Appeal Act, R.S.O. 1877, ch. 38: "When, on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal."

Before the next revision, that of 1887, important legislation had been passed, which it was thought could be moulded to cover the case, and the former language was no longer used: R.S.O. 1887, ch. 44, sec. 88, being quite different.

The old rule that judgments should not bear interest was

changed in England by 1 & 2 Vict. ch. 110, sec. 17, which enacted that every judgment debt should carry interest at the rate of 4 per cent. "from the time of entering up the judgment." Our legislation goes back to the Common Law Procedure Amendment Act of 1866, 29 & 30 Vict. ch. 42 (Can.), which, by sec. 2, for the first time mentions the "verdict:" "2. In any suit or action in which any verdict is rendered for any debt or sum certain, on any account, debt, or promises, such verdict shall bear interest at the rate of 6 per cent. per annum from the time of the rendering of such verdict, if judgment is afterwards entered in favour of the party or person who obtained such verdict, notwithstanding the entry of judgment upon such verdict has been suspended by the operation of any rule or order of Court which may be made in such suit or action, and in all cases damages shall be assessed only up to the day of the verdict."

Thoroughly to understand this, the state of the practice before the Judicature Act must be borne in mind. The pleadings being completed in a common law Court, a record was made up and taken to an entirely different Court, the Court of the Commissioners of Assize and Nisi Prius (at this time really of Nisi Prius), the "Assize Court." In that Court the case was tried, and the jury gave a "verdict." He for whom the verdict was given had the "postea;" he brought the record to the office of the common law Court in which the proceedings were, and there the officer of that Court entered up judgment (without an order of the trial Judge or of any one else) unless the entry of the judgment was stayed by rule or order. The object then of this section was two-fold: (1) to give interest on the amount of the verdict in certain personal actions in contract (not by any means in all such actions, as the plaintiff found to his sorrow in *Woodruff* v. *Canada Guarantee Co.* (1881), 8 P.R. (Ont.) 532); and (2) to provide that such interest should be payable from the "time of the rendering of such verdict," not from the time of the entering of judgment thereon.

This came forward unchanged as R.S.O. 1877, ch. 50, sec. 269, when the Common Law Procedure Act became R.S.O. 1877, ch. 50. Then came the Judicature Act of 1881, which abolished the Courts of Nisi Prius etc. Commissions of Assize and Nisi Prius had ceased to be issued in fact by the provisions of the statute (1855) 18 Vict. ch. 92, sec. 43 (Can.), but the Judges of Assize had the

ONT.

S. C.

ROWAN v. TORONTO R.W. CO.

Riddell, J.

same powers and functions as though the Commissions had actually issued to them. (See an article, "New Trial in Present Practice," 27 Yale Law Journal 353, at p. 357, January, 1918.) The Judicature Act, 1881, provided, by Rules 273, 274, 275, for a new method of entering judgment, viz., by direction of the trial Judge. From this time on, no judgment could be entered on a verdict; the registrar etc. must follow the directions of the Judge.

The next statute is the Administration of Justice Act, 1884, 47 Vict. ch. 10, which, by sec. 4, allowed interest on a verdict or judgment in an action for tort in cases in which the jury were permitted by secs. 266, 267, and 268 of the Common Law Procedure Act to allow interest up to the rendering of the verdict. This is the first provision for the allowance of interest on a verdict or judgment in cases of tort. The provision is that "the verdict or judgment, as the case may be, shall bear interest from the time of the rendering of the verdict, or of giving the judgment, notwithstanding that the entry of judgment upon the verdict, or upon the giving of the judgment, shall have been suspended by the operation of any rule or order of Court made or of proceedings had in any such suit or action, whether in the Court in which the action is pending or in appeal." It cannot be said that the language of this section is happily chosen, but the meaning is clear enough: (1) Interest is now to be allowed upon verdicts in certain cases of torts, whereas formerly it could be allowed only in cases of contract; (2) and the interest is not to be prevented from running from the date of verdict by reason of adverse delay in entering judgment. It would seem that "judgment" is used in two senses in this section. It is recognised that a case may be tried by a jury or by a Judge; if by the former the decision is a "verdict" rendered, if by the latter the decision is a "judgment" given—in either case there is to be a "judgment entered," in the former case "upon the verdict," in the latter "upon the giving of the judgment." Rule 351 of the original Judicature Act thus became widened in its application. In the revision in 1887, the two provisions for interest after trial were consolidated and extended in R.S.O. 1887, ch. 44, sec. 88: "Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict, or upon the giving of the

judgment, shall have been suspended by any proceedings in the action, whether in the Court in which the action is pending or in appeal"—which is the present R.S.O. 1914, ch. 56, sec. 35 (4), with trifling verbal differences. It will be observed that we still have the word "judgment" used in two senses. No legislation previous to the revision of 1887 can assist the plaintiff here. His action is for trespass to the person, a tort not covered by the Act of 1884.

But of course we may examine the meaning of the word in the original legislation by which interest might be allowed on a "verdict:" (1866) 29 & 30 Vict. ch. 42, sec. 2. There were then two kinds of verdict, the general and the special verdict. In the general verdict the jury found for one party or the other and if for the plaintiff (in personal actions) the amount of damages; in the special verdict the jury found the facts and left the further determination to the Court. In either case if and when the plaintiff entered up his judgment he had interest from the day of the rendering of the verdict—this interest being a creature of the statute: *Sproule* v. *Wilson* (1893), 15 P.R. (Ont.) 349; and compare *Malcolm* v. *Leys* (1892), *ib.* 75.

The power of the jury to give a general verdict was modified in 1873 by the Act 36 Vict. ch. 8, sec. 20 (O.), which enacted that "where the Court or a presiding Judge shall otherwise direct, it shall not be lawful for such jury to give a general verdict, and it shall be the duty of such jury to give a special verdict if the Court or presiding Judge shall so direct." The following year, 1874, the right of the jury to give a verdict at all was taken away in certain cases: the trial Judge, "instead of directing the jury to give either a general or a special verdict may direct the jury to answer any questions of fact . . .; and in such case the jury shall answer such questions, and shall not give any verdict; and on the finding of the jury upon the questions which they answer, the Judge shall enter the verdict; and the verdict so entered, unless moved, against, shall stand and be effectual as if the same has been the verdict of the jury:" 37 Vict. ch. 7, sec. 32.

The power of giving any verdict might thus be taken away from the jury: *Furlong* v. *Carroll* (1882), 7 A.R. 145; and, when this was done, the verdict was the work of the Judge. I cannot understand how the Legislature could have indicated more clearly

ONT.
S. C.
ROWAN v. TORONTO R.W. CO.
Riddell, J.

(except by the very words) that the answering by a jury of questions was not a verdict.

The subsequent legislation does not assist the plaintiff. The first revision, R.S.O. 1877, ch. 50, sec. 264, is *totidem verbis*, and the second, R.S.O. 1887, ch. 44, sec. 84, provides that on the answers "the Judge shall direct judgment to be entered"—apparently recognising that where all a jury does is to answer questions there is, properly speaking, no verdict at all. The Act of 1895, 58 Vict. ch. 12, sec. 117, and R.S.O. 1897, ch. 51, sec. 112 (in addition to purely verbal changes), makes a change in the provision that "the Judge shall direct judgment to be entered," and provides, "on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered." This Act was in force when this action was tried (June, 1897); our present Act is no more favourable to the plaintiff: R.S.O. 1914, ch. 56, sec. 61.

I can find nothing in the statutes or cases entitling us to call that a verdict which the jury lawfully did in pursuance of a statute which says they are not to give a verdict, and upon which there is not a verdict to be entered or given or rendered, but a direction to enter a judgment.

We are pressed with the judgment of the Supreme Court of British Columbia in *Gordon* v. *City of Victoria* (1900), 7 B.C.R. 339 (see *S.C.* (1897), 5 B.C.R. 553), in which they apparently decided that answers to questions by a jury, which were ultimately held to entitle the plaintiff to a judgment, constitute a "verdict" upon which interest is to be allowed under the Dominion Interest Act, now R.S.C. 1906, ch. 120, sec. 14. (See 57 & 58 Vict. ch. 22, sec. 3 (D.)) I do not presume to criticise this judgment—I have enough trouble to keep track of the practice of this Province—but I would say that the decision that certain words in a Dominion statute mean a certain something when applied to British Columbia practice does not help much toward the determination that the same words mean the same thing in an Ontario statute applied to Ontario practice. It is possible the difference between the British Columbia case and this will be found to depend upon the prohibition of the jury giving any verdict at all in our practice, but I do not pursue the inquiry.

I have read all the cases cited and others, but I can find none of much assistance. *Hope* v. *Beatty* (1876), 7 P.R. (Ont.) 39, *Woodruff*

v. *Canada Guarantee Co.*, 8 P.R. 532 (Ont.), and *McLaren* v. *Canada Central R. Co.*, 10 P.R. (Ont.) 328, are on cognate points, but not applicable.

Then it was argued that to withhold the name "verdict" from such answers would be to emasculate the section, now sec. 35 (4). But that is not the case. At present the Judge may, in such an action as this, (1) try the case himself; he "gives the judgment," and there is an "entry of judgment," and interest on "the judgment" is allowed; (2) allow the jury to "give a general verdict" (sec. 60 (1)); they render the verdict, and interest is allowed on the amount of "the verdict;" (3) direct the jury to "give a special verdict" (sec. 60 (1)); they render such a verdict, including of course the sum to which the party is entitled, and interest is allowed on the amount so found; or (4) refuse to allow them to give a verdict at all. It is only in the last case that sec. 35 (4) does not apply. Nor does Rule 264* make any difficulty. Every day at the Assizes we enter on the record the verdict of a jury with (generally) a direction to enter up judgment. Where there is no jury, we generally direct judgment to be entered. The Rule does not mean that in every case there must be a verdict and a judgment. In most cases there is no verdict, but the verdict is entered if there is one.

This appeal was argued at such length and with such earnestness that I have thought it well to examine the statutes at length, historically and otherwise; and I can see no reason for allowing the appeal.

If the matter were in our discretion (as I think it is not), I should not allow the interest after this long delay: *Redfield* v. *Ystalyfera Iron Co.* (1884), 110 U.S. 174; *United States* v. *Sanborn* (1890), 135 U.S. 271.

The appeal should be dismissed with costs.

Sutherland, J.

SUTHERLAND, J.:—In the judgment appealed from, Middleton, J., has fully dealt with the questions raised on this appeal. I agree with his disposition thereof, and can add nothing useful to what he has said. I would dismiss the appeal with costs.

Kelly, J.

KELLY, J., concurred.

*264. The verdict and judgment shall be endorsed on the record, and shall also be recorded by the Registrar or officer acting as clerk at the sittings in a book to be kept for recording the proceedings thereat.

ONT.
S. C.
ROWAN v. TORONTO R.W. CO.
Clute, J.

CLUTE, J.:—(dissenting). The Supreme Court of Canada, on October 3, 1899, reversed the judgment of the Court of Appeal and directed that the said appeal should be and the same was allowed, and that the said judgments of the Court of Appeal and of the Hon. Mr. Justice MacMahon should be and the same were reversed and set aside, and that judgment should be entered in favour of the appellant for the sum of $1,500.

The effect and meaning of this judgment obviously is that the judgment of the trial Judge was wrong and should have been entered for $1,500. The statute then operating, that amount should, in my opinion, bear interest from the date the trial Judge directed judgment, the 3rd June, 1897. Form 160, then in force, directs that the date of the judgment shall be "the date of pronouncing judgment." The statute refers to the verdict or judgment given at the trial, and not to intermediate proceedings or judgments in appeal by which the wrong entry of the trial judgment may be corrected. It was the duty, therefore, of the judgment clerk, upon the receipt by him of the judgment of the Supreme Court of Canada, to give effect to the reversal of the judgment wrongly entered at the trial; and this is what he did, and settled the judgment, dated the 20th January, 1900, for $1,751.25, thus allowing interest on $1,500 from the 3rd June, 1897 the date of trial, to judgment.

The Supreme Court of Canada refused the motion to vary this judgment so as to allow interest, on the ground of want of jurisdiction.

The delay in the final disposition of the motion is not raised as an objection, owing to the responsibility of counsel therefor by mutual indulgence, as it was said.

Section 112 of the Judicature Act, R.S.O. 1897, ch. 51, now sec. 61 of R.S.O. 1914, ch. 56, provides that upon a trial by jury (except in certain cases) "the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict; and, on the finding of the jury upon the questions which they answer, the Judge may direct judgment to be entered." That is what occurred in this case. The trial Judge and the Court of Appeal considered that the

answer to one question amounted to a finding of contributory negligence. The Supreme Court of Canada in effect found that it meant that there was no contributory negligence. The result was that the judgment which the trial Judge on the 3rd June, 1897, directed to be entered for the defendants, should have been entered for the plaintiff, in which case the plaintiff would have been entitled to interest from that date.

Section 116 of the Judicature Act, R.S.O. 1897, ch. 51, now sec. 35 (4) of R.S.O. 1914, ch. 56, is as follows: "Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceedings in the action, whether in the Court in which the action is pending or in appeal."

It was urged upon the argument, for the plaintiff, that the finding of the jury was in effect a verdict, and for the defendants, that the jury by express enactment answered questions and did not and could not give any verdict under the wording of sec. 112. I think it wholly immaterial whether the findings of the jury may be said to amount to a verdict or not. The statute provides that interest is to run unless otherwise ordered by the Court from the time of the rendering of the verdict or of the giving of the judgment. In this case, the judgment was given on the 3rd June, 1897, but by error it was directed to be entered in favour of the defendants instead of the plaintiff.

The Court in such case will consider that as done which ought to have been done; and, when the Supreme Court of Canada reversed the judgment for the defendants and directed judgment in favour of the plaintiff, it had relation back to the date of the findings of the jury and the judgment directed by the trial Judge, for it was upon the findings of the jury that the judgment was entered.

There was no appeal in respect of interest. The appeal was in respect of the right of the plaintiff to have judgment entered for him upon the findings of the jury at the trial. The statute expressly directs interest from the time of the giving of the judgment. The right to interest is by virtue of the statute, and not by virtue of any decision of the Supreme Court in respect to interest. The

ONT.

S. C.

ROWAN v. TORONTO R.W. CO.

Clute, J.

error having been cured, the statute refers to the judgment that should have been entered for the plaintiff on the 3rd June, 1897. It is significant, as I am informed by the judgment clerk, that this has been the universal practice heretofore.

In *Gordon* v. *City of Victoria*, 7 B.C.R. 339, the plaintiff obtained a verdict at the trial, but the trial Judge dismissed the action. The Full Court allowed the plaintiff's appeal and ordered that judgment be entered in the plaintiff's favour for the amount of the verdict. Held, that the plaintiff was entitled to interest from the date of the verdict. In giving judgment McColl, C.J., said: "The Full Court could only properly have ordered judgment to be entered upon the verdict of the jury if of opinion that the plaintiff was entitled to judgment upon the findings of the jury and the facts not in dispute. That being so, the learned trial Judge ought to have given effect to the verdict at once instead of leaving the parties to move for judgment, and giving it for the defendants."

In that case, as in this, the Judge was in error in entering judgment for the defendants. It was by virtue of the decision of the full Court that judgment was finally directed, and the Court held that the plaintiff was entitled to interest.

I am unable to agree with my brother Middleton that in this case "it is otherwise ordered by the Court." I do not think that the Supreme Court of Canada gave any judgment on the question of interest. In effect the judgment for the defendants was reversed, and judgment directed to be entered for the plaintiff for $1,500. This is the amount assessed by the jury, and should bear interest from the time when judgment for that amount ought to have been entered.

The English cases of *Borthwick* v. *Elderslie Steamship Co.*, [1905] 2 K.B. 516, and *Ashover Fluor Spar Mines Limited* v. *Jackson*, [1911] 2 Ch. 355, do not assist very much in a decision of this case. They are decided under a different statute, and different rules.

In the *Borthwick* case, at the trial of the action, judgment was entered for the defendants. An appeal was allowed, and the judgment of the trial Judge set aside, and judgment directed to be entered for the plaintiff "for such sum as might be assessed by a referee to be agreed upon by the parties. . . . Liberty to apply."

ONT.

S. C.

ROWAN v. TORONTO R.W. Co.

Clute, J.

Upon a further appeal to the House of Lords, the judgment of the Court of Appeal was affirmed. The assessment of damages stood over by consent pending the appeal to the House of Lords, but subsequently the amount for which the judgment should be entered for the plaintiff was agreed between the parties, and it was further ordered that interest should be paid, but no time was specified with regard to this matter. The agreed amount of damages was paid to the plaintiff, but a dispute arose as to the date from which interest ought to run, the defendants being willing to pay interest from the time when the amount of damages was determined until payment thereof, and the plaintiff claiming interest from the date of the judgment given by the learned Judge at the trial. The application was made in pursuance of the liberty to apply. The result of the application was, that judgment should be entered for the agreed damages with interest upon the amount from the date of the judgment of the appellate Court. It will be observed that, at the date of the judgment, the amount had not been ascertained. The Court declared that it was not desirable to say what the result of the application would have been, had the amount claimed at the trial been a fixed sum, and had the only question for decision been whether it was due or not. In other words, the Court refrained from pronouncing an opinion upon the exact point involved in this case.

Collins, M.R., refers to Order XLI., r. 3, which directs that, where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or Judge shall otherwise order, and the judgment shall take effect from that date: provided that by special leave of the Court or a Judge a judgment may be antedated or postdated. See also Order LVIII., r. 1.

Collins, M.R., after reference to a certain railway case, says: "The principle to be gathered from the decision is that till the sum was ascertained there was no exigency on the railway company to pay anything, and consequently no sum on which they could be called on to pay interest." In the present case the sum was ascertained at the trial.

Romer, L.J., said that, when the plaintiff has failed in the Court below so that his action has been dismissed, if he succeeds

ONT.

S. C.

ROWAN v. TORONTO R.W. CO.

Clute, J.

on appeal it cannot be properly said that the judgment of the Court of Appeal must be regarded for all purposes as if it had been the judgment given by the Judge in the Court below. The judgment in favour of the plaintiff must be treated as of the date on which it was given in the Court of Appeal, subject to the right of that Court to antedate its judgment.

In the *Ashover* case, Eve, J., in referring to the *Borthwick* case, pointed out (p. 359) that it was conceded by counsel on behalf of the defendants and affirmed in terms by Romer, L.J., that the amount ultimately ascertained was to be treated as if it had been mentioned in the order, with the result that interest thereon ran from the date of the judgment. The order was in fact a judgment for the sum subsequently ascertained, and on the sum being ascertained and a note of the amount being endorsed upon the judgment, execution would issue.

The Act under which interest was allowed in the *Borthwick* case is the Judgments Act (1838), 1 & 2 Vict. ch. 110, sec. 17, which provides that every judgment debt shall carry interest at the rate of 4 per centum per annum from the time of entering up the judgment, and such interest may be levied under writ of execution on such judgment. This is quite different from our Judicature Act, R.S.O. 1897, ch. 51, sec. 116, which clearly has reference to the trial, and provides that a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment.

The difference in the wording of the English and Ontario Acts, and the fact that the Court in the *Borthwick* case was careful to avoid stating what would have been the result of the application had the amount claimed at the trial been a fixed sum, confirms me in the view that in the present case interest should be allowed from the date when judgment should have been entered for the plaintiff.

In my opinion, with deference, the order of Mr. Justice Middleton should be set aside, and the minutes as settled by the judgment clerk confirmed, with the costs of this motion here and below.

Appeal dismissed; CLUTE, J., *dissenting*

CANADA FOUNDRY Co. v. EDMONTON PORTLAND CEMENT Co.

IMP. P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Lord Buckmaster and Lord Atkinson. October 16, 1918.

DAMAGES (§ III P 2—340)—BUILDING CONTRACT—DELAY—LOSS OF PROFITS—CONCLUSIVENESS OF AWARD.

For delay in completion of a contract for the construction of a building plant, beyond what would be considered a reasonable time for performance (no time of completion being stipulated clearly in the contract) the owners of the building are entitled to claim from the contractors damages for the delay resulting in loss of profits, it being established that it was clearly within the contemplation of both parties that loss of profits would result from such delay.

[*Hadley* v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, applied.]

Statement.

APPEAL from 32 D.L.R. 114. Affirmed.

The judgment of the court was delivered by

Lord Atkinson.

LORD ATKINSON:—This is an appeal from the judgment of the Supreme Court of Alberta, Appellate Division (Hyndman, J., dissenting as to the amount and principle of allowance of damages), dismissing an appeal taken by the appellants from the judgment of the trial judge, Walsh, J., given on the 4th November, 1915, who awarded to the respondent the sum of $10,000 damages for breach of contract by the appellants.

The appellants are a limited company duly incorporated, having their head office and works in the City of Toronto, in the Province of Ontario, where they carry on the business of founders and manufacturers of steel-work for buildings. The respondents are also a limited company duly incorporated, having their head office in the City of Edmonton, in the Province of Alberta. They are engaged on the manufacture of Portland cement on certain lands of which they are the proprietors, situate at Marlborough, about 50 miles distance from the City of Edmonton.

The action out of which the appeal arises, styled a mechanics' lien action, was brought to recover a sum of $13,196.52, the unpaid balance of a sum of $40,585.05 alleged to be due by the respondents to the appellants for materials consisting of steel-work for buildings and machinery supplied to them at Marlborough, and for work done in erecting the same under a certain agreement in writing dated December 27, 1911, and the document incorporated therewith. In respect of this claim, the appellants recovered judgment against the respondents for the sum of $12,740 with interest at 5% till paid. No controversy now arises in reference to this claim.

IMP.

P. C.

CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Lord Atkinson.

The real matter in controversy is the relief which the respondents, by their counterclaim pray for, namely, to recover damages, amounting to the sum of $79,201.26, in respect of the failure of the appellants to supply the aforesaid materials and to erect the same on the respondents' said lands within the time expressly or impliedly provided therefor by this agreement of December 27, 1911. The undisputed facts are that the first transmission, or shipment as it is styled, of the steel contracted for was made on July 18, 1912. The last carload of which was received at the respondents' lands on November 12, 1912 (some single lots being received afterwards), and the work of erection not completed till March 18, 1913.

In one of the documents incorporated into, and thus forming part of, the agreement of December 27, 1911, is to be found the clause following:—

We (*i.e.*, the appellants) would expect to make shipments of this material about the 1st April, and to complete erection of the steel work in about two months after the arrival of the same at site.

The formal agreement does not provide for the completion of the work at any specified date.

The trial judge, Walsh, J., held that on the true construction of this clause the appellants were (unless excused by other clauses) bound to make shipments of all the material from Toronto on or before April 1, 1912, and to complete the erection of them on the specified site in about 2 months after their arrival there, which, if 1 month—not an unreasonable time—be allowed for transit, would mean that the work of erection of the buildings should be completed by July 1, 1912, about 8 months before the date of actual completion.

He further held that the appellants were not protected from the consequences of this delay, by the terms of the clause to be found in the first of the incorporated documents, running as follows:—

The company shall not be held responsible or liable for any direct or indirect damage, loss, stoppage, or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not.

The ground of his decision was that as the law imposed upon a contractor who is guilty of a breach of his contract liability therefor in damages, he, when he desires to be protected against that liability, should so provide in clear and unambiguous language, especially

IMP.

P. C.

CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO

Lord Atkinson.

where, as in the present case, the contract was prepared by himself. The judge was of opinion that this latter clause, which was very ambiguous and difficult to construe, was possibly intended to protect the appellants from liability for loss arising from imperfections in plant or machinery, but not from liability for such a breach of contract as the respondents alleged the appellants had committed.

The tender put in by the appellants now forming part of the contract contained a clause to the following effect:—

> The contractor shall furnish duplicate copies of detail and dimension, drawings on crane and steel within thirty days after signing the contract, which shall be approved by the engineers of the purchaser before any shop work is done, the responsibility for errors in said drawings to remain with the contractor.

The trial judge construed this clause as meaning that as soon as the plans of any particular building were approved of the shop work might be commenced upon it though none of the other plans had been approved, and thought this was the view the parties themselves took of the provision; and founding himself upon the letters which passed between them and the written documents given in evidence in the case, not on the parol evidence, came to the conclusion that neither the tardiness of the respondents in returning approved of the plans furnished in pursuance of this provision, nor the alteration by them of these plans, nor yet the alteration which they required to be made in the works actually executed caused any material delay in the completion of those works. And, finally, found that the appellants were responsible substantially for all the delay in the completion of the works from July 1, 1912, to March 8, 1913, and assessed the damage on the counterclaim at $10,000.

The majority of the Court of Appeal did not adopt the view of the trial judge as to the proper construction of the clause in the type-written document, naming April 1, as the date for the completion of shipment of the materials. They held that the contract gave the appellants a reasonable time to complete this shipment, and taking into consideration the time necessary to obtain the approval by the respondents of the plans which the appellants were bound to furnish, fixed July 1, 1912, as the date when the reasonable time for the completion of the shipment of the material should expire, to which if one month the time necessary for transit, as

IMP.

P. C.

CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Lord Atkinson.

shewn by the exhibits, be added, the two months of August and September would remain available for the work of erection, quite a reasonable time they thought for the completion of that work. They accordingly held that the appellants were in default from October 1, 1912, till March 8, 1913, when the work was actually completed.

They concurred with the trial judge in holding that the clause contained in the first of the incorporated documents designed to absolve the appellants from liability for delay, already referred to, did not apply to delays such as those complained of by the respondents, and approved of the amount of damages awarded by him as well as the method by which he measured and ascertained it.

They accordingly, by their order dated November 14, 1916, dismiss the appeal of the present appellants, and the cross-appeal of the present respondents against the order dated March 1, 1916, and on December 7, 1916, by an order of that date gave leave to the present respondents to appeal to His Majesty in Council from so much of their judgment of November 3, 1916, as dismissed their appeal upon their counterclaim, and also gave leave to the present appellants to appeal to His Majesty in Council against so much of their aforesaid judgment as dismissed their appeal in respect of the respondents' counterclaim.

The present appellants have availed themselves of that order and lodged the present appeal. The present respondents have not lodged any appeal, so that the question for decision of the Board is, whether the dismissal of the present appellants' appeal in respect of the respondents' counterclaim was right. That question involves the construction of the contract entered into between the parties, the nature and extent and consequences of the alleged breaches of it by the present appellants, and the amount and method of measurement of the damages awarded on the counterclaim. Stuart, J., in delivering the judgment of the majority of the Appellate Division of the Supreme Court commented in severe but well deserved terms on the manner in which the parties formed their contract in this case. It is a slovenly ill-constructed puzzling patchwork, knit together by a few ill-made links. It is composed of three documents. The first printed, dated December 18, 1911, designed apparently to deal with a subject matter wholly different from that to which it was intended to apply it in the present case.

It is addressed to the respondents and signed by the appellants. The second, bearing no date, is partly typed, partly written, addressed apparently to the present respondents but not signed by or on behalf of any person or body; and the third, partly printed, partly typed, purports to be an agreement between the two companies, signed by both and mainly dealing with the terms of payment for the supply to the respondents of the "apparatus and machinery" specified in the sheets attached to it, which are stated to be part of the agreement.

By the attached sheets are presumably meant documents (1) and (2). The only mention in this agreement of the erection of anything is to be found in the provisions (1) that 25% of the value of each building is to be paid "on completion of erection of such building," and (2) that it is understood in connection with this payment and another payment of 25% to be paid 60 days after acceptance, "that if through no fault of the company erection or acceptance is unduly delayed, the balance shall be due and payable in 4 months after shipment."

Turning to the first of these documents, it commences by a statement that the appellant company proposes to furnish apparatus thereinafter described according to "the following conditions for the sum named in the attached agreement." Well, no apparatus of any kind is described in it. It is further provided that the purchaser, *i.e.*, the respondent company, shall provide a suitable location for the apparatus, also foundations and foundation bolts; that if the installation is to be made by the appellants, the purchaser shall provide all necessary buildings and foundations, etc; "that should the purchaser require the apparatus or any part of the machinery to be put into operation before the entire completion of the work, the plant as affecting terms of payment shall be considered as having started." This last provision clearly means that if part of the apparatus shall be set to work before the whole is completed it shall for the purpose of payment be treated as if the whole apparatus had been set to work, and that the word "*plant*" is used to describe the entire apparatus. Again, the apparatus is to be installed by and at the expense of the purchaser, the apparatus mentioned is to be delivered by the appellants, and the place of delivery is f.o.b. Edmonton, Alberta, which is 50 miles distant from Marlborough, the site where the steel frame was to be erected.

IMP.
P. C.
CANADA FOUNDRY CO.
v.
EDMONTON PORTLAND CEMENT CO.
Lord Atkinson.

It would be difficult to select language more inapplicable to the steel framework of a factory than the language of those provisions. It would be as rational to speak of the wall of bricks and mortar or cement built in the spaces between the uprights of the frame being "put into operation," as it is to speak of the frame itself or any part of it being put into operation; but whatever was the nature of the apparatus to which the document referred, the important provision remains, that the appellant company undertakes to deliver the plant and machinery with due despatch, entirely composed of first-class material and sound workmanship, and to correct any defects which may appear therein within six months after delivery, which are proved to be due to the use of defective material or workmanship.

Then comes a provision which strongly supports the assumption that this document is inapplicable to the work agreed to be done in this case. It runs thus: "Provided the equipment shall not be taxed beyond its normal capacity and shall be operated in accordance with the company's" (*i.e.*, the appellant company's) "instructions." Already in one instance the word plant is used to describe the whole apparatus. And then one finds amongst these singularly inapplicable provisions one clause upon which so much turns to the effect that:—

> The company shall not be responsible or liable for any direct or indirect damage, loss, stoppage, or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not.

It is difficult to say what this provision means.

Literally construed it would mean that the appellants might delay the shipment, delivery, or erection of this steel frame as often and as long as it seemed good to them. That would be in itself an irrational result, and besides would be altogether irreconcilable with earlier provision binding them to deliver the plant and machinery with due despatch. The document must be construed as a whole, effect being, as far as possible, given to each part. And the only way in which that can be done is to hold either that the second clause does not at all apply to the plant and machinery mentioned in the earlier clause of the document, or that if it does apply to them it was only intended to protect the appellants from being responsible for consequential damage. Their Lordships are, however, like the trial judge and the Court of Appeal, of opinion

that it does not apply to such breaches of contract as the long-delayed shipment, delivery, or erection of the steel frame contracted for. It cannot, therefore, in itself, furnish any defence to the respondents' counterclaim.

The second document commences by the statement that in accordance with the respondents' specification and blue prints Nos. 403-417 the appellants will be pleased to supply, erect in place, and pay freight as far as Edmonton on steel work for buildings for the sum of $37,000, and will also be pleased to furnish a 15-ton hand-operated travelling crane with a span of 33 ft. and pay freight on same as far as Edmonton for the sum of $1,488. The specifications, in accordance with which the steel work for the building is to be supplied and erected, contains the following provisions amongst others:—

1. A description of the buildings included in the specification, namely, the power-house, the coal storage building, the coal drying and coal grinding building, the kiln building, the clinker storage building, the clinker grinding building, and cement warehouse, all of which, with the exception of the power-house, are described as adjoining, their roofs extending from one to the other or intersecting.

2. A provision that the work shall be entered upon immediately after the signing of the contract, and shall be pushed to the earliest possible completion consistent with good work; that time is an important factor in the contract, and the guaranteed time of the completion of the contract, which must be specified, will be considered in awarding the contract. The power-house is first in the order of delivery.

3. That the contractor shall furnish duplicate copies of all detailed drawings for the work which shall be approved of by the engineer of the purchaser before any shop work is done, the responsibility for error in the drawings to remain with the contractor.

Document No. 2 contains the provision already referred to, differing somewhat from this latter, touching the delivery of detailed drawings, and also contains the provision already referred to expressing the expectation of the appellants that they would be able to make the shipments of all the material by April 1, 1912, and complete the erection of the steel work after its arrival at the site. Their Lordships, like the Court of Appeal, differ from the trial judge as to the construction of this latter provision. They do not think it amounts to a contract by the appellants to ship and complete the work at the dates therein mentioned. They concur with the Court of Appeal in thinking that the appellants were only bound to ship the material and complete the work within, in

IMP.

P. C.

CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Lord Atkinson.

each case, a reasonable time in that behalf, and are of opinion that in fixing July 1, 1912, as the limit of that time for the completion of the shipments, and October 1, 1912, as its limit for completion of the work of erection, as they have done, they have dealt most considerately with the appellants.

Mr. McCarthy contended, for the appellants, as is set forth in the 16th, 17th and 18th paragraphs of their case, that the completion of the work was greatly delayed by alterations which the respondents, by their order dated March 21, 1912, required to be made in the structural steel work (beams, channels, stairs, and connection) for the engine-room floor of the power-house, as shewn on a drawing, a print of which was enclosed, same to be erected complete and shipped with the first carload of material for the power-house; that this work, which was not covered by the original contract, involved the preparation of detailed drawings by the appellants, and the approval of them by the respondents, that these drawings were not ready till the 19th and 20th June, 1912, that they were forwarded to the respondents for approval on those dates, and were returned on June 27 with some further alterations, that the revised drawings were sent to the respondents for final approval on July 5, 1912, and returned finally approved on the 13th of the same month, with the result that this altered flooring was not shipped till September 24, 1912, and the erection of the power-house was much delayed in consequence.

He further contended that the Court of Appeal have not dealt with this matter. The trial judge, however, dealt with it very effectively. He pointed out that Mr. Klossoski, the respondents' engineer, stated that no more than 2 weeks' delay, both in the office and shop, could well have been caused by these alterations, and that his evidence on this point was uncontradicted, that on February 20, 1912, the drawing print (A) of the power-house was returned, fully approved of; that on March 28, the day on which the new order for alterations was received by the appellants, they wrote acknowledging the receipt of it, and stating the work would be put in hand at once, and drawings be sent for approval as soon as possible; that on April 8, 1912, the respondents wrote to the appellants asking to be advised when they expected to ship the steel for the power-house; that this letter was received upon April 13; that it appeared from communications passing between

IMP.

P. C.

CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Lord Atkinson.

the chief draughtsman of the appellants and the bridge department of their works, that the latter department, by letter dated April 24 1912, informed the draughtsman that all the drawings and bills of materials for the power-house were in their shops; that the respondents, having wired the appellants on July 9, 1912, complaining that serious delay was caused by their failure to ship the power-house steel, and requesting them to wire when the first shipment of it was made, the latter replied by wire on July 12 stating that the power-house steel had been loaded that day for immediate shipment; and on July 23, 1912, wired again that the shipment had left upon the 18th of that month.

The comment of the judge on these facts and documents is significant. He says:—

> In other words, while the plaintiff now says that the defendant delayed it in the matter of the approval of the plans of the power-house until the 19th July, its own records shew that these plans were in the shops three months before that, and the steel was actually shipped the day before that to which the plaintiff is said to have been so delayed.

It is quite true that the Court of Appeal did not deal expressly with this matter. But did it need to be further dealt with after the contentions of the appellants have been refuted by letters written, and telegrams sent by their own employees? Their Lordships concur in the conclusion at which the learned trial judge arrived upon this point. Now the buildings not having been completed, admittedly, till March 8, 1913, over 5 months beyond the expiration of the reasonable time, as fixed by the Court of Appeal, for completion, the appellants were unable to commence the installment of their machinery in these several buildings before that date. Nearly 6 months were spent in finishing the thorough equipment of the factory, so that they were not able to start the manufacture of the Portland cement, as the trial judge finds, till September 1, 1913. Had the building been completed in the month of July or August 1912, or even November 1, the respondents assert they could have completed the installation during the winter months, and have been able to commence their manufacture in March or April, 1913. The trial judge admits the soundness of this contention, and finds that the respondents by reason of the delays for which the appellants are responsible lost the use of their factory and works for 153 days, including Sundays and holidays. He endeavoured to fix the damage sustained by this

IMP.

P. C.

CANADA FOUNDRY CO. v. EDMONTON PORTLAND CEMENT CO.

Lord Atkinson.

loss in this way. He finds that once the factory commenced to run it continued to do so for 180 days, including Sundays and holidays; that the average output for this time was stated by the respondents' witnesses to be 703 barrels per day; that if the plant had been run at the same average rate during the 153 lost days it would have produced 110,865 barrels; that the cost of production of these barrels would, as was stated, have been $1.39 per barrel, the selling price $2.10, and the profits, the difference between the the two, namely, 71 cents, making in all $76,584.15. The judge, however, did not accept those figures. He took much smaller figures, and after several deductions came to the conclusion that the profits which the respondents might have made by the working of their factory for the 153 days of which they lost the use through the appellants' default was $10,000, less than $7 per day for 153 days and less than one-seventh of the sum claimed. No question arose as to any loss of profit by the respondents on any particular contract or transaction. The profits which they claimed to have lost were merely those which the sale in the open market of what they could have produced would have enabled them to reap.

It is clear upon the evidence that both parties knew the purpose for which this factory was designed, namely, the manufacture of Portland cement for sale. They were both necessarily well aware that the installation of machinery within it was indispensable for this purpose, that the completion of the building was the necessary preliminary of the installation, that delay in the completion of the building necessarily involved the postponement of the latter, and that the loss of the use of the machinery which could not be installed would result in the loss of those ordinary profits which might have been reaped upon what, if worked, it would have produced. So that the loss of this profit was at once what fairly might be considered as arising naturally, that is, according to the ordinary course of things from the breach of the appellants' contract complained of, and was also such a loss as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. If so, both the tests laid down in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, and the cases which have followed it would appear to be satisfied. The damages, in addition appear to be

very moderate in amount. The Court of Appeal approved of the amount.

IMP.
P. C.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and the appeal be dismissed with costs, and they will humbly advise His Majesty accordingly. *Appeal dismissed.*

Lord Atkinson.

BRODIE v. CHIPMAN.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ., and Cassels, J., ad hoc. October 8, 1918.

WILLS (§ I F—60)—CODICIL—CONSTRUCTION—REVOCATION OF BEQUEST IN WILL.

A codicil setting out the testator's life insurance policies and providing that "one-quarter of these policies go direct to my wife, but all my other property now goes, with my last son dead, to my three daughters under the terms of my said last will" revokes a bequest in the will to the testator's wife of half the residue of his estate.

Statement.

Appeal from a decision of the Appellate Division of the Supreme Court of Ontario, 41 O.L.R. 281, *sub nom Spink*, reversing the judgment on an originating summons in favour of the female appellant. Reversed.

McLaughlin, K.C., and *Stinson* for appellant; *Hellmuth*, K.C., and *Neil Sinclair*, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The case, I think, comes before the court with insufficient information to enable it to be satisfactorily dealt with. By his will the testator recited:—

I have certain life insurance upon my life, some payable to my estate, some payable to my wife, some payable to my wife and children, and it is my wish, purpose and desire that the conditions of payments in all policies of insurance be carried out and that my wife and children and estate may receive and benefit in the proportions and manner as set forth in all and each of said policies.

With the exception of a specific bequest to his wife of his household goods and effects the testator bequeathed to trustees upon the trusts mentioned all of his property which, of course, would include insurance moneys coming to his estate.

The codicil to the will provided:—

And further I say, and irrevocably will and determine that my wife E. F. Spink shall have one-quarter or one-fourth of my life insurance. I intend it to cover my policies in the Standard Life, now over $8,000, I think No. 80076 W. and United Workmen, I think certificate No. 3491, and I think Provident Saving Life No. 177,764, and Independent Order of Foresters, certificate No. I think Nos. 31236 and 242632.

CAN.

S. C.

BRODIE v. CHIPMAN.

Fitzpatrick, C.J.

Although much argument has been made upon the amounts of the insurance moneys as they would go under the provisions of the will or codicil, there is no information concerning them in the record beyond a statement by certain of the parties that under the will the widow would receive of the life insurance about $9,000, and under the codicil about $4,000 or $5,000 less. This statement, of course, depends upon what is the understanding of the parties as to the effect of the will and codicil, an understanding that is possibly, if not probably, erroneous.

Not only have we no information concerning the policies and the amounts which, under their terms, would go to the widow and children and the estate of the testator respectively, but we do not know whether in the codicil the testator, in the insurance of which he makes mention, was dealing only with those belonging to his estate, or whether he was assuming to dispose of the whole of the insurance on his life.

Meredith, C.J.O., has accepted the parties' figures and ignored any difficulties to which they give rise, though his remarks that the insurance money amounted to about $20,000; that the half share of the widow under the will would have amounted to $9,000, and her quarter share under the codicil to about $4,000, seem to involve calculations difficult to reconcile with the immutable laws of arithmetic.

I do not, however, think it is necessary to refer the matter back on account of this imperfect evidence, because, in my opinion, the judgment appealed from cannot in any event be maintained.

The important words of the codicil which are in question read:—

One-quarter of these policies go direct to my wife, but all my other property now goes, with my last son dead, to my three daughters under the terms of my said last will.

I suppose it must be admitted that, taken by themselves alone, the meaning of these words does not admit of much doubt. Omitting the words "under the terms of my said last will," it does not admit of any doubt.

The testator drew both will and codicil himself, and the latter document when he was *in extremis*. May he not well have supposed that some of the terms of the will would still be applicable to his bequest, the equal division between the children; the taking by survivorship; grandchildren inheriting their parents' share, etc.? Is not this more likely than supposing that he had forgotten that

by his will he had left his children nothing but a reversionary interest in one-half share of his residuary estate?

In the reasons for judgment appealed from it is said:—

> These considerations (of intention) are no doubt relevant only if the meaning of the provision of the codicil which is in question is doubtful, for if, on the true construction of it, there is a clear gift of the whole of the residue to the three daughters they are irrelevant and the codicil must be given effect to according to its terms.

The first ground on which the decision is put is the rule of law that an erroneous recital by a testator in a codicil that he has by his will given a legacy to A. B. when he has not done so, creates no legacy at all. This, of course, admits of no doubt but does not seem to be in point here. It has application in such cases as *Mackenzie* v. *Bradbury* (1865), 35 Beav. 617, 55 E.R. 1036, quoted by Meredith, C.J.O., where the codicil erroneously stated:—

> Whereas, by my will, I have bequeathed to Francis, the son of my husband's niece, the sum of £1,000, now I hereby declare that the said legacy shall not be payable until, etc.,

and the claim of Francis to be entitled by implication to a legacy of £1,000 was held to be unfounded. Such a case as this has no bearing on the present unless we assume that the testator was not, by his codicil, making a bequest but merely a purposeless and erroneous recital of so important a matter as the disposition made by his will of the whole of his property.

The second ground put forward is that as held by the House of Lords in *Hearle* v. *Hicks* (1831), 1 Cl. & F. 20, 6 E.R. 823, where there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest. To enable this rule to have any application it is necessary to assume the point in dispute, namely, that the codicil gave no bequest to the daughters, for obviously there must be a necessary revocation of a devise made by a will if the same property is left by the codicil to a different devisee. The argument, therefore, seems to amount to this, that there was no bequest by the codicil because there was no revocation of the will and there was no revocation because there was no bequest by the codicil. This does not prove the proposition.

In the absence of any ambiguity the court cannot consider what may have been the intentions of the testator, but if it were possible in the present case to inquire into these, I do not think the probablities would be such as the Chief Justice of Ontario sug-

CAN.
S. C.
BRODIE
v.
CHIPMAN.
Fitzpatrick, C.J.

gests. The main ground on which he rests his views is that the testator must have intended in his codicil to have preserved to his widow the same proportion of his estate as he had left her in his will. Why should he wish to do so? I can imagine no reason, but, on the contrary, think the presumption, so far as there is any, should be the other way. The ordinary man, I apprehend, desires to leave his widow a suitable income proportionable to his means for the rest of her life, or until her remarriage, a dower in fact, following the provision made for her by the common law. If he should have an estate of $50,000 he might leave his widow one-half or $25,000, but if subsequently to the making of his will he became possessed of $500,000, it is most unlikely that he would wish to leave her half of this. He might increase her legacy to $50,000, or one-tenth of his estate, but the rest he would leave to his married children.

What are the facts assumed in this case, for as I have said, we do not know with certainty what they really are? The estate, excluding life insurance, was sworn at $26,500, but this included the moiety of the son's insurance which, as appears from the affidavit of the latter's executor, was upwards of $11,000. Consequently the estate, excluding insurance, of which the testator was disposing at the date of his will, was not much over $20,000. Of this he left half, or $10,000, to his widow, and the other half, subject to a life interest to her, to his children. Adopting the figures of the executor, the respondent, J. R. Brodie, the widow, would have taken $9,000 of the insurance money, a total of $19,000. Now the son died, and his mother took one moiety of his insurance money, and by the codicil in question, the other moiety, $11,000 and upwards; then the testator, again according to the figures of the executor, reduced her share of his insurance moneys from $9,000 to $5,000, and gave all the residue to his children, leaving her with $16,000 actual cash, instead of an uncertain $19,000, for he could not have known what the share which she would get under the will would amount to, and the life interest in half the residue. This, of course, was a reduction in the benefits given to the widow, but not an extravagant one, especially in view of the fact that the testator did undoubtedly intend to make some reduction of them.

We cannot speculate as to the motives of the testator. It is suggested in the appellants' factum that

> the son, unmarried, being dead and all the daughters being married, the necessity of the widow looking after and caring for the unmarried son had also ended.

It may be so, we cannot go into the family circumstances. It is said in the affidavit of the respondent, Ruby J. Middleton, that

> to the last there never was any change whatever in the tender relations and most affectionate regard which existed between my father and my mother.

It would indeed be unfortunate if the courts undertook to vary testamentary dispositions on such considerations. Where, owing to family circumstances, a testator finds it desirable to alter the previous appropriation of his property he would often have the best of reasons for not wishing to make public the cause of his doing so. The present case itself affords an illustration and I give it only as such. The testator may have had reason to foresee that, as in fact has happened, his widow would leave all her property to two of her daughters, disinheriting the third, contrary to his own wish. Yet how impossible it would have been for him to set down in his codicil the reason for revoking the bequest to his widow and making a different provision for her by the codicil.

In my own view a natural interpretation would be that in making his will the testator knew that his wife would employ her property largely for the benefit of his only son, but the death of the latter entirely changed the condition of affairs. The codicil was undoubtedly made owing to this occurrence, it was then only necessary to make a suitable provision for his widow, which was done, and the testator said "but all my other property now goes with my last son dead to my three daughters."

If, as I should think, these were his wishes, the terms used seem natural and apt enough to carry them into effect.

It is, I suppose, possible that the construction contended for by the appellants would involve the revocation of the specific bequest to the widow of the household goods and effects, and this can hardly have been the intention of the testator. Even if it were so, this would only be an unfortunate accident due to his want of skill or incapacity at the time, and cannot affect the construction of the provision in the codicil. In my opinion, however, it is not necessary to attribute any such effect to the provision. The testator is dealing only with his residuary estate, money and

CAN.

S. C.

BRODIE v. CHIPMAN.

Fitzpatrick, C.J.

valuables, all of his property other than goods and chattels which form the subject of the specific bequest to the widow. Except in so far as the appropriation of his residuary estate is concerned, the will is in all other respects expressly confirmed.

The case is unlike that of *Re Smith*, in the Ontario courts (1913), 15 D.L.R. 44, affirmed by the Privy Council (1914), 19 D.L.R. 192, to which reference is made by Meredith, C.J.O. That case was so wholly special and the decision so entirely dependent on the particular circumstances and the terms of the testamentary documents in question that it is of no general value as an authority which doubtless is the reason that it was not reported in the law reports. (English.)

If I am correct in the views above set forth it will be seen that the testator secured to his widow his household goods and effects and a sum of $16,000 cash. It, moreover, appears from the will that she already had some property of her own. This seems to have been a very reasonable provision for the testator to make for his widow, a woman of advanced age with no one dependent upon her, considering the amount of his estate and that his three children were all married and they and his grandchildren and their needs were the objects, as they naturally would be, of his careful consideration for their welfare.

For these reasons I am of opinion that the appeal should be allowed and the judgment on the trial restored with the variation that the declaration should only be as to the residue of the property of the deceased after giving effect to the specific bequests contained in both the will and codicil.

It is a proper case in which the costs of all parties should be paid out of the residuary estate.

Idington, J.

IDINGTON, J.:—The testator, by his last will, made on the 23rd December, 1913, after some specific dispositions, referred to his life insurance as consisting of some payable to his estate, some payable to his wife, some payable to his wife and children, and declared it to be his wish that the conditions of payments in policies of insurance on his life should be carried out.

Then he directed the residue of his estate, real and personal, to be divided into two equal parts of which one was given the wife absolutely and the other to his executors and executrix upon trusts which he declared at some length.

CAN.

S. C.

BRODIE v. CHIPMAN.

Idington, J.

The income of the trust was to be paid the wife during her life and at her death the principal to be divided equally between his son and three daughters.

He provided for the children of his son and each of his daughters taking the parent's share in case of death and even anticipated the possibility of grandchildren's rights in case of any of his children dying leaving such.

He further provided against loans to wife or child being enforced, as he declared them cancelled.

The son died suddenly under painful circumstances; within a week after the testator had made his will.

The son left life insurance amounting to $11,000, which came by his will in equal shares to the testator and his wife.

The only other apparent alteration in the circumstances of the testator created by the death of the son arose from the fact that the son had been named an executor of the will.

The testator, on February 3, 1914, made a codicil to his will, by which it is made clear to my mind that for some reason or other he had conceived another plan or scheme for the disposition of the greater part of his estate.

The death of his last son evidently was to him a disturbing factor of more far-reaching consequences than involved in the possible need, suggested by acquisitions, derived from the son's bequests of his life insurance, for a slight readjustment of amounts he, as testator, had bequeathed. That could easily have been provided for, by a few words clearly expressing such purpose, instead of the complex plan the codicil presents, which suggests much that is entirely overlooked in the elaborate computation in the judgment of the Chief Justice of Ontario, the correctness of which was challenged in argument.

Did the father not feel that, with the last son gone, there was some reason to fear the happening of that which has in fact taken place, by the mother preferring two out of three daughters?

Had he been possessed of unbounded confidence that an equal distribution would ultimately prevail, there would certainly have been little use in his making a codicil.

This codicil was made when the testator was very ill and suffering much on his death-bed, and he died ten days later.

Inasmuch as we do not know more than is presented, which

CAN.
S. C.
BRODIE
v.
CHIPMAN.
Idington, J.

does not even tell us all that was involved in the original distribution of insurance, I lay no great stress upon the facts just referred to but merely allude thereto by way of pointing out that the results of the construction put upon said codicil by Masten, J., as constrasted with what the wife might have got had there been no change in circumstances, may have been, as I respectfully submit, pressed too far by the judgment appealed from. It may be that the statements in affidavits filed as to what the wife would have got under the distribution which each of the policies of insurance provided, furnishes a possible key to the whole; but it by no means is necessarily to be implied that it accurately does so, or can disclose all relative to the original schemes of distribution in said several policies of insurance, which we should know if the train of thought, adopted by the use of such a key, is to be accepted as a leading factor in reaching our decision.

The codicil deals with the subject matter of the insurance in an entirely different manner from that adopted in the will by giving only one-fourth of the insurance on the testator's life to the wife.

That entire insurance money amounted to $20,000 and he gave the wife all that might have come to her or him under the son's will.

Then, after specifying the life insurance on his own life, he proceeds first by repeating that bequest, and comprehensively as follows:—

> One-quarter of these policies go direct to my wife, but all my other property now goes, with my last son dead, to my three daughters under the terms of my said last will.

The neat point to be determined in this case is the effect of this single sentence.

I think we must have regard to the law requiring the express language used to be given its plain ordinary meaning, and if possible give effect to every word of it.

Then there is a principle deducible from numerous cases of which *Hearle* v. *Hicks*, 1 Cl. & F. 20, 6 E.R. 823, is one usually relied on, which requires the language of a codicil to be clear and manifest before it can be maintained in revocation of a clear and manifest devise or bequest in a will.

That principle was involved in the case of *Re Stoodley*, [1916] 1 Ch. 242, and presumably was what induced Mr. Justice Eve to place the construction he did on the will in question therein.

The report does not make clear exactly what he relied upon, but the course of argument and reasoning in the judgments in appeal suggest strongly such was the case.

Upon appeal therefrom the Court of Appeal reversed his construction and rested the judgment doing so upon the case of *Earl of Hardwicke* v. *Douglas* (1840), 7 Cl. & F. 795, 7 E.R. 1271.

That involved in each of those two cases, as in that at bar, what had been given by a residuary bequest in each of the respective wills.

The language used in each codicil in question in the cases cited was, as the conflicting opinions shew, capable of more than one construction, but I venture to think is neither more comprehensive, forcible and expressive of the real intention of the testator, having regard to the circumstances surrounding each of the respective testators, than that I have just quoted from the codicil now before us.

I, therefore, conclude so far as concerns the residuary bequest to the wife that it was, in my opinion, partially revoked by this codicil, but the will in all other respects stands unrevoked save as to the insurance money of which there is no question.

I observe such a difference between the expressions of the strong, clear-headed man, writing his will, and the same man writing his codicil, under most painful circumstances, that I cannot help feeling how he would in health and strength have put the possibility of this lawsuit beyond peradventure.

Yet I cannot doubt his intention was that, seeing his last son dead and his wife provided for, as far as she was concerned, there was no contingency to be anticipated but what affection would meet, and that the daughters, so far as he was concerned, should be treated equally.

Such would be my reading of this will and codicil apart from authority save the doubt that must ever exist of whether or not he did not suppose that he was giving his wife the income of the entire residue for life.

The expression, "to my three daughters under the terms of my said last will," indicates such a restricted intention. Any way one may try there is a difficulty just there, but clearly the predominant purpose was an equal distribution amongst and between his three daughters.

CAN.

S. C.

BRODIE v. CHIPMAN.

Idington, J.

Out of respect to the court below I have fully considered all the cases cited, but am of the opinion that the three cases I have cited above contain the whole relevant law which should govern us.

The appeal should, I think, therefore, be allowed, and the judgment below be modified accordingly, and that the costs of all parties should be paid out of the estate.

Anglin, J.

ANGLIN, J. (dissenting):—Mr. McLaughlin's very able argument on behalf of the appellants failed to convince me that the judgment appealed from is erroneous. On the contrary, I think it correct and feel that I cannot usefully add anything to the reasons stated by the Chief Justice of Ontario in support of it.

I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—The question we have to decide in this case is whether by his codicil of February 3, 1914, John Lawrence Spink has revoked the bequest given to his wife by which she was to have one-half of his property.

By his will made on December 23, 1913, Mr. Spink devised all his real and personal property into 2 equal shares and gave one share absolutely to his wife and the other was to be divided among his 3 daughters and his son, and he declared that his wife and children should receive the amounts set forth in each of his insurance policies.

The evidence shews that $9,000 of that insurance money would have gone to his wife, and $11,000 to his children, the testator having his life insured for $20,000.

A few days after his will was made, his only son died and left an estate of $11,000, half of it going to his father and half to his mother.

The testator himself became seriously ill and on February 3, 1914, he made a codicil, and he died a few days later, on February 13, 1914. The reason for making the codicil is stated by the testator himself to be owing to the fact of the death of his son. In that codicil he provided that the insurance money, instead of being divided as it was stated on the policies, would go one-fourth to the mother, and three-fourths to the three surviving children, his three daughters. He gave also by the codicil the amount of money which he had received from his son to his wife, and he added that everything that might have come to him or to her under the will of his son would belong to his wife. After having

described the policies of insurance and included their numbers, he said:—

One-quarter of these policies go direct to my wife, *but all my other property* now goes, with my last son dead, to my three daughters under the terms of my said last will.

It is contended by the appellant that the provisions of that codicil revoke the bequest which the testator had made by his will of one-half of his estate to his wife.

On the other hand, it is claimed that this provision of the will has not been disturbed by the codicil.

Masten, J., decided that the contention of the appellant should be sustained, and he even declared that the life estate which had been given to the wife by the will had been revoked.

I must say here that the appellants do not insist upon the construction of the will as to the life estate.

The Appellate Division decided in favour of the respondents that the bequest of the half of the estate was not disturbed by the codicil.

It is strongly claimed on the part of the respondents that the sole reason for which this codicil was made was to dispose of the share of the son.

If the words "all my other property" were ambiguous, the construction put by the respondents on the codicil might perhaps be sustained in view of the relations existing between Mr. Spink and his wife. But those words seem to me so clear that I think we should construe them in their ordinary meaning.

According to my opinion, then, he has disposed of all his other property in favour of his three children. As to the income during the life-time of the wife, I consider that, contrary to the view expressed by Masten, J., this was one of the terms under which the bequest to his children was given, namely, that the life estate would remain in his wife and as he has said in his codicil that all his other property would go to his daughters under the terms of the will, I consider that the residuary was disposed of on the condition that the life estate would remain in the wife.

For these reasons, the judgment *a quo* should be reversed and the appeal should be maintained with costs to be paid out of the estate and the trial judgment should be restored with the modifi-

CAN.
S. C.
BRODIE v. CHIPMAN.
Cassels, J.

cation that the wife was entitled, during her life-time, to the income of the property of the husband.

CASSELS, J. (dissenting):—After a careful consideration of the able argument of Mr. McLaughlin, and the authorities cited by him, I have arrived at the conclusion that the judgment pronounced by the Appellate Division is correct and should not be disturbed.

The Chief Justice of Ontario has fully discussed the questions argued. I agree with his reasons and conclusions.

It would be merely repetition to again discuss the facts.

The appeal should be dismissed, and I think the appellants should pay the costs of the appeal.

The costs of the other proceedings have been allowed out of the residuary estate, but I think the appellants took a further appeal to the Supreme Court at the risk of costs.

Appeal allowed.

ONT.
S. C.

McPHERSON v. CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. July 15, 1918.

MASTER AND SERVANT (§ I D—22)—MUNICIPAL EMPLOYEE—ADULTERY—GROUND FOR DISMISSAL.

The refusal of a municipal employee to discontinue living in apparent open adultery when threatened with dismissal if he continued is sufficient to justify such dismissal.

Statement.

AN appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of York, after a trial without a jury, dismissing the action, which was brought to recover damages for the plaintiff's alleged wrongful dismissal from his employment as a member of the Toronto Fire Brigade, the ground assigned for his dismissal being that he, being a married man, separated from his wife, had living with him the wife of another man, and refused, on being threatened with dismissal if he continued to have her in the house, to banish her from it, his conduct being considered by the Chief of the brigade to be prejudicial to the interests of the brigade and the public.

T. N. Phelan, for appellant.

Irving S. Fairty, for respondents,.

ONT.

S. C.

McPHERSON v. CITY OF TORONTO.

Meredith, C.J.O.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 17th April, 1918, 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 that day.

The appellant was a member of the Toronto Fire Brigade, and his action is brought to recover damages for his alleged wrongful dismissal from his employment.

The main question for decision is as to whether the ground upon which he was dismissed by the Chief of the brigade was a sufficient ground to justify the dismissal.

The appellant is a young man, not living with his wife, and he had living with him the wife of another man, a comparatively young woman, who was separated from her husband. Complaint was made to the Chief on account of this, and, after investigation, he informed the appellant that he must leave the brigade if he did not cease to have the other man's wife living under the same roof with him. This the appellant refused to do, and the Chief, being of opinion that the appellant's conduct was prejudicial to the interests of the brigade and the public, dismissed him.

I take the law to be as stated by Armour, C.J., in *Marshall* v. *Central Ontario R. Co.* (1897), 28 O.R. 241, 243, quoting from the judgment of Lopes, L.J., in *Pearce* v. *Foster* (1886), 17 Q.B.D. 536, at p. 542:—

"It is sufficient" (i.e., to justify the dismissal of a servant) "if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."

In Labatt on Master and Servant, 2nd ed., vol. 1., p. 926, sec. 297, it is said:—

"In some classes of employments, it is one of the implied stipulations of the contract that the employee will refrain from conduct which, although not immoral, is indecorous to a degree likely to endanger his own reputation and injure his employer's interests. The only reported cases in which this doctrine has been adverted to relate to teachers, but its applicability to many other classes of employees is indisputable. Whether the conduct proved

ONT.
S. C.
MCPHERSON
v.
CITY OF
TORONTO.
Meredith, C.J.O.

amounts to a breach of duty *quoad* a particular person is a question of fact. The standard of decorum plainly varies considerably, according to the character of the occupations and the sex of the employee."

With this statement of the law I agree; and, applying it to the case in hand, I am of opinion that, having regard to the nature of his employment, the conduct of the appellant was such as to justify his dismissal.

His employment was one in which only men of good character and conduct should be employed. His duties were such that at any time he might be called upon to enter the houses of citizens, both in the day-time and at night. It was important, too, that, brought into contact as he was with the other members of the brigade, he should do nothing to affect prejudicially the discipline of the body to which he belonged. His position was, besides, that of an employee of a municipal corporation, and I cannot believe that his conduct was not such as to affect prejudicially the reputation of his employer.

He was apparently living in open adultery, and his refusal to comply with the request of the Chief to cease to have his neighbour's wife living under his roof, in my opinion justified the Chief in dismissing him. Whatever the fact may have been, the circumstances were such that the public would naturally come to the conclusion that improper relations existed between the appellant and his neighbour's wife, and I cannot believe that the respondent was bound to retain in its service a member of its fire brigade who persisted in maintaining the conditions which led to the complaint against him. It was urged that there was no precedent for holding that the appellant's conduct was such as to justify his dismissal, but I am prepared if necessary to make one and to hold that an employee of the public whose conduct was such as that of the appellant may be dismissed if he persists in so conducting himself.

The judgment may also be supported upon the ground that the appellant was guilty of boasting to his comrades in the brigade of having illicit relations with his neighbour's wife. This aspect of the case was not dealt with by the trial Judge—no doubt because he came to the conclusion that the other ground with which I have dealt was sufficient to justify the dismissal. That these boasts were made was well proved; that the appellant made them was

testified to by three other members of the brigade, and was met only by the denial of the appellant.

Although it was not known to the Chief that these boasts were made, and the making of them was not a ground assigned for the dismissal, it is clear law that the dismissal of an employee may be justified for a cause not known to the employer at the time when the dismissal took place.

I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

ONT.
S. C.
McPHERSON v. CITY OF TORONTO.
Meredith, C.J.O.

GOLDSTON v. ALAMEDA FARMERS ELEVATOR & TRADING Co.

SASK.
C. A.

Saskatchewan Court of Appeal, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

NEW TRIAL (§ II—5)—TRIAL JUDGE INFLUENCED BY FACT THAT PLAINTIFF ACQUITTED ON CRIMINAL CHARGE—NEW TRIAL.

If a perusal of the judgment of a District Court Judge convinces the Court of Appeal that he has been influenced in his judgment in a civil action by the fact that the plaintiff had been acquitted on a criminal charge, a new trial will be ordered.

APPEAL from the judgment of a District Court Judge in a civil action. New trial ordered. Statement.

G. H. Barr, K.C., for appellant.

T. D. Brown, K.C., for respondent.

HAULTAIN, C.J.S., and NEWLANDS, J.A., concurred with ELWOOD, J.A. Haultain, C.J.S. Newlands, J.A.

ELWOOD, J.A.:—A perusal of the judgment of the District Court Judge convinces me that he was influenced—if not altogether, at any rate to an extent that he should not have been—by the fact that the plaintiff had been acquitted of a charge of theft brought against him in connection with some of the matters in dispute in the case at bar. Elwood, J.A.

The fact that the plaintiff had been acquitted of theft is not a matter that should have in any way influenced the District Court Judge, and no consideration should have been given to the fact of such acquittal.

In my opinion there should be a new trial of the action and of the counterclaim. The costs of the abortive trial should be costs in the cause to both parties, and the appellant should have the costs of this appeal.

LAMONT, J.A.:—If the trial judge reached the conclusion at which he arrived without being influenced by the fact that the plaintiff had been acquitted of the charge of theft referred to in Lamont, J.A.

SASK.

C. A.

GOLDSTON v. ALAMEDA FARMERS ELEVATOR & TRADING CO.

Lamont, J.A.

his judgment, his decision should not be interfered with. He was not entitled, however, to take that acquittal as conclusive that the plaintiff had not in fact received and kept the money he was accused of stealing. That was a question of fact to be determined by the judge in the civil action before him. As there are expressions in the judgment of the judge which leave it doubtful whether or not he was making an independent finding of fact upon this point, on the evidence before him, I am of opinion there should be a new trial.

The appeal should be allowed with costs, the costs in the court below to abide the event of the new trial. *New trial ordered.*

ALTA.

S. C.

REX v. SHAAK.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ. December, 1918.

DISORDERLY HOUSES (§ I—12)—RIGHT TO SEARCH IN CASES OF SUSPICION—ARREST—EXAMINATION OF PERSONS ARRESTED—CRIMINAL CODE, SECS. 641, 228, 642.

Section 641 of the Criminal Code as amended in 1913 (Dom. stats. 1913, c. 13, s. 21) gives authority to search, in the case of suspicion of the existence of a "disorderly house" as defined in s. 228. The arrest of all persons found in such house is consequently authorized, but no change having been made in s. 642, such persons cannot be examined under oath for evidence that the place was being kept as a bawdy house, but may be held pending the laying of a charge against them.

Statement.

APPEAL from an order of the Chief Justice dismissing an application to quash a conviction. The defendant was convicted of keeping a bawdy house, contrary to s. 228 of the Code. The only objection to the conviction taken before us on appeal was that the accused had been arrested without a proper warrant, and that, therefore, the magistrate was not justified in trying him upon the charge.

J. Short, K.C., for the Crown; *J. B. Barron*, for appellant.

The judgment of the court was delivered by

Stuart, J.

STUART, J.:—The facts were that on June 29, 1918, Mr. Davidson, the Police Magistrate for Calgary, upon an information sworn before him by one David Richardson, described therein as an "inspector," a word well known as describing rank in the police, issued a search warrant under s. 640 of the Code, directed to the Calgary City Police. This warrant read as follows:—

Whereas it appears on the oath of David Richardson of Calgary that there is reason to suspect that the keeper and inmates of a common bawdy house are concealed in the house or premises at No. 501 Fourth Street east,

Calgary, this is, therefore, to authorize and require you to enter between the hours of 10 p.m., June 29th, 1918, and 3 a.m., July 1, 1918, into the said premises and to search for the said persons and to bring the same before me or some other justice.

Pursuant to this warrant, the police entered the premises mentioned, found the defendant there, arrested him and detained him at the police station until July 3, when he was brought before the magistrate and put upon his trial upon an information which had been laid on July 2, the day before, and by which he was charged with keeping the house referred to for the purposes of prostitution. Objection was taken by his counsel that the accused had not been properly arrested. According to our recent decisions, this would be a valid objection in the circumstances were it not for what was done under the search warrant.

The Chief Justice was of the opinion that the arrest under the search warrant was sufficient and it seems to me that he took the correct view. Until the year 1913, the authority to enter and search as given by the sections corresponding to the present s. 641 had been confined to gaming and betting houses. There had been authority to "take into custody all persons who are found therein" as well as to seize tables and instruments of gaming, etc. One of the things which could be done with the persons so arrested was shewn by the provisions of s. 642, which authorised the magistrate before whom they were brought to examine them under oath in regard to "any unlawful gaming in the house" and there is a provision in sub-s. 2 for their protection. Then in 1913 the wording of s. 641 was changed so as to give the authority to search in the case of suspicion of the existence of a "disorderly house" generally as defined by s. 228 which covers gaming and betting houses but also includes houses of ill-fame. But while this, in consequence, authorised the arrest of all persons found in such a house no change was made in s. 642, so that the authority to examine under oath is still confined to evidence of gaming. Thus the purpose of arresting persons found in a house searched in consequence of suspicion that it is a bawdy house is left rather obscure. They cannot be examined under oath for evidence that the place was being kept as a bawdy house. Yet there is undoubtedly authority to take them into custody. While there no doubt is a possibility that this was an oversight in not at the same time amending s. 642, still we must

ALTA.
S. C.
REX
v.
SHAAK.
Stuart, J.

endeavour to attribute some sensible purpose to the provision for arrest. There would seem to be no other than that they may be held pending the laying of a charge against them and I see no reason why this should not also apply to persons arrested in a gaming house, although a special additional action by way of examination is provided in their case. Of course this should be done promptly, otherwise there would be a way open for oppression. If there were delay *habeas corpus* would undoubtedly lie. But in this case a charge was promptly laid. It does not appear at what hour exactly the arrest was made, but at the worst a charge was laid within 48 hours and probably within 36 hours after the arrest. The charge was laid on July 2, and he was brought up for trial on the 3rd. He would no doubt, have been allowed an adjournment if it had been asked for. He was represented by counsel and no adjournment was requested. It is therefore purely a question of technical law whether the magistrate had power to proceed to hear and adjudicate upon the charge. And the contention is that after the swearing of the information a regular warrant of arrest should have been issued and that without it there was no authority to proceed. In my opinion the principle of the previous decisions ought not to be extended to cover the present facts. The arrest was duly authorized and as I have said the authority to arrest must have been given for some purpose. I can see no other purpose than that the arrested person may be held until a charge is laid. Until arrested his name may not be known and it seems reasonable that the laying of a charge should be postponed until the identity of the person is discovered.

The appeal should be dismissed. *Appeal dismissed.*

ONT.
S. C.

GOODWIN v. TAYLOR.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 17, 1918.

NEW TRIAL (§ II—9)—MASTER AND SERVANT—DEFECTIVE APPLIANCES—INJURIES—INSUFFICIENCY OF QUESTION SUBMITTED TO JURY.

A new trial will be ordered in an action for damages for injuries sustained by reason of defective appliances, where the question as to whether the master did all that should be expected from a reasonably careful and prudent employer of labour to avoid the danger, or to discover and remedy it were not fully and adequately placed before the jury, although the judge's charge to the jury was not objected to at the trial.

ONT.

S. C.

GOODWIN v. TAYLOR.

THE following statement of facts is taken from the judgment of FERGUSON, J.A.:—

Appeal by the defendant from a judgment of the Chief Justice of the Exchequer, upon the findings of a jury, in favour of the plaintiff, for the recovery of $4,000 damages with costs, in an action for injuries sustained by the plaintiff while employed as a farm labourer on the defendant's farm; his work at the time of the accident being to attach certain ropes to a pulley fixed to the joist of the roof of a silo, the pulley and ropes being necessary to the use and operation of the pipes by which the corn is carried from the cutting box to and spread in the silo. The accident occurred on the 6th October, 1916.

The action was tried at Kitchener on the 2nd November, 1917, judgment being pronounced at the conclusion of the trial.

The questions left to the jury and their answers were as follows:—

"1. Was the defendant guilty of any negligence which caused the accident? A. Yes.

"2. If yes, then what did such negligence consist of? A. Of not having the plank properly secured.

3. Was the plaintiff guilty of any negligence which caused or contributed to the accident? No.

"4. (Requires no answer).

"5. What damage, if any, do you award the plaintiff? A. $4,000."

On the 5th October, 1916, the defendant engaged the plaintiff to work on his farm as a labourer; the term of employment to commence the next day.

On the morning of the 6th, the plaintiff presented himself at the defendant's farm, and the following conversation took place:—

"Mr. Taylor said to me, 'What do you want to do, Bert?' I said, 'I want to go in the field.' He said, 'Will you mind putting those pipes up?' I said, 'I pulled off for two or three days, I want to go in the field.' He said, 'Will you mind fixing those pipes for me and pulling off till Mr. Horton comes?' I said, 'All right.' "

The pulling off there referred to means pulling corn away from the cutting box. The pipes referred to were the pipes leading from the cutting box to the silo.

The silo was built of concrete, circular in form, 12 feet in dia-

ONT.
S. C.
GOODWIN v. TAYLOR.

meter, and 35 feet high. A dormer window 2½ feet high by 2 feet wide was placed in the roof, for the purpose of permitting entrance at the top of the silo to fill it, and of placing, joining, and equipping the inside and outside pipes, which are only connected while the silo is being filled. The outside pipe of the silo is a fixture, while the inside pipe is not, but it is necessary each year when filling the silo to connect the two at or near the inside of the dormer window, and in doing so, and to permit the moving of the inside pipe about during the process of filling, it is necessary to draw up the inside pipe by attaching ropes to the pulley fixed to the roof. This pulley is situated about 4 feet 11 inches from the sill of the dormer window.

The plaintiff's testimony is that, acting upon the defendant's request, he proceeded to his work by way of the ladder affixed to the outside of the silo; that, when he arrived at the top and looked through the window, he saw a plank across the concrete top of the silo, about 3 feet out from the window; he also saw the pulley. The plaintiff describes the further happenings in these words:—

"I put my hand out and felt the plank and pulled it and I said to Fitzgerald (who was at the bottom of the silo), 'Is this plank safe?' " (Fitzgerald's answer is not given in evidence).

"Q. You say you took hold of the plank? A. Yes, took hold of the plank.

"Q. Did or did not the plank move in? A. Didn't move at all.

"Q. Then what did you do? A. I crawled in on to the plank, and I put the one end of the rope through the pulley and let the other end down to Fitzgerald to tie the rope on to the pipes. I didn't like to stay on the plank and put all my weight on while pulling up the pipes because I had to pull all myself, so I got out on the ladder, where I would have a good hold, and I pulled the pipes to the top. Then, as another rope was tied to the top of the pipes for me to put through the pulley to make the pipes fast, as I was getting in, just put my hands, hardly got inside when the plank slipped and let me down . . . I had my hands on the plank and might have just left the wall, the doorway, to crawl in on to the plank . . . I put nearly all my weight on with the hands and pulled my body over to the plank . . . practically lying down . . . I hadn't room to get through the window and stand up there.

ONT.
S. C.
GOODWIN v. TAYLOR.

"Q. Then you say that just as you were getting on the plank the plank slipped? A. Slipped.

"Q. Slipped from where? A. Off the wall. . . .

"Q. And I suppose you and the plank went down 35 feet? A. Yes, I went down all right. . .

"Q. What do you say as to the arrangement on the inside of the silo, having regard to this plank? A. The plank should have been nailed and fixed properly.

"Q. Was it possible to have nailed it? A. Yes, sir."

In cross-examination, at p. 10, the plaintiff states that he has been in the country for about five years; that farming is his usual occupation; that he had helped to fill other silos and had helped attach other silo pipes; that he had once before worked for the defendant three parts of a day, but he had not previously been in the silo (p. 12).

The defendant in his evidence, pp. 78, 79, 80, and 81, says:—

"Q. You are the defendant, Mr. Taylor? A. Yes, sir.

"Q. And the silo was built for you by some other man? A. Yes.

"Q. And the roof put on by Mr. Ruddell? A. Yes.

"Q. Now you hired the plaintiff the day before? A. Yes, sir.

"Q. And, as he said, to fill this silo? A. Yes.

"Q. And I understand there is a slight difference in what occurred in the morning when he came there. Tell what happened. A. When he was coming in the gate, I asked if he would put them pipes up; he said, 'Yes,' and he went up. If he hadn't come along, I was going to do it myself.

"Q. Were you there waiting at the time to do it? A. Yes.

"Q. He went on up? A. He went up.

"Q. You knew or did you know he had been doing similar work before? A. Yes, sir.

"Q. And he had worked for you before around the farm generally? A. Yes.

"Q. Then you weren't present at the time of the accident at all? A. No, I was at other work.

"Q. When you told him to go up there, was there present to your mind the fact that there was a plank or board and plank up there? A. Yes; I didn't think much about it; it was put up a year ago, and I never paid much attention.

ONT.
S. C.
GOODWIN v. TAYLOR.

"Q. It wasn't present to your mind? A. No.

"Q. You knew it had been there? A. Yes.

"Q. Who put it there? A. Mr. Bond.

"Q. Did you tell him to put it there? A. No, I just asked him the same as Mr. Goodwin to put the pipes up.

"His Lordship: Whose plank was it? A. It was my plank.

"Mr. Kerwin: How did he get it? A. I can't tell how he got it.

"Q. You weren't there? A. No.

"Q. And you didn't give it to him? A. No, I didn't give it to him.

"Q. It came off your place? A. Yes.

"Q. When did Bond put it there? A. In 1915, I believe.

"Q. Is there a window in your door at the top of the silo? A. No; it is open all the time.

"Q. Had you been up in the silo from the time Bond had been working around there until after the accident? A. No, not to the top of the silo.

"Q. You had been in it of course? Yes, but not to the top.

"His Lordship: That is for a year? A. For a year.

"Mr. Kerwin: You had nothing to take you up there? A. No reason to go up whatever."

Cross-examination by Mr. Secord:—

"Q. Mr. Bond was just at your place casually? A. Yes.

"Q. Came there for the purpose of helping you around your farm to fill the silo? A. Yes, to fill the silo.

"Q. And you didn't engage him for the purpose of fixing any board or anything? A. No, not that I know of.

"Q. Did you help to put the pulley up? A. Yes, I helped to put the pulley up.

"Q. And at that time you didn't take the trouble to put in any plank? A. No.

"Q. Therefore it was no protection for the man? A. No.

"Q. And you knew and realised what was to be done with the pulley? A. Yes, partly.

"Q. That must be to go up with a rope and put it through the pulley and pull the pipes up and tie them? You realised that when you put it up? A. I realised the pipes had to be put up, and that is the way they had to be put up, I believe.

"Q. And knew the distance from the door to the pulley? A. No.

"Q. Didn't you take any pains in that connection? A. Didn't ever measure.

"Q. You knew when you were there and helping to put the pulley up? A. I didn't go to the top to help put the pulley up.

"Q. You knew it had been put up? A. Yes, I knew it had been put up.

"Q. And no place to put it except where it was put—it had to be put that distance away to take care of the pipes? A. It had to be there to take care of the pipes—and that distance.

"Q. You knew that because you saw Mr. Fitzgerald's silo. A. Yes, I was over looking at Fitzgerald's silo.

"Q. This was a new process around where you were in the year 1915? A. Yes, sir.

"Q. Distributing by the pipes? A. Yes.

"Q. And you saw the same plank over at Fitzgerald's? A. No; I don't think I went into Fitzgerald's silo.

"Q. If you didn't go up, you didn't see it? A. No.

"Q. But you saw the pulley? A. I don't know that I seen the pulley.

"Q. I thought you told us a moment ago you went to see how Fitzgerald had his up? A. Yes; I had a man with me who was supposed to understand it.

"His Lordship: Did you know the plank was there on the plate of the silo? A. I didn't know how Bond put the plank on.

"Q. You knew he put the plank on? A. Yes, I knew he put the plank on.

"Q. For what purpose, do you know? A. I wasn't there when he put it up.

"Q. He didn't put it for the workmen? A. No.

"Q. You knew he put the plank up in 1915? A. Yes.

"Q. Didn't you inform yourself why he put it there? A. I never went up in the silo; it is a pretty hard place to get into.

"Q. Did you not know why he put it there? A. I supposed he put it there to help him.

"Q. Help what? A. Help Mr. Bond.

"Q. To do what? To put that rope through the pulley? A. Yes, sir.

ONT.
S. C.
GOODWIN
v.
TAYLOR.

"Q. To tie the inside pipe to it, you supposed he put it up there on that occasion for that purpose? A. Yes, sir.

"Q. Then you allowed it to remain there? A. I allowed it to remain there.

"Q. What part had the plank to play in the plaintiff tying the rope? A. Well, I wasn't there; I suppose he must have put his feet on, by what evidence he gave, to go to the top of the silo.

"Q. He told you of having put the plank there, didn't he? A. I don't know as he did.

"Q. Why did you leave it there? A. I can't tell you why it was left there."

In his examination for discovery, read at the trial, the defendant says that Bond, who placed the plank, was a carpenter, and, so far as he knew, a competent man.

The plaintiff in his statement of claim alleges the defendant's neglect in these words:—

"The plaintiff says his fall was occasioned by the neglect of the defendant to provide proper planking at the top of the silo properly secured for the purpose of carrying the weight of a man required to be thereon; that the boards provided by the defendant for the plaintiff to sit upon . . . were not nailed or in any way securely fastened to the silo."

The defendant denies these allegations, pleads contributory negligence, and also by paragraph 4 of his defence pleads:—

"The defendant further says that the said silo was constructed and the said planking placed thereon by competent workmen employed for that purpose, and the defendant was not guilty of any neglect or default in respect thereof, even if the said planking subsequently proved unsafe or insufficient, which the defendant does not admit."

Dealing with the question of the duty of the defendant to the plaintiff, the learned trial Judge instructed the jury as follows:—

"Now at common law . . . a master owes some duty to his servant; he must supply the servant with reasonably safe premises with which to carry on the work and with reasonably safe appliances with which to carry on the work, and the conditions under which the operations are to be performed under the directions of the master must be reasonably safe in order that the

servant will not be unnecessarily exposed to risk or danger. . . . If the master knows of some risk, or ought to know of some risk, not one incident to the business, but some difficulty that the master knows about in the appliances or in the premises, it is his duty to warn his servant, so that the servant shall not be unnecessarily exposed to danger. . . . The plaintiff, in the discharge of his duty and at his master's bidding . . . goes up there, and it is not in controversy that he fell inside the silo, because of the plank on which he was resting for a moment giving away, either by breaking in the centre, or one end slipping off the plate on top of the silo. . . . The accident was caused, therefore, by one of two of those things, either the plank wasn't strong enough to support him or it was insecure and slipped and caused him to fall . . . It would be the duty of the master if the plaintiff had to use the plank . . . to see that the plank was reasonably safe. If he failed to see that it was reasonably safe . . . the defendant would be liable for negligence; and in like manner if that plank slipped and in that way caused the accident. If under the circumstances it was reasonable for the plaintiff to have endeavoured to get on that plank to carry out his master's orders, then the master will be guilty of negligence—and if you find that the plank wasn't reasonably secure and was capable of being secured. . . . If he (the defendant) thought of it at all, he knew the plank was there when the plaintiff went up at his bidding. He knew or had a right to assume that the plank in its position would act as an invitation to this plaintiff to make use of it for the purpose of doing the work which he had gone up to do. . . . What should the defendant have done to have prevented the plank from slipping off the plate? Could he by any reasonable means have made the plank safe from slipping? If he could, by the exercise of reasonable care, as for example by nailing, and I suppose two or three nails would have prevented the slipping, if by the exercise of reasonable care he could have made it safe from slipping, that as a matter of fact was his duty to have done. If it was impossible, that is another matter, but if it was reasonably possible then it ought to have been done. . . . It is the duty of the master frequently to inspect the premises where his work is being carried on. . . . The master, Mr. Taylor, unfortunately never went up for a year at least to look at conditions. Perhaps a year

ONT.
S. C.
GOODWIN v. TAYLOR.

before other people were on that plank and it gradually lost its hold. . . . Do you think a man's life should be exposed to such a danger as that? Is that an ordinary risk incident to the filling of the silo, that that plank should be put in that position, left there not spiked, not secured, and that this man should be sent up there to do that work under conditions that would naturally invite him to make use of that plank? . . ."

Hugh Guthrie, K.C., S.-G. Can., for appellant.

M. A. Secord, K.C., for respondent.

Ferguson, J.A.

FERGUSON, J.A. (after setting out the facts as above):—Counsel for the appellant contends that the learned trial Judge in effect instructed the jury that the law imposed an absolute duty upon the master to supply his servant with reasonably safe premises, and that to that extent the master was an insurer of his servant's safety, and contends that such instruction is in law improper and insufficient, in that all that is required of a master is *to exercise such ordinary care and diligence as may be reasonably necessary to provide* safe premises and proper appliances so as not to subject his servant to unnecessary risk. Counsel further contended that it is not the duty of the master to do personally the work connected with his business, but that he may select proper and competent persons to do it; and, if he supplies them with materials and resources for the work, he has done his duty to his servant; and that in the case at bar it was established that Bond, the workman and carpenter who did the work, was competent; and that, even if Bond was negligent in not nailing the plank, the defendant is not responsible, but is entitled to succeed on the plea stated in the 4th paragraph of his defence.

The duty that a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work was considered by this Court in *Junor* v. *International Hotel Co. Limited*, (1914), 20 D.L.R. 960, 32 O.L.R. 399. In that case, at pp. 408 and 409, Meredith, C.J.O., in delivering the opinion of the majority of the Court, says (p. 409):—

"It is a startling and to me a novel proposition that a householder who employs a competent plumber and steam-fitter to make a connection between his furnace and his kitchen does so at the peril of being answerable for any injury that may be occasioned to his servants owing to the neglect of the plumber and steam-

fitter to provide some safety device which he erroneously believes to be quite unnecessary—at all events, unless the householder knows or ought to know of the defect."

And (p. 408): "It will be well at the outset to ascertain what duty a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work. The nature and extent of that duty has been expressed in different language by different Judges; but, when their statements are read in the light of the particular circumstances of the cases they were dealing with, they do not differ from the statement of Lord Herschell in *Smith* v. *Baker & Sons*, [1891] A.C. 325, 362, which is: 'It is quite clear that the contract between employer and employed involves on the part of the former *the duty of taking reasonable care to provide* proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.' See also Halsbury's Laws of England, vol. 20, para. 234, pp. 119, 120."

In Beven on Negligence, Canadian ed., p. 613, the learned author states the duty as follows:—

"The principle established by these cases is that when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks."

In *Wilson* v. *Merry* (1868), L.R. 1 H.L. Sc. 326, the Lord Chancellor, at p. 332 of the report, states the duty in these words:—

"What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen.

ONT.
S. C.
GOODWIN v. TAYLOR.
Ferguson, J.A.

As was said in the case of *Tarrant* v. *Webb* (1856), 18 C.B. 797, 139 E.R. 1585, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

In *Cole* v. *DeTrafford*, [1918] 1 K.B. 352, 355, Lawrence, J., discussing the judgment appealed from, says:—

"I think the learned Judge correctly held that duty as being to take reasonable care to maintain the premises in a condition free from any concealed danger of which she was aware or ought to have been aware."

From these authorities it is clear that the master is not an insurer of his servant's safety, but is only required to exercise such ordinary care and diligence as may be reasonable in view of the work performed, and the danger incident to the employment, and in view of the surrounding conditions and circumstances.

On a careful consideration of the charge in the light of these authorities, it appears to me that the learned trial Judge did not sufficiently explain and point out to the jury the exact duty of the master, and that he did not deal with the questions raised by the 4th paragraph of the defence, in such a way as adequately to draw them to the attention of the jury in order that they might be considered and passed upon by the jury in arriving at a conclusion as to whether the defendant was or was not negligent.

The measure of the defendant's duty to the plaintiff is to be fixed by ascertaining what a reasonably careful and competent master would, under like circumstances, have done to provide the plaintiff with safe premises and appliances. Should the defendant have employed a more competent man than Bond to erect and nail the plank? Was Bond a competent person, or such a person that the defendant was entitled to assume that he did his work properly, and that, when he put a plank in place, he did all that was reasonably necessary to keep it in place? Or was there any knowledge or thing connected with Bond or the doing of his work and the placing of that plank that would raise a suspicion in the mind of a reasonably careful employer of labour, requiring him to make an inspection to ascertain for himself whether or not the plank was safely fastened? Or, in other words, should or ought the defendant, acting as a reasonably careful master, in the cir-

cumstances of this case, to have made an inspection, and would such inspection have uncovered and cured the defect?

The plaintiff says he tried the plank and was satisfied it was secure; and, as the evidence now stands, it is not shewn why, on an inspection by the defendant, more would probably have been discovered than was ascertained by the plaintiff.

These seem to me to be questions which were not, but which should have been, submitted to the jury for consideration. There was no real dispute as to the condition of the premises. The real issue between the parties to this action was as to whether or not the master had taken reasonable precautions to prevent that condition, and as to whether or not the plaintiff was guilty of contributory negligence. The question of contributory negligence seems to me to have been placed before the jury fully and fairly, but the question as to whether the master did all that should be expected from a reasonably careful and prudent employer of labour to avoid the danger, or to discover the danger and remedy it, was not, I think, in the charge of the learned trial Judge, fully and adequately placed before the jury for their consideration.

For these reasons, I am of the opinion that there should be a new trial, and that it is not necessary for me to discuss the objections taken to the charge of the learned trial Judge on the question of damages. The verdict of $4,000, in the circumstances of the case, appears large, and the damages may have been aggravated by reason of the matters complained of, but I refrain from expressing any opinion thereon.

A question was raised as to whether or not Bond and the plaintiff had both been engaged as farm labourers for the defendant, and were consequently fellow-servants. I do not think that the evidence establishes the exact nature of Bond's employment, so as to enable us to pass upon that question.

Counsel for the defendant did not, at the trial, object to the charge of the learned trial Judge, or request him to direct the jury on the questions raised by the 4th paragraph of the defendant's pleading and in his argument on the appeal. The defendant should not, for that reason, be deprived of the benefit of his plea or of these defences. However, had counsel objected at the trial, or requested the learned trial Judge to instruct the jury on the questions discussed before us, this appeal would probably have

ONT.

S. C.

GOODWIN v. TAYLOR.

Ferguson, J.A.

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

Hodgins, J.A.

been unnecessary; and, for that reason, I think that, while the appellant succeeds, he should not be awarded the costs of the appeal.

I would, for these reasons, allow the appeal without costs, and direct a new trial; costs of the former trial to be costs in the cause.

MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

HODGINS, J.A.:—The appellant employed the respondent to connect the pipe inside the top of the silo on his farm with that from the outside in order to enable the silo to be filled. It is a difficult job to attach these pipes which have to be put together at the top of the silo 35 feet above the ground.

In 1915, a man named Bond was employed by the appellant to fill the silo. He took up a board when he went to connect the pipes, and left it there, not fastened but resting on the top of the wall inside the roof. He was not engaged to put the board there nor to fasten it; in fact it was his own idea, and not within the appellant's instructions nor in his mind. The appellant did not give him the board, was not there when he used it, and did not know how he got it.

The appellant, however, knew of it, and supposed Bond had used it to help him, but never inspected it nor went up to see it, and cannot tell why it was left there.

I see no foundation on these facts for the suggestion that the appellant engaged Bond as an independent contractor, and is therefore not liable for his neglect in not making the plank secure. The reason why a principal escapes liability when he has employed another man is that his duty to take reasonable care to make his premises safe can, and indeed in most instances must, from the nature of the case, be discharged by another, and if that other is selected to do and is competent to do properly the thing that, if the principal did, he could only do in the same way, the law accepts his ability to perform the duty as a sufficient discharge of the principal's obligation. But this immunity is necessarily limited to cases where the principal does actually delegate the performance of the duty to a competent contractor, and cannot be extended to cases where the principal never intended to do nor instructed to be done, nor knew of, the thing that was done, until it was performed.

ONT.

S. C.

GOODWIN v. TAYLOR.

Hodgins, J.A.

Here Bond was to fill the silo, not to make it a safe place for others. The appellant's duty, whatever it was, was not to be performed, nor was it performed, by Bond in taking up a plank as part of his outfit when filling the silo. So that it is quite impossible to put Bond in the position of an independent contractor, when neither he nor his employer intended that he should occupy that position, and where the work he was employed to do was not done in discharge of his principal's duty to make his premises safe, but in pursuance of a totally different task.

Objection was made that the learned trial Judge laid down the law too broadly as to the appellant's liability, and that the jury should have been asked to find whether the appellant knew or ought to have known that his premises were unsafe. But I do not see that the objection is a valid one, where, as here, the appellant never inspected at all, after he knew that the plank was there. The place had been finished under competent supervision and the pipes installed without any plank. A change had therefore occurred in the equipment of the silo, and in a place where dangerous work was necessary, and that threw upon him a clear responsibility, when he employed the respondent, as to the condition of his premises. The jury have found that the appellant was negligent in that he did not have the plank properly secured. He did know of the plank, and he did not inspect, and it proved unsafe; what more is needed? As to the respondent, here the duty of the employer first arose as to the safety of his premises when he employed the respondent. He took no precaution at all, and I can see nothing in dispute to leave to the jury. The appellant took his chances of the premises being safe and cannot complain of the result.

This Court can say whether that finding establishes sufficient negligence to make the appellant liable. If it does not, then he escapes; but, if it does, he is responsbile. The Judicial Committee have laid down the limits of responsibility for plant in these words: "The master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable:" *Toronto Power Co.* v. *Paskwan*, [1915] A.C. 734, 738, 22 D.L.R. 340.

Where a jury put their finger upon the exact thing which a man

ONT.
S. C.
GOODWIN v. TAYLOR.
Hodgins, J.A.

should do, the Court is bound, I think, to decide whether, under the circumstances in evidence as to which no dispute exists, that is negligence in law, and it is not necessary to instruct the jury as to the whole law of negligence as if their verdict were to be a general one.

The taking of reasonable care to provide proper appliances and to maintain them in a proper condition is a duty imposed upon an employer; and, if the answer of the jury, defining what they consider to be negligence, indicates something lying outside of that line of duty, the Court must set aside their answer; but, if their definition of negligence involves disregard of the duty imposed, it would be wrong, I think, to disregard it because the learned trial Judge has failed to discuss with fullness the law of negligence from that particular point of view.

I would, therefore, be disposed to dismiss the appeal, but for one circumstance which, to my mind, worked or may well have worked a hardship on the appellant. After a very careful charge by the learned trial Judge, one of the jurors asked a question in the following words, "Has Mr. Taylor refused to meet the plaintiff?" And a discussion took place in the presence of the jury, the learned trial Judge winding up the discussion by saying that the jury might be quite sure that the case had not come into Court until the other methods had failed. After the retirement of the jury, they returned late at night, and the foreman asked the following question: "Can we be told the situation of the farmer, so far as his financial condition is concerned?" And the learned trial Judge then said: "I don't know whether his solicitor would care to give any information on that point. I can ascertain. You will have an opportunity in the morning. His counsel may be able to get you the information; and, if there is no objection on the part of the counsel for the plaintiff, I will allow the information to be given, but otherwise it really is not evidence."

On the following morning, after discussion between the Court and counsel, but not in the presence of the jury, the learned trial Judge recalled the jury and made the following statement to them: "When the Court had adjourned last night, you asked me a question and I have considered it since. You wanted to know what the means of the defendant were. I have been considering that question, and I have reached the conclusion that the information is not evidence, and the jury must not consider that."

ONT.

S. C.

GOODWIN v. TAYLOR.

Hodgins, J.A.

While what I have just quoted states the law exactly and puts the responsibility on the Court, yet it may not have removed the impression created by what took place the night before.

The broad fact still remains that the jury had asked for the information; and, when it was not furnished, they may well have thought that the defendant was of such means as to prefer not to state his condition, and that if he were a poor man he would gladly let the jury know that fact.

Whether that had any effect on the amount of the verdict I am unable to say, but I cannot rid my mind of the feeling that what occurred in the evening may have been considered as a sort of half promise that they would have the information unless there was an objection from counsel, and have led the jury to think that counsel had objected. This would, if I am correct, put the appellant in a position of prejudice. In nothing should the Court be more careful than in eliminating every element tending to inflate or reduce the damages unless strictly admissible; and the jury, by their early question, indicated a possible dissatisfaction with the appellant which this last episode might aggravate.

Under the circumstances, I think there ought to be a new trial, confined to an assessment of damages; costs of the former trial and of the new trial to be costs in the cause.

Appeal allowed and new trial directed.

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A., and Prendergast, J. December 10, 1918.

CARRIERS (§ II G—114a)—PASSENGER—DERAILMENT OF CARS—CAR DEFECTIVE—NEGLIGENCE—PROOF.

The plaintiff was injured by the derailing of a passenger coach in which he was riding as a passenger on defendants' railway; the cause of the derailment was the breaking of an equalizing bar. The court held that the maxim *res ipsa loquitur* applied and that by proving that the car in which he was riding ran off the track the plaintiff made a *primâ facie* case of negligence and that the duty then devolved upon the defendant to shew that the accident was not due to any fault or carelessness on its part.

As carriers of passengers the defendants' undertaking was to exercise a high degree of care, and to carry safely as far as reasonable care and forethought could attain that end. The verdict of the jury that the negligence of the defendant consisted "in not having proper inspection or testing of equalizing bars, since it has been known of their breaking," was justified on the evidence.

APPEAL by defendant from a judgment of Galt, J., in an action for damages for injuries received by a passenger on defendant's railway. Affirmed.

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Perdue, C.J.M.

A. J. Andrews, K.C., and *L. J. Reycraft*, K.C., for appellant.

D. Campbell, and *H. F. Tench*, for respondent.

PERDUE, C.J.M.:—The present appeal is from the judgment on the second trial of this case. At the first trial the finding of negligence by the jury was based on an error made by an official of the defendant company in answering an interrogatory administered by the plaintiff. The case is fully reported in (1917), 28 Man. L.R. 266, 37 D.L.R. 751. The circumstances in which the accident arose, in so far as they were then disclosed, are fully set out in the report. At the second trial no attempt was made by the plaintiff to prove that the car in which the plaintiff was travelling was derailed some five miles north of Kirkella station. The case was presented to the jury in a completely different aspect. It was not disputed that the cause of the derailment of the car was the breaking of the equalizing bar. After the break occurred the bar fell down, or worked its way down, until the broken end caught on the lower part of the pedestal, the elbow of the bar being brought close to the ground outside the rail. When the train came to the switch of the "Y" at Kirkella the bar caught in the diverging rail and wrenched the truck off the rails on which it was moving, with the result that the car was overturned and the plaintiff was severely injured.

The plaintiff, at the trial, relied upon the maxim *res ipsa loquitur* and did not attempt to prove any specific negligence on the plaintiff's part. I think he was justified in taking this course in the circumstances of the case. The plaintiff was a passenger who had paid his fare and was lawfully travelling in the car. The car was overturned while he was so travelling in it and he received the injury. The burden was cast upon the defendants to prove that they had exercised all the care and skill which the law imposes upon them in the carriage of passengers, or whatever other defence they might have. See 4 Hals. 47; 21 Hals. 439; *Burke* v. *Manchester S. & L. R. Co.* (1870), 22 L.T. 442, applying the principle stated in *Scott* v. *London Docks Co.* (1865), 3 H. & C. 596, 159 E.R. 665.

Carriers of passengers are not insurers of the safety of the persons whom they carry, neither do they warrant the soundness or sufficiency of their vehicles. Their undertaking is to take all due care, and to carry safely as far as reasonable care and forethought can attain that end: 4 Hals. 44.

A number of cases are cited in support of this statement of the law. The duty of a railway company to a passenger whom it

is carrying on its railway is very fully discussed by Montague Smith, J., in giving the judgment of the Exchequer Chamber in the case of *Readhead* v. *Midland R. Co.* (1868), L.R. 4 Q.B. 379, at 393. He says:—

"Due care," however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order.

He goes on to shew that the duty to take care, however widely construed, will not compel the railway company

to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected.

Carriers of passengers are answerable for the soundness and sufficiency of their vehicles in respect of any defect which careful and reasonable examination would reveal: *Christie* v. *Griggs* (1809), 2 Camp. 79; *Hyman* v. *Nye* (1881), 6 Q.B.D. 685, at 687. In the last mentioned case Lindley, J., said:—

A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but, in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against.

Repeated inspection and testing of the wheels and other parts of the car trucks is part of the care and precautions which the railway company is bound to take: *Manser* v. *Eastern Counties R. Co.* (1861), 3 L.T. 585; *Richardson* v. *Great Eastern R. Co.* (1876), 1 C.P.D. 342. But where a break is not due to negligence in manufacture, but is caused by a latent defect which could not have been discovered by any ordinary and reasonable test, and there is no other negligence on the part of the railway company, the company is not liable: *Readhead* v. *Midland R. Co.*, *supra*.

The equalizing bar, the breaking of which was the primary cause of the derailing and overturning of the car, is a bar of steel 8 ft. 7½ inches in length, 6 by 2 inches at its largest part and somewhat smaller at the ends. Towards each end the bar is bent at an angle to the central part so as to form an "elbow" and the ends are again bent outward parallel to the central part so that each end may rest in a slot upon the tops of the journal box. The bar is not fastened to the truck but is kept in place by the sides of the pedestal. The form and size of the equalizing bar and the

MAN.

C. A.

PYNE
v.
CANADIAN PACIFIC R. CO.

Perdue, C.J.M.

manner in which it is placed in the truck are shewn by the models and drawings put in evidence. The whole weight of the body of the car and its contents rests upon the four equalizing bars, there being two on each truck. Much evidence was put in to shew that these bars were constructed with great care and skill and of the best quality of steel for the purpose. The bar was designed so as, theoretically, to withstand a strain ten times that to which it would ordinarily be subjected. The expert called by the plaintiff gave the margin of safety, according to the specifications, at six times the ordinary load.

I was much impressed with Mr. Andrews' argument that the defendants had fulfilled the onus of shewing that they had exercised due care and skill in the making of the bar in question. But still the fact remains that the bar broke. It broke while the train was travelling at a moderate speed over a straight, well-kept piece of railway, where there was nothing shewn which could cause any unusual jolt or strain. The evidence is that the break was fresh and clean and *that there was no latent defect* where the break occurred. What then caused it to break? It is said that the weather was very cold at the time and that intense cold might reduce by some forty per cent. the strength of the bar to withstand a sudden shock. But if it was constructed in accordance with the specifications there still would be an ample margin of safety. The cold alone could not have caused the break. The natural inference is the bar was not strong enough for the purpose to which it was put, taking into account the fact that it was intended to be used in a place where intense cold would often occur. There were several facts which must have impressed the jury. Three or four equalizing bars similar to the one in question had already broken. The bar which was responsible for the accident had not been subjected to any test before it was put into use in the first place and it had not been tested afterwards, although at the time of the break it had been in use for four years. The broken bar was not produced. It had been sent to Winnipeg by the defendant's officials for inspection and had been "scrapped." It was destroyed before the first trial took place. Without intending to reflect upon anyone, the loss of the bar was unfortunate. The bar itself would have been a most important piece of evidence. It is not, perhaps, too much to say that it would have been the best witness in the case

upon several points in dispute. The evidence of defendant's witnesses left in doubt the exact nature of the break, whether it was straight across the bar or in an oblique direction, also the exact spot in the bar where the break occurred. These matters became of great importance in arriving at a conclusion as to what caused the break, as to where on the journey the break occurred, and whether after the break it would catch on the ledge on the side of the journal box and remain for some time in that position before falling low enough to interfere with the rail. It was the duty of the defendants to have produced the bar and have cleared up these points.

On the day prior to the accident the train to which this car was attached was stalled in a snowdrift. A message was sent to Virden and a powerful freight engine was despatched to its assistance. This engine attempted to push the train through the snowbank and failed. It then drew the train back a short distance and starting forward again with the necessary impetus it pushed the train through the snowbank and assisted it to the next station. The car in question was at the rear end of the train and the bar in question was in the rear truck of that car. It was strongly urged by plaintiffs, and, no doubt, the jury was asked to infer, that the bar was either broken or injured while the train was being pushed through the snowbank. It was stated by several of defendants' witnesses, claiming expert knowledge, that this was impossible, because the bar rests loosely on the journal boxes and no pressure or strain would be communicated to it by the pushing of the engine. But it is urged by plaintiff that with the snow under and around the truck and upon the rail and the tremendous pressure behind, the wheels of the truck may have been momentarily lifted slightly from the rails and allowed to come down again suddenly. The weight of the car and its contents, about 48 tons, would, as the wheels again struck the rails, cause a heavy blow to be communicated to the ends of the equalizing bars through the wheels and journal boxes on which these ends rested. Mr. Sullivan, the chief engineer of defendants' western lines, who gave expert evidence, after referring to the effect of a shock to the wheel by hitting a pebble or something similar, said: "I am speaking of a shock that may have caused that break, and that is a shock that would come first to the wheel, a sudden raising or drop of the wheel."

MAN.

C. A.

PYNE
v.
CANADIAN PACIFIC R. CO.

Perdue, C.J.M.

There is evidence to shew that if the bar broke obliquely at the point where it did break the end would catch on the first ledge of the journal box about 8 inches lower down. In this position the elbow would not catch on the rail. But it is argued, if the end of the bar became disengaged from the first ledge by the oscillation of the train, it would fall down to the web of the pedestal, the elbow would then sink 3 or 4 inches more and be low enough to catch on the rail at a switch. If the broken bar was resting on the first ledge, the condition of the bar could have been readily detected by a visual inspection conducted with any reasonable degree of care. This is shewn by the evidence of Mr. Page, one of the defendants' car inspectors. The evidence, I think, justified the jury in finding that there had not been proper inspection of the bar, especially after the train had been pushed through the snowbank.

Several questions were left to the jury. The answer to question No. 1 states that the plaintiff's injury was caused by the negligence of the defendants. If the matter had rested there I do not think that this court could have interfered with the verdict: see *Newberry* v. *Bristol Tramways Co.* (1912), 107 L.T. 801, pp. 803, 804. The answer to question No. 2 states the negligence as "in not having proper inspection or testing of equalizing bars since it has been known of their breaking"; then follows a suggestion as to a safety guard to prevent the bar from falling. Q. 4 was as follows: "To what cause or causes do you ascribe the breaking of the bar?" Now this question may deal with the question of negligence, inasmuch as the cause or causes may have been such as might have been foreseen and guarded against by the defendants. The answer to this question was: "The shock given the bar when the powerful engine was attached in the snowbank the previous day, and the inadequacy of the bar to withstand such shock."

The answer to No. 2 finds in effect that the defendants, knowing that similar equalizing bars had already broken, should have given them proper inspection or testing when putting them in use and should keep them inspected while in use, and that the defendants had failed to do so. With this answer must be read the answer to question No. 4 which deals with the cause of the accident and may also affect the question of negligence. The answer to No. 4 states that the bar was inadequate to withstand the shock to which it was subjected in the snowbank on the previous day.

It is argued for the defendants that the answer to No. 2 excludes all other negligence. But the answer to No. 4 is not inconsistent with the answer to No. 2. The first implies that proper inspection or testing would have disclosed the injury to, or the inadequacy in, the equalizing bar, and finds that the failure to provide such inspection or testing was negligence. The answer to No. 4 shews that the bar was inadequate to withstand the shock it received on the day before the accident, a condition that proper inspection or proper testing would have disclosed.

I think that there was sufficient to warrant the findings made by the jury. It is urged for the defendants that the breaking of the bar was due to some obscure cause, that it was a mere accident and that no negligence was disclosed by the evidence. But much of the suggested obscurity would have been obviated by the production of the bar itself. For the failure to preserve and produce the bar the defendants must assume the responsibility. The bar would have shewn the condition in which it was; whether it had, or had not, been weakened by wear; where exactly in the bar the break occurred; what was the nature of the break—straight across, or in an oblique direction. I think the jury was justified in drawing inferences favourable to the plaintiff's contention.

Cases were cited in which railway companies were held not liable for an accident caused by the breaking of a rail under ordinary traffic in exceedingly cold weather, where it was shewn that the rail was of the best quality, that it had been tested before being laid and had been regularly inspected thereafter. See *C.P.R.* v. *Chalifoux* (1888), 22 Can. S.C.R. 721; *Ferguson* v. *C.P.R.* (1908), 12 O.W.R. 943. But it seems to me that there is a great difference between the degree of care that is possible, and is demanded, in regard to the inspection of the wheels, trucks and other portions of the running parts of a car, and that which can reasonably be given to the rails, ties and other parts of the railroad over which the car travels. It would be impossible to give the railroad the same careful and minute inspection as may easily be given to the car.

Although the cause of the breaking of the equalizing bar is not clear from the evidence, the jury might, on the facts that were available and were laid before them, infer whether it arose from the negligence of the defendants or not. See *McArthur* v. *Dominion*

MAN.

C. A.

PYNE
v.
CANADIAN PACIFIC R. CO.

Cameron, J.A.

Cartridge Co., [1905] A.C. 72; *G.T.R. Co.* v. *Hainer* (1905), 36 Can. S.C.R. 180.

I think the appeal should be dismissed with costs.

CAMERON, J.A.:—This is an action brought by the plaintiff to recover damages for serious injuries sustained by him on January 25, 1916, near the village of Kirkella, while a passenger on the defendant's train proceeding from the village of McAuley to the City of Brandon, when, owing to the negligence of the defendant (as alleged) the coach in which the plaintiff was riding ran off the track, and down an embankment and was overturned. The statement of claim was issued December 2, 1916.

The statement of defence, filed December 14, contained only general and specific denials of the allegations in the statement of claim and the allegation in para. 5 that the accident was caused by latent and undiscoverable defect unknown to the defendant. Subsequently, and after notice of trial, by order the following amendment was made to the statement of defence, and this was presented as the real defence at the trial and was urged as such on the argument before us.

5a. In the alternative to par. 5 hereof the defendant says that if the said coach did run off the said track and down an embankment, and if the plaintiff was injured, the said coach left the said track and ran down said embankment and the plaintiff was injured owing to the breaking of an equalizing bar on the said coach, as a result of atmospheric conditions or of some other cause or causes which could not be foreseen and against which no care or skill on the part of the defendant or its servants and employees could provide and the defendant is not liable.

The action was first tried before Prendergast, J., and a jury at Brandon in April, 1917. The trial judge then submitted certain questions to the jury and on the jury's answers to these questions entered a judgment for the plaintiff for $4,500.

An appeal was taken from this judgment to this court, which was argued in October, 1917, and decided November 12. Owing to facts connected with the evidence for the defence submitted at the trial, a new trial was ordered on the terms and for the reasons which are set out in the report of the case in 37 D.L.R. 751, 28 Man. L.R. 266.

The action accordingly came on for trial a second time before Galt, J., and a jury at Winnipeg on February 18, 1918, and succeeding days.

The plaintiff's case consisted of the simple narration of the

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Cameron, J.A.

plaintiff concerning his occupation and physical condition prior to the accident, the events leading up to and the incidents connected with the accident and of the professional evidence relating to the injuries suffered by him. Counsel for the defendant then called witnesses in support of the defence set up in para. 5a above.

At the conclusion of the evidence, counsel for the defendant moved for a nonsuit or for a verdict for the defendant. He said:—

The law, as I understand it, is, as I stated at the opening of the case, an accident has happened and a passenger has been injured. Because he was injured in the defendant's coach when a passenger, and because such accident did not happen in the ordinary course of affairs, an obligation is cast upon the defendant to explain that accident and the burden of proof of how that accident happened, or at least, to prove that we have taken proper care, is upon the defendant.

The reason put forward for the nonsuit was that the burden of proof had been answered and that the defendant had taken all the care required by law. This motion was refused and the learned trial judge placed the case before the jury, submitting to them the questions which, with their answers thereto, are as follows:—

(1) Q. Was the plaintiff's injury caused by the negligence of the defendants? A. Yes.

(2) Q. If your answer is "Yes," in what respect or respects were the defendants negligent? A. In not having proper inspection or testing of equalizing bars, since it has been known of their breaking, and would suggest some safety guard to prevent falling of said bar.

(3) Q. At or near what point on the defendants' lines did the equalizing bar break? A. From the evidence we cannot say.

(4) Q. To what cause or causes do you ascribe the breaking of the bar? A. The shock given the bar when the powerful engine was attached in the snow-bank the previous day, and the inadequacy of the bar to withstand such shock.

(5) Q. What damages do you assess to the plaintiff in case the Court holds that on your previous answers the plaintiff is entitled to damages? A. $4,500 (four thousand, five hundred dollars).

On these questions the trial judge entered judgment for the plaintiff. Against this judgment the defendant company appeals.

The statement made at the trial by counsel for the defendant as above quoted, was reiterated by him on the argument before us, and his contention was that the evidence produced for the defence had fully established that the defendant had complied with all the requirements of the law. The real cause of the accident, he urged, was the extremely cold weather at the time, which affected the strength of the equalizing bar and for which the defendant was

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Cameron, J.A.

not responsible. The structure and functions of the equalizing bar, the breaking of which caused the derailment, were fully explained and discussed and appear clearly from the models and exhibits filed.

The maxim *res ipsa loquitur* is peculiar to the law of negligence, and to no case could that doctrine or maxim be more applicable than to one such as that before us.

> The most frequent application of the doctrine, as stated, is to passenger cases because the passenger of necessity passively submits himself to be acted upon by forces exclusively under the carrier's control. Shearman & Redfield, Negligence, 6th ed., s. 58 *b*.

The legal import of the maxim *res ipsa loquitur* was set forth by the Court of Exchequer Chamber in *Scott* v. *London Dock Co.*, 3 H. & C. 601 (where the only evidence was that of the plaintiff), in a frequently quoted passage:—

> 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 defendants, that the accident arose from want of care.

In *Kearney* v. *London & Brighton R. Co.* (1870), L.R. 5 Q.B. 411, in Ex. Ch. (1871), L.R. 6 Q.B. 759, the facts were that as plaintiff was passing under a railway bridge a brick fell from the perpendicular wall on which one of the girders rested and injured him. The defence called no evidence, and the jury found for the plaintiff. The judgment of the Court of Queen's Bench (Cockburn, C.J., and Lush, J.; Hannen, J., dissenting) upheld the verdict of the jury. This judgment was affirmed in Exchequer Chamber by Kelly, C.B. (with whom six judges concurred), who held there was sufficient evidence of negligence to support the finding of the jury.

These two cases are frequently cited in the text-books and decisions and unquestionably state the law.

Another case much cited in the text-books and decisions is *Readhead* v. *Midland R. Co.*, L.R. 4 Q.B. 379, where it was held by the Court of Exchequer Chamber that the contract made by a general carrier of passengers for hire with a passenger is not a contract of warranty, by way of insurance, but a contract "to take due care (including in that term the use of skill and foresight) to carry a passenger safely," *per* Montague Smith, J., at p. 393. The defendant was accordingly held not liable for an accident

arising from a latent defect in the machinery which it was obliged to use, which no human skill or care could either have prevented or detected.

See 21 Hals. 439, 440; 4 Hals. 47.

In *Dawson* v. *Manchester R. Co.* (1862), 5 L.T. 682, a derailment case, no witnesses were called for the defence and the jury gave a verdict for the plaintiff. Pollock, C.B., said:—

We have held where an accident happens, as in this case, to a passenger in a carriage on a line of railway, either by the carriage breaking down or running off the rails, that that is *primâ facie* evidence for the jury of negligence on the part of the railway company.

Lord Halsbury said in *Smith* v. *Baker*, [1891] A.C. 325, at p. 335:—

And I think the unexplained and unaccounted for fact that the stone was being lifted over a workman, and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation.

This doctrine of *res ipsa loquitur* is applicable only where the thing shewn speaks of the negligence of the defendant; and, where it is further made to appear that the injury was caused by something which, at the time it occurred, was in the care, custody, or under the control of the carrier, . . . and the circumstances attending the injury were so unusual and of such a nature that the accident could not well have happened without the defendant being negligent, as where the happening of the accident appears to have been due to defective roadbed, track, machinery, or appliances, or fault in the operation of the conveyance, it makes out a *primâ facie* case in favour of the plaintiff and throws on the carrier the burden of adducing evidence to shew its freedom from negligence, that is, from any want of the exercise of the high degree of care, skill, and foresight required of carriers of passengers in the prosecution of their business with respect to the defect or fault which caused the accident. Corpus Juris, X., p. 1025.

So also:—

A presumption of negligence in regard to the condition of the track, roadbed, or machinery, or in regard to the operation of the train, arises where injuries are shewn to have been received by a passenger in a derailment accident, and places on defendant the burden of accounting for the derailment and shewing that it was without negligence on the part of its employees or that the accident could not have been prevented by the exercise of the highest degree of care compatible with the prosecution of its business *Ib.* pp. 1034-5.

The subject was considered in *Newberry* v. *Bristol Tramways*, 107 L.T. 801, where a passenger on the top of a tramcar was injured by the falling of the trolley arm. The defendant called expert evidence to shew that the apparatus was of the best and most widely approved pattern known; that it was properly constructed and in perfect working order and used without negligence.

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Cameron, J.A.

Channell, J., who tried the case, after the jury had brought in a general verdict for the plaintiff, asked them what the negligence was. The foreman stated the company did not take sufficient precautions against a danger that they must have foreseen, but professed themselves unable to state what precaution should have been taken. The defendant appealed and the appeal was allowed.

Cozens-Hardy, M.R., said that the court could not have interfered if the jury had simply given a general verdict. But he thought the verdict of the jury discharged the defendant from its burden. He held, as I understand his judgment, that the defendant had shewn it had adopted the best known apparatus, kept in perfect order and worked without negligence and was therefore not responsible for the consequences of a "rare and obscure accident." Hamilton, L.J., p. 804, took the same view of the defendant's evidence and its effect.

> Their evidence has successfully discharged the burthen of proof cast on them by the occurrence of such an accident in itself, and has shifted it to the plaintiff, and the plaintiff, who gave no rebutting or contradictory evidence, has failed to prove or to approach proof of anything beyond. P. 854.

But Farwell, L.J., pp. 803 and 804, took another view. He calls attention to an admission made by the defendant's chief engineer, that "He had never considered any means of catching the pole," and says: "The truth appears to be that the accident is so rare that the defendants have not troubled to try and guard against it: they have taken the chance"; and holds the jury were entitled to give the verdict they did. He cites the judgment in *Readhead* v. *Midland*, and Lindley, J.'s phrase in *Hyman* v. *Nye*, 6 Q.B.D. 685, at 687:—

> Although not an insurer against all defects, he (the carrier) is an insurer against all defects which care and skill can guard against,

and goes on to state that

> The real issue is whether the defendants have proved affirmatively that they have done everything that skill and care can provide; not whether the plaintiff has himself proved some specific act of omission, if the evidence given by the defendants permit of the finding that everything possible has not been done.

In a recent Irish case of *Coughlan* v. *Monks*, [1918] 2 I.R. 306, the Irish Court of Appeal applied and followed the *Scott* and *Kearney* cases and similar decisions in the Irish courts, holding that where an accident results from the defective condition of

plant, the burden of disproving negligence lies on the person responsible for the defect.

I also refer to *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, where a jury having found that an explosion occurred through the negligence of the defendant company to supply suitable machinery and to take proper precautions, and that the plaintiff was guilty of no negligence, a judgment of the Supreme Court setting aside a verdict for the plaintiff was, on the ground that there was no exact proof of the fault which certainly caused the injury, was reversed. Proof to that effect may be required in particular cases: it is not so where the accident is the work of a moment and its origin incapable of detection. This was a master and servant case, but the underlying principle of the decision makes it, I would say, applicable here.

The statement of Farwell, L.J., above quoted (which merely restates the law) appeals to me as being peculiarly applicable in a derailment case. In the nature of things the knowledge of the defect must be that of the carrier and not that of the passenger. The evidence of the facts in the case lies peculiarly within the knowledge of the carrier. The plaintiff knows nothing of them and has to submit to his surroundings. Moreover, the carrier has failed to perform its contract and the burden is on it to shew an excuse for such failure.

Numerous authorities were cited to us in addition to those I have mentioned. I have examined them, but cannot attempt to discuss them at length. In a decision relied on by counsel for the defendant, *Omaha St. R. Co.* v. *Boesen* (1905), 105 N.W.R. 303, there are to be found expressions of opinion which, in my opinion, are not in accord with our jurisprudence. In *Gaiser* v. *Niagara, St. Catharines & Toronto R. Co.* (1909), 19 O.L.R. 31, it was held by the Chancery Divisional Court that the defendant had failed adequately to discharge its duty of examining thoroughly and skilfully the equipment furnished for an occasion and was liable. The remarks of Boyd, C., at p. 33, on the subject of testing equipment, are searching and instructive. In *Toronto R. Co.* v. *Fleming* (1913), 12 D.L.R. 249, 47 Can. S.C.R. 612, the question of inspection of equipment is discussed by Idington, J., at pp. 613-614; by Duff, J., at p. 616, and Anglin, J., at p. 619. It was held by the majority of the court that the evidence justified the jury in finding

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Cameron, J.A.

the controller there in question had not been properly inspected. These two decisions state with clearness and precision the duties imposed on carriers of passengers with respect to testing and inspecting their equipment, and are of great importance in the determination of the issues before us upon the facts as disclosed by the evidence.

We now come to the questions submitted to the jury and their answers thereto.

In the first place, I consider questions 3 and 4 and the answers to them deal with matters not relevant to the issues, though the answer to q. 4 reveals the judgment of the jury on the question of the adequacy or inadequacy of the bar. Neither the breaking of the bar nor the shock alleged to have been given to it is stated by the jury to be the negligence responsible for the accident or to be negligence at all.

In the affirmative answer to q. 1, we have the finding of the jury that the injury to the plaintiff was caused by the defendant's negligence. Then comes the second question, with the answer as set out above. I take the answer to mean that as it had been known to the company that some equalizing bars had been broken, there should have been such inspection or testing by the company as would have provided against its having defective or inadequate equalizing bars in service, and that such inspection or testing had not been properly made.

In reviewing the evidence, counsel for the defendant first dealt with the vital subject of broken equalizing bars. Paul Roy, the workman in the Angus shops, who makes all the equalizing bars for the company, testifies that this was the only case of a broken bar that he knew of (p. 239). Bowen, the defendant's mechanical engineer, said the company had some equalizing bars broken. "I know in the last 3 or 4 years we had 3 or 4 break" (p. 293). Main, works-manager of the C.P.R. shops in Winnipeg, never heard of any broken bar but this one (p. 402), but he had "seen an equalizing bar broken off, that is bent up" (p. 377). Maharg, divisional superintendent at Brandon, did not remember having seen a broken bar, but had heard of them "very occasionally, though." Mitchell, the foreman of the truck work in the coach shop, had seen one broken bar of the class of this one in question. He did not know of one occasioning a wreck (p. 549). Page, car

inspector, had seen 2 broken bars on trains brought in (p. 588). It is suggested that there may be repetition in these enumerations by the witnesses. But it is reasonable to infer that at least some 5 or 6 bars had been broken in the district tributary to Brandon.

Now this particular bar, an all-important factor in the history of this transaction and the object of much and contradictory evidence, is unfortunately not forthcoming. Washburn says the last he saw of it was on Mr. Maharg's private car and he understood it was sent to the general superintendent in Winnipeg for inspection. Had it been kept for evidential purposes, as it ought to have been, much of the evidence that occupied the time of the court would have been rendered unnecessary.

The attention of the court was next directed by counsel for the appellant to the construction of this bar and its inspection.

Palmer, the foreman blacksmith of the Angus shops, gives the facts concerning peculiar steel used in these bars and the method of making them. He says any flaw in the steel would be detected once the billet gets to the hammer. Afterwards, when it went to the forge-man, Paul Roy, he would detect it, and a great deal of reliance was placed on this forging as a test. The method in use in the Angus shops he considers just as good as if not better than some of the other car-shops, p. 225. Paul Roy, for 18 years defendant's foreman on this job, says that in the process of forging, he would detect any defects.

Bowen says the bar on the blue print shewn him (not so strong as one of the size of the bar in question would be) would be capable of standing ten times the strain on it. Moodie, district engineer of the Canadian Northern Railway, considers the bar of a standard type, common on all standard passenger coaches. Main considers the bar sufficiently well designed, though he has designed none himself. Maharg considers it (the bar represented by the replica in court) a standard bar which has proved satisfactory. Dr. Frank Allen, Professor of Physics in Manitoba University, considers the specification for steel in the bar a fair one. Mr. Sullivan, chief engineer of the defendant company, also considers the specification for steel sufficient and that the bar itself was efficient for its purpose (p. 485). Washburn, train-master, considers the bar properly designed, and that it is a standard design (pp. 529, 530).

Attention was next directed by counsel to the subject of inspec-

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Cameron, J.A.

tion. The car in question was inspected at Brandon the night and morning before it was sent out; at Neudorf on the way to Regina, and on the night before and morning before its departure at Regina. It was stated that at every watering place the car was inspected by the crew. Mitchell says the car was overhauled in the shops Nov. 15, 1915, not long before the accident. Maharg describes the system of inspection in use. The inspection of the equalizing bars is visual only. Sullivan says tapping a bar would not disclose a fracture. Washburn further describes the system of inspection.

No question is raised as to the inspection at Brandon. As to the inspection at Neudorf, Sutherland, car inspector there, says he inspected the car in question and its truck and draught rigging. The truck includes the trucks, the equalizing bars and axle axes. It appeared on cross-examination that the train remained at Neudorf five minutes during which the steam hose is uncoupled and the air hose broken while the engine is uncoupled, and then the inspector goes around the train while another engine is being brought. So that it is in less than five minutes that the eight wheels under each of the four cars were examined and tapped. Sutherland was asked if he ever tapped an equalizing bar and answered "no, not necessarily." Not only had he the wheels to tap but had to look at the truck beams and the truck shoes on the wheels and the airbrake cylinders as well as the draught rigging (pp. 593-4). Taylor, the car foreman at Regina, gives an account of the inspection there with which he had nothing to do personally, as it was done by two car inspectors who subsequently enlisted and were killed at the front.

As to the inspection by the train crew at each watering point, Osborn, the trainman, with Waddell the conductor (who is now dead) says he went completely around the train at Rocanville. On cross-examination he describes the inspection at Rocanville where the train stops three or four minutes for water. He simply got off one side of the car, with his lantern, and walked around the train. The evidence of Waddell given at the former trial was read at this trial. He describes his duties at the inspection points, but is without special recollection of the day and train in question.

Maharg is of the opinion that no tapping on the bar would disclose any defect. So also thinks Sullivan.

There was a good deal of evidence and discussion as to what would happen to the equalizing bar if it broke as it did. Maharg holds that the bar would drop when the weight fell on it and fall out. Moodie and Main are of this opinion also. But of course it is evident from models before us that a great deal must depend upon the nature of the break, whether it is vertical or diagonal. Sutherland, who was on the scene shortly after the wreck, says the bar, when they lifted the truck back to the track, "was lying down on the tie with the broken end point up against the rail inside the pedestal" (p. 442), and the pedestal was intact (p. 455). All these points raise considerations which no doubt were in the minds of the jury.

In conclusion counsel for the defendant rested the defence upon the ground that the accident was due to the action of the extremely cold weather upon the steel bar. The evidence on this point was examined and discussed at length. The weather was at the time of the accident and had been for some time previously thereto extremely cold. But there was not at the time any sudden change of temperature. Clearly a low temperature without an impact could not cause a break. All this, too, was no doubt duly considered by the jury who rejected any such contention.

It was argued for the plaintiff that the findings of the jury clearly indicate that the jury were satisfied that the defendant had not discharged the onus placed on it.

It was pointed out that there was no test of the bar when it was made. Bowen says so expressly (p. 256). Fullington, a qualified civil engineer, says it would be an easy matter to weight the bar down and see what weight it would resist (p. 576). And forging does not increase its resisting power (p. 578). Roberts, a witness for the plaintiff, called in rebuttal, a consulting engineer of wide experience on various railway systems and elsewhere, gives it as his opinion that a test could conveniently be applied to an equalizing bar by having it weighted and then shocked and so test its resistance. Similar tests are applied to other parts of railway equipment (p. 669).

There was evidence that this break was visible. Page says so at p. 587. The difference between the model before the court and a real car is stated by Sullivan at p. 508. In answer to His Lordship's question "Could you see any better on a real car?" (than in

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Cameron, J.A.

the case of the model), the answer was "On a real car you could see through."

It is argued that there is no evidence the bar was sufficient for the purposes for which it was intended. Bowen's evidence is really theoretical and hypothetical, based on the specifications which he says were probably drawn from those of the Association of Master Mechanics (p. 252).

It is also pointed out that there is no witness for the defence who states positively that the bar had enough steel.

It is further argued that the broken bars in and about Brandon, already referred to, were notice to the defendant that the specifications for them were wrong, that those in use should be tested, and that the company should have safeguarded itself and the public against the possible inadequacy of those in use.

In view of the nature of the break in the bar, which was clear cut, no question of latent defect arises.

I have come to the conclusion that there is evidence to support the second finding of the jury. Whatever may be the theories as to the resisting qualities of the bar, the fact remains that, while its life is said to be indefinite, it did break and it broke on a track that was level and unquestionably in good condition. There was no attempt to account for the accident except by Mr. Sullivan, who suggested the possibility of a pebble on the track. The theory of the defence as to the effect of the weather upon the steel bar cannot be accepted in view of the evidence and of common knowledge. In any event it was before the jury and rejected. And there is no question as to some equalizing bars having been broken on the Brandon division. This fact alone indicated an inadequacy for the purpose for which it was intended in the structure or design of the bar. That the jury find that the bar was inadequate is to be inferred from their second answer and is more directly stated in the fourth, and it is impossible to say there was no evidence to support their opinion. The facts as to these broken bars were within the defendant's knowledge and should have invited action to safeguard against accidents by such methods of testing or inspection as might be sufficient. There seems to be no reason on the evidence why the bar could not be strengthened. Sullivan says it could be increased if there was any need for it (p. 500).

Now as to the inspection and testing. It seems to me quite

within the province of the jury to hold that the inspections at Regina, Neudorf and Rocanville were inadequate. It is idle to argue that the jury were bound to accept the testimony which was put forward by the defendant as conclusive in its favor on those matters. It is not so and anyone who reads this evidence can see clearly that there are gaps in it that were not filled and that the jury were at perfect liberty to find as they did.

It is clear that there was no test of the bar at the time it was manufactured. Had it been purchased from a dealer, this would have been necessary. There was evidence that it would not be a very difficult matter to arrange a test at any time by weighting and shock. This the jury were within their right in accepting, if they wished to do so.

It is necessary that the defendant should have a bar capable of meeting all the strains, stresses and impacts that may be looked for in the ordinary operation of a railroad in this country. Yet this bar, under circumstances that cannot be called extraordinary, did not meet those requirements. There had been bars broken previously, yet the defendant did not go to the trouble of employing some means to guard against a recurrence of these dangerous fractures, either by making a closer inspection of the bars in service or by taking them out to be tested or otherwise.

Whether the bar broke vertically or obliquely, the fact is, it did fall. The jury, no doubt, concluded the fracture was oblique and had ample evidence to support that view. The jury also concluded that the bar was broken some time before the broken piece left the pedestal five miles from the derailment, and there is evidence for that opinion. The train was running on a good track and the broken piece may have easily remained practically unmoved until shaken out by vibration.

The train was firmly imbedded in a snowdrift the day before the accident and when the Mogul engine pushed against the last car the effect of the packed-in snow may have been to raise up the end of the car and when the push relaxed the wheels may have struck the rails with such force as to produce a shock from the impact of the car communicated to the bar and sufficient to fracture it. There is, in point of fact, nothing else seriously suggested that was out of the ordinary in the history of this train from the time it left Regina up to the falling out of the broken piece

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Cameron, J.A.

that could have produced a shock of any consequence on this bar of steel.

Upon my best consideration of the facts as shewn in the evidence and of the authorities applicable thereto, I am of opinion that the judgment entered by the trial judge on the findings of the jury should not be disturbed. The burden was positively on the defendant to satisfy the jury that it had exercised all vigilance to see that whatever was required for the safe conveyance of its passengers was in fit and proper order, and evidently the jury did not think it had. More than that, they expressly found the defendant negligent and gave particulars of negligence which have, in my judgment, support in the evidence. The defendant knew that instances of broken bars had occurred but these instances were not numerous and, though they might have had serious results, it did not apparently consider it worth while to try to guard against their recurrence and took the chances accordingly. Even if the third and fourth questions with their answers are struck out as irrelevant, as I think they might be, the verdict should not be interfered with.

Haggart, J.A.

HAGGART, J.A.:—I would not interfere with the disposition of the case made by the trial judge and jury. I cannot find it was not open to the jury to find negligence either by direct proof or by inference. Such is my reading of the questions, taken all together, and the answers given to them by the jury.

The functions of the jury are very wide. In 21 Hals., at p. 441, the text-writer, in digesting the law and discussing this question, says:—

> In cases where the subject matter of the action is negligence, the principle to be applied, in order to define the respective functions of the judge and jury, is that it is the province of the judge to decide whether or not there is evidence on which the jury can reasonably find negligence, either by direct proof or by inference, and the province of the jury to say whether or not negligence is in fact established or ought to be inferred.

And the same author, in discussing the questions of the burden of proof and the principle of *res ipsa loquitur*, on p. 435, says:—

> The burden of proof in an action for damages for negligence rests primarily upon the plaintiff, who, in order to maintain the action, must shew that he was injured by an act or omission for which the defendant is in law responsible.

And at p. 436, he proceeds:—

> If, however, he proves injury due to facts which can only be reasonably explained by attributing negligence to the defendant, or which point *primâ facie* to negligence on the latter's part, the burden of proof is shifted, and it is

then for the defendant to shew that he has taken all reasonable precautions in order to avoid liability for the act complained of,

and again, at p. 439:—

An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence. To these cases the maxim *res ipsa loquitur* applies. Where, therefore, there is a duty upon the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance upon the defendant to disprove his liability.

The following are authorities for the foregoing propositions: *Burke* v. *Manchester etc., R. Co.*, 22 L.T. 442; *Chapronière* v. *Mason* (1905), 21 T.L.R. 633; and

In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate.

An instructive case, and one that is very frequently cited along these lines, is *Scott* v. *London, etc., Docks Co.*, 3 H. & C. 594, at 601, 159 E.R. 665, at 667. There it was held, in the Exchequer Chamber, that in an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the judge in leaving the case to the jury. 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.

This was an action against a dock company for injury to the plaintiff by the alleged negligence of the defendant. The plaintiff proved that he was an officer of the Customs, and in the discharge of his duty he was passing in front of a warehouse on the dock when six bags of sugar fell upon him. It was held there was reasonable evidence of negligence to be left to the jury, and Erle, C.J., who delivered the judgment of the court, in his reasons says:—

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

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

Haggart, J.A.

those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

We all assent to the principles laid down in the cases cited for the defendants; but the judgment turns on the construction to be put on the judge's notes. As my brother Mellor and myself read them we cannot find that reasonable evidence of negligence which has been apparent to the rest of the court.

The judgment of the court below must be affirmed, and the case must go down to a new trial, when the effect of the evidence will in all probability be more correctly ascertained.

Another case which was cited to us is that of *Thatcher* v. *Great Western R. Co.* (1855), 4 U.C.C.P. 543. The plaintiff was a passenger in one of the defendants' cars, the axle of the tender broke, and the tender and car in which plaintiff was were thrown off the track, whereby plaintiff's arm was broken. At the trial, the defendants called the engineer of the train, who proved that he examined the axle shortly before the accident, when it appeared in good order. The jury having found a verdict for plaintiff upon this evidence, and with a charge favourable to defendants, the court refused to set it aside, on the ground that it was for the jury, on the evidence, to determine whether there was negligence on the part of defendants or not.

Macaulay, C.J., in giving the judgment of the court, says:—

The accident having happened unaccountably and without any proximate or active cause to account for it, constituting as the cases say some evidence of negligence, it rested with the defendants to explain and reconcile it with perfect innocence on their parts, and having failed to do this to the satisfaction of the jury, I do not see sufficient ground for sending the case to a second trial when the same evidence and no more might be again submitted to another jury. If a jury must decide on this evidence, I cannot say there is not evidence for their consideration; I think it was for them to decide on the evidence, and do not see any reason for disturbing their decision. That the axle broke without any sudden cause or emergency that we see, and that the plaintiff was seriously injured in consequence, are undisputed facts; and the jury have come to the conclusion that the evidence did not exonerate the defendants from blame. The rule will therefore be discharged.

I think the two foregoing cases are very much in point. The jury discharged their functions and no more. I do not think that this court would be justified in setting aside the verdict. I would dismiss the appeal.

Fullerton, J.A.

FULLERTON, J.A.:—The plaintiff made a *primâ facie* case of negligence against the defendant by proving that the car, in which he was riding as a passenger, ran off the track and as a result he was injured.

Thereupon, the duty devolved on the defendant to shew that the accident was not due to any fault or carelessness on its part.

The authorities shew that while a carrier of passengers is not an insurer he is nevertheless bound to exercise a very high degree of care and skill to ensure the safety of passengers: *Newberry* v. *Bristol*, 107 L.T., at p. 801; *Hyman* v. *Nye*, 6 Q.B.D. 685; *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501.

On the argument, it was admitted that the cause of the derailment was the breaking of an equalizing bar which dropped down and caught in a switch.

The defendants called a number of witnesses who established pretty clearly that the bar in question was made of good steel, theoretically well constructed and able to carry a load considerably greater than the weight of the car. The witnesses also say it was a standard type of equalizing bar in use on all railway standard passenger coaches.

Palmer, a foreman blacksmith, under whose supervision the bar was made, and Roy, the blacksmith who actually made the bar, were called and both testified that any defect or flaw in the steel would be detected during the process of forging and that no defective bar would be allowed to pass.

The evidence also shewed that the break was a "clean, fresh break."

The question of any flaw in the steel can, therefore, be eliminated.

A piece of the equalizing bar and the springs were found at a point about 5½ miles from the scene of the accident, and Maharg, the divisional superintendent at Brandon, says he thinks it is very clear that the break occurred at that point. The evidence shews that the rails and roadbed were in good condition. We have, therefore, the case of an equalizing bar which, theoretically, would carry its load, plus any shock or stress which might reasonably be expected to be applied to it, breaking on a smooth roadbed. The bar was not tested to ascertain its resisting powers against shock or weight, although Fullington, who was called by the defendant, stated that it could have been so tested. The jury have found that the negligence of the defendant consisted "in not having proper inspection or testing of equalizing bars since it has been known of their breaking." It is not entirely clear whether

MAN.

C. A.

PYNE v. CANADIAN PACIFIC R. CO.

the jury meant failure to test at the time of the manufacture of the bar or failure to test after knowledge of the fact that these bars were breaking.

Mr. Bowen, a mechanical engineer in the employ of the defendant, stated in his evidence that in the last three or four years he knows of three or four having broken.

Fullerton, J.A.

There is nothing in the case to indicate that the defendant, after it became aware that these bars were breaking, made any effort to ascertain the cause. On the contrary the evidence suggests the defendants were quite willing to take the risk. Sullivan, the chief engineer of the defendant, said he would not increase the size of the equalizing bar "because there was one break in a lifetime," although he admitted that the size of it could be increased if there was any occasion for it. Whether the jury meant by its answer that the bar should have been tested at the time of its manufacture or after it was learned that the bars were breaking to my mind makes little difference. I think there was evidence to go to the jury in support of either finding.

Prendergast, J.

PRENDERGAST, J.:—I concur with the judgment of the Chief Justice.

I would only emphasize the point that the gravamen of the jury's finding, that the equalizing bar was damaged at the snowbank, lies in the fact that between that occurrence and the time of the upsetting of the car, there was travelled a distance of over 400 miles, and then elapsed a whole day, including the night lay-off at Regina, which, at the same time that it gave the defendants such wide opportunity, cast upon them a commensurate duty of inspection.

In my opinion, the appeal should be dismissed with costs.

Appeal dismissed.

N. S.

S. C.

WALSH v. SMITH.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Chisholm, J. November 19, 1918.

ADVERSE POSSESSION (§ II—64)—CROWN LANDS—GRANTEE FROM CROWN—EJECTMENT ACTION—STATUTE OF LIMITATIONS.

A person claiming under the title of persons who have been in the possession of land between twenty and sixty years cannot be put out of possession by the grantee of a grant from the Crown. [*Emmerson* v. *Maddison*, [1906] A.C. 569, distinguished.]

The Statute of Limitations will run against the grantee of the Crown, not from the date of the grant, but from the commencement of adverse occupation as against the Crown.

N. S.

S. C.

WALSH v. SMITH

Statement.

APPEAL from the trial judgment in favour of plaintiff in an action to recover possession of land granted to plaintiff by the Crown. Reversed.

The facts of the case are as follows:

Patrick Walsh went into possession of the lands in question in this action in the year 1858 and was in possession when he died in 1906; by his possession he had acquired a good title, save only as against the Crown. By his will Patrick Walsh devised whatever interest he had acquired in the lands to his wife, Mary Walsh. By deed dated October 30, 1908, Mary Walsh conveyed the lands to Charles Curry and he, by deed dated May 15, 1909, conveyed the lands to the defendant Smith. The defendant Anderson defends under Smith's title. On January 7, 1914, the lands were granted by the Crown to the plaintiff. Sixty years' possession is necessary to give title as against the Crown, and the possession of the defendant Smith and his predecessors in title was a few years short of that period.

The trial judge regarded this case as concluded by *Emmerson* v. *Maddison*, [1906] A.C. 569, and gave judgment for the plaintiff.

T. R. Robertson, K.C., for appellants; *B. W. Russell*, for respondents.

Russell, J.

RUSSELL, J.:—The important question to be decided in this case is whether the Crown can make a grant conferring title to land and giving the grantee a right to the possession of that land against all the world, including an intruder who, at the date of the grant, is in possession and has been in possession for more than twenty years. As I understand the Ontario cases the law was in that province as stated in the headnote to *Fitzgerald* v. *Finn* (1844), 1 U.C.Q.B. 70, that:—

The grantee of the Crown may maintain ejectment against a person who has been in adverse possession of the land granted for upwards of 20 years, and it is not necessary that the Crown should proceed by information of intrusion in such a case, before the grant, or that the grant should specifically convey the Crown's right of entry in the land to the grantee.

As I read the opinion of Nesbitt, J., in *Maddison* v. *Emmerson* (1904), 34 Can. S.C.R. 553, it is in accordance with this principle, and his opinion is affirmed by the decision on appeal to the Privy Council, [1906] A.C. 569.

The effect of 21 James I., c. 14, is there explained as being restricted to procedure in a case where an information of intrusion

N. S.
S. C.
WALSH v. SMITH.
Russell, J.

is filed and can have no possible bearing on the present case if so restricted. The case of *Doe d. Watt* v. *Morris* (1835), 2 Bing. N.C. 189, 132 E.R. 75, has, as explained both in the Supreme Court of Canada and in the Privy Council, been misunderstood by the text writers. The effect of the decision in *Emmerson* v. *Maddison* seems to me to be that the principle of the Ontario case is affirmed.

It is true that there is a state of facts in the present case different in one respect from the facts in the case of *Emmerson* v. *Maddison*, but I cannot agree that this difference makes any difference in the result. The Crown has the right to extrude the intruder and it would seem a strange thing that if so it should be unable to confer that right upon its grantee.

I confess that I have not given the subject the exhaustive study that I should deem necessary if the result depended on my decision.

I think it would be regrettable that on so important a point the parties should be driven to a court of appeal on the reversal of the trial judge by a court consisting of less than the usual quorum.

Ritchie, E. J.

RITCHIE, E.J. (after setting out the facts as stated):

The point decided in *Emmerson* v. *Maddison*, *supra*, was that an information of intrusion is not a necessary preliminary to a valid grant when the grantee of the Crown is in possession, but the question remains as to whether or not, under the facts of this case, the plaintiff can recover in ejectment against the defendants. There is, to my mind, one very important difference between the facts in this and the facts in *Emmerson* v. *Maddison*. In *Emmerson* v. *Maddison*, when the action was brought, the grantee of the Crown was in peaceable possession. The plaintiff in that case had not been in actual possession for seven years prior to the date of the action. He, therefore, had no title by possession against the defendant. The only case he had was that there was no information of intrusion before the grant to the defendant. When this point failed him he had nothing left except the fact of his former occupation against the defendant in possession and having title under his grant. But in this case the defendant Smith not only is in possession, but he and his predecessors in title have been in possession without any break for more than 50 years; it is one thing to be in possession and retain it and quite another thing to go out of actual possession for 7 years and recover it again. The

case of *Emmerson* v. *Maddison* is, of course, binding upon this court, but in that case the grantee of the Crown was in possession and the only purpose and object of an information of intrusion in respect to lands is to put the Crown in possession.

In Chitty on Prerogatives, at p. 332, it is said:—

> The information of intrusion into land states that the Attorney-General gives the court to "understand and be informed" that certain land ought to be in the hands and possession of the King in right of his Crown of England.

When one considers the facts in *Emmerson* v. *Maddison* it is obvious that a writ of intrusion in that case would have been a useless proceeding because the grantee of the Crown was in possession. The statute 21 James I., c. 14, s. 1, was relied upon by counsel in *Emmerson* v. *Maddison* as making the grant invalid, as the Crown had not first established its title by information of intrusion. That statute is printed in full in *Emmerson* v. *Maddison*, [1906] A.C. at 576. Lord Macnaghten, p. 571, interjected the following significant remark:—

> That statute is in favour of defendant's possession: You are plaintiff in ejectment and must prove your title.

In this case the defendant was in possession at the time of the grant and is still in possession. It seems to be a fair implication from Lord Macnaghten's remark that the statute of James operates in his favour on account of his possession. At p. 578 Sir Alfred Wills, in *Emmerson* v. *Maddison*, in dealing with the case of *Doe d. Watt* v. *Morris*, 2 Bing. N.C. 189, 132 E.R. 75, said:—

> It is obvious that the decision does not touch such a case as the present. The right of the Crown to take peaceable possession, if that were possible, of the land in question without information filed was never discussed or considered. It lay entirely outside the subject-matter then dealt with, and the case, therefore, has no bearing upon the matter now under discussion. The court emphatically asserted the doctrine that the unlawful occupation, however adverse, for a period short of 60 years, of a subject, cannot affect the legal possession of the Crown; and only said that if the Crown desired to regain possession in fact, it would have to proceed by information, as undoubtedly it must under ordinary circumstances.

Sir Alfred Wills, in referring specially to the facts in the case before him, makes it fairly clear that his decision is not intended to be extended beyond what is actually decided. It is true that the statute of James is a statute regulating procedure merely, but Sir Alfred Wills, in giving judgment in *Emmerson* v. *Maddison*, at p. 576, said:—

> Its effect is to put a person against whom the sovereign may file an information of intrusion on the same footing as a defendant in an ordinary

N. S.
S. C.
WALSH
v.
SMITH.
Ritchie, E. J.

action of ejectment if the Crown has been out of possession for 20 years and to allow him like a defendant in an ordinary ejectment, to retain such possession as he had at the date of the filing of the information of intrusion until the title of the Crown has been tried, and found or adjudged for the sovereign.

As I have pointed out in *Emmerson* v. *Maddison*, there was nothing for the statute to operate on, there being no one to be ejected by an information of intrusion. The grant to the plaintiff works, I think, a great injustice, and I am confident that the Crown would not have been a party to this injustice if the facts had been brought out by an information of intrusion prior to the issuing of the grant. Mary Walsh and her husband had been in possession for a period not far short of 60 years, and she was the person to whom the Crown, in ordinary course, would have made the grant. At her request the grant was made to the plaintiff notwithstanding that she had previously conveyed to a predecessor in title of the defendant. She was defeating her own deed, by her request, and the non-disclosure of the conveyance she had made. I think it is not going too far to say that her course of conduct was fraudulent, and I am satisfied that the facts were known to the plaintiff.

In the judgment appealed from it is said:—

Since the decision of the Privy Council in *Emmerson* v. *Maddison*, the Crown may grant land in the occupation of squatters without first establishing its title by information of intrusion.

But in *Emmerson* v. *Maddison* the land was not in the occupation of a squatter; it was, as I have said, in the occupation of the grantee of the Crown. All general expressions in the judgment in *Emmerson* v. *Maddison* must be read with reference to the facts of that case. The case of *Doe d. Watt* v. *Morris* was distinguished, not over-ruled, by *Emmerson* v. *Maddison*. Sir Alfred Wills said, referring to that case, p. 578:—

Great stress has been laid upon the following words in the judgment: "The intruders, after 20 years' adverse possession, were protected even against the Crown itself until a judgment in intrusion." But all such general expressions must be read with reference to the facts of the case to which they are applied, and the court never meant to say that the Crown or its grantee having undoubted title, would not be able to set it up should actual possession have been obtained without force and without litigation.

In this quotation I think we have the real ground upon which the judgment in *Emmerson* v. *Maddison* is founded. I am of opinion that, under the facts of this case, *Emmerson* v. *Maddison* is not applicable, and that the defendant cannot be ejected, there being no judgment in intrusion.

I would, therefore, allow the appeal and dismiss the action with costs. N. S. S. C. WALSH v. SMITH. Ritchie, E. J.

There is another contention in this case which was not raised and, therefore, not decided in *Emmerson* v. *Maddison*, namely, that while the defendant had not acquired a title under the Statute of Limitations as against the Crown, his actual adverse possession for more than 20 years was good as against the plaintiff. I see some difficulty about this proposition but there is respectable authority in support of it.

In 2 Corpus Juris, at p. 218, s. 457, it is said:—

If the statute by its terms runs against the state, it will run against a grantee of the state not merely from the date of the grant, but from the commencement of the adverse occupancy.

In Banning on Limitations, 3rd ed., at p. 242, it is said:—

Where the Crown has been out of possession for 20 years or now *semble* 12 years and the Crown (the 60 years not having yet run) may still recover the possession by information of intrusion if the Crown (being so out of possession) grants the lands to A. B. the Crown grantee is unable to recover the possession, being deemed bound by the 20 years (or now *semble* the 12 years) of the Crown's dispossession although the Crown itself is not bound. But *semble* in such case if the right of the Crown to recover possession were expressly included in the Crown grant to A. B. that would make a difference.

It is not so included in this case.

CHISHOLM, J., concurred with Ritchie, E.J. Chisholm, J.

Appeal allowed.

ESQUIMALT & NANAIMO R. Co. v. TREAT.

B. C. C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips, and Eberts, JJ.A. November 5, 1918.

DEEDS (§II C—34)—DESCRIPTION OF PROPERTY CONVEYED—"COAST LINE"—MEANING OF.

When a conveyance describes one of the boundaries of land as the "coast line," that boundary is to be found at high water mark.

APPEAL by plaintiff from the judgment of Clement, J., in an action to determine the boundaries of certain property. Affirmed. Statement.

H. B. Robertson, for appellant; *O. C. Bass*, for respondent.

MACDONALD, C.J.A.:—I agree entirely with the conclusion arrived at by Clement, J., in the court below. I think "coast line" as descriptive of the eastern boundary of the block of land granted by the province to the Dominion, and by the latter granted to the plaintiffs to aid in the construction of the Esquimalt & Nanaimo R. Co. is, in relation to the subject-matter in dispute, synonymous Macdonald, C.J.A.

B. C.

C. A.

ESQUIMALT & NANAIMO R. CO. v. TREAT.

Macdonald, C.J.A.

with "shore." I think it is well settled that when a conveyance describes one of the boundaries of land as extending to the shore of the sea, that boundary is high water mark. In the Encyclopædia Britannica, vol. 8, 10th ed., speaking of coast line geographically, it is said:—

> It is necessary to distinguish between *general* coast line measured from point to point of the headlands disregarding the smaller bays, and *detailed coast* line which takes account of every inflection shewn on the map employed and follows up the river estuaries to a point where tidal action ceases.

I think what was meant by "coast line" in the conveyance in question was the detailed coast line, and hence that its boundary is to be found at high water mark.

It was further contended by defendants' counsel at our bar, that an inference should be drawn, from certain transactions between the two governments and railway contractors mentioned in the proceedings, that the province intended to grant more than the land to high water mark. I do not think such an inference a permissible one to draw from that source.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A., dismissed the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The respondent is in possession of the land in question under a license from the Crown (Provincial) to prospect for coal issued in pursuance of the Coal and Petroleum Act (c. 159, R.S.B.C. 1911) and the land in question is particularly described as follows:—

> Commencing at a post planted at high water mark at the mouth of Chemainus River in the County of Nanaimo, Vancouver Island, B.C., thence east eighty chains thence south eighty chains thence west to high water mark, thence following the line of high water mark to the point of commencement.

The land is all below the high water mark, on the foreshore, and under the sea. The appellant is the owner of a vast tract of land upon Vancouver Island, having received the grant thereof as being part of the aid given for the construction of the line of railway built and operated by it upon Vancouver Island, the province conveying the land to the Dominion, and the Dominion granting the same to the appellant. The statutes under which the grant and conveyance were made are c. 14, 47 Vict. (1883, B.C., and c. 6, 47 Vict. (1884) Canada. The appellant relies upon its title to the land in question by reason of the description as contained in the provincial statute—"On the east by the coast line of Vancouver

Island" (see c. 14, s. 3, 47 Vict. 1883, B.C.) The land in question is situate on or off the coast line of Vancouver Island—the contention of the appellant is that the coast line is to be read as inclusive of the foreshore, *i.e.*, the land below high water mark and even the lands under the sea abutting upon the foreshore, and in aid of this further contention cites the language of the grant from the Dominion.

The appellant putting its contention at the very least strenuously maintains that its title is inclusive of all the land down to and inclusive of all that lying between the high and low water marks at the point in question.

The determination of the meaning of "coast line" is determinative of this appeal. It will be observed that in the description of the subsidy land as contained in the provincial Act (c. 14, s. 3, 47 Vict. 1884), no reference is made to the foreshore, s. 3 reading as follows:—

> There is hereby granted to the Dominion government, for the purpose of constructing, and to aid in the construction of a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted) all that piece or parcel of land situate in Vancouver Island, described as follows:—
>
> Bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca;
>
> On the west by a straight line drawn from Muir Creek aforesaid to Crown Mountain;
>
> On the north, by a straight line drawn from Crown Mountain to Seymour Narrows; and
>
> On the east by the coast line of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein, and thereunder.

It is noticeable however that in the Dominion Act (c. 6, s. 3, 47 Vict.) reference is made to the foreshore, s. 3, reading as follows:—

> The Governor in Council may grant to the Esquimalt and Nanaimo Railway Company mentioned in the said agreement, and incorporated by the Act of the legislature of British Columbia lastly hereinbefore referred to, in aid of the construction of the said railway and telegraph line, a subsidy in money of $750,000, and in land, all of the land situated on Vancouver Island which has been granted to Her Majesty by the Legislature of British Columbia by the Act last aforesaid, in aid of the construction of the said line of railway, in so far as such land shall be vested in Her Majesty and held by Her for the purposes of the said railway, or to aid in the construction of the same; and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under the lands so to be granted to the said

B. C.

C. A.

ESQUIMALT & NANAIMO R. CO. v. TREAT.

McPhillips, J.A.

company as aforesaid, and the foreshore rights in respect of all such lands as aforesaid, which are to be granted to the said company as aforesaid, and which border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land, and of mining and keeping for their own use all coal and minerals, herein mentioned, under the foreshore or sea opposite any such lands, in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever, and foreshore rights are vested in Her Majesty as represented by the Dominion government.

In passing it may be said that it would be idle contention to advance any argument to the effect that the Dominion Act could expand the terms of the provincial statutory conveyance to the Dominion government, save it were that the Dominion government had lands or foreshore rights within the described area independent of the provincial grant—arising under the provisions of or in the exercise of the right of acquirement of lands for Dominion purposes under the B.N.A. Act (30 & 31 Vict. c. 3, Imp.)—such as public harbours, but there is no evidence whatever of this. Therefore, unless the description of the boundary of the subsidy lands "on the east by the coast line of Vancouver Island"—is wide enough in its terms to include the language in the Dominion Act "the foreshore rights in respect of all such lands . . . " it is clear that the grant of the land as made to the appellant by the Dominion government cannot extend to any such foreshore rights (see *Att'y-Gen'l of Canada* v. *Keefer* (1889), 1 B.C.R. 368; *Att'y-Gen'l of Canada* v. *Ritchie* (1914), 17 D.L.R. 778, 20 B.C.R. 333; (1915), 26 D.L.R. 51, 52 Can. S.C.R. 78; *Att'y-Gen'l for B.C.* v. *C.P.R. Co.* (1904), 11 B.C.R. 289, [1906] A.C. 204; *Att'y-Gen'l for B.C.* v. *Att'y-Gen'l for Canada* (1901), 8 B.C.R. 242; 11 B.C.R. 258, [1906] A.C. 552).

The Crown grant (Dominion) of the subsidy land was made on April 21, 1887, and contains the following clause:—

And whereas it has been agreed by and between the Government of Canada, the Government of British Columbia, and the said company that the grant of the said lands to the said company shall be by the description hereinafter contained, that the exact boundaries of the lands covered by such grant shall be as settled and agreed upon by and between the Government of British Columbia, and the said company and further that it shall not be necessary for settlers under sub-section (*f*) of the agreement recited in the said Act of the Legislature of British Columbia to pay the price of lands pre-empted by them in full before the expiry of 4 years from the passing of said Act and that the terms of payment by such settlers for their land shall be those provided by the laws affecting Crown lands in British Columbia, and that the company shall grant them their conveyance upon demand when such price shall have been paid in full.

The description and habendum clauses are as follows:—

All and singular the land situated on Vancouver Island which has been granted to us by the Act of the Legislature of the Province of British Columbia passed in the forty-seventh year of our reign chaptered fourteen and intituled "An Act relating to the Island Railway, the Graving Dock, and railway lands of the Province," in aid of the construction of the said line of railway, in so far as such lands are vested in us and held by us for the purposes of the said railway or to aid in the construction of the same, and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under such lands, and the foreshore rights in respect of such of the said lands as border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land and of mining and keeping for its and their own use all coal and minerals herein mentioned, under the foreshore or sea opposite any such lands in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights are vested in us as represented by the Government of Canada, and also the full benefit and advantage of the rights and privileges granted to us by section five of the said Act of the legislature of British Columbia.

To have and to hold the said lands, coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and the said foreshore rights and privileges of mining and the said rights and privileges in the said section five of the said Act of the Legislature of British Columbia referred to, unto and to the use of the said company, its successors and assigns, forever, subject nevertheless to the several stipulations and conditions affecting the same hereinbefore recited and which are contained in the Acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited, as such stipulations are modified by terms hereinbefore recited of the agreement so made as aforesaid by and between the Government of Canada, the Government of British Columbia and the said company.

The Crown grant taken in all its terms is made in pursuance only of the provincial statutory grant (c. 14, 47 Vict. B.C. 1884) and that which is first recited is s. 3 of the provincial Act which sets out the boundaries. It is true that in the Dominion Crown grant we find this language:—

And whereas it has been agreed by and between the Government of Canada, the Government of British Columbia and the said company that the grant of the said lands to the said company shall be by the description hereinafter contained that the exact boundaries of the lands covered by such grant shall be as settled and agreed upon between the Government of British Columbia and the said company . . .

And we find that "the foreshore rights in respect of such of the lands as border on the sea together with the privilege of mining under the foreshore and the sea opposite any such lands" are pecifically dealt with. Now I cannot see any warrant for this additional language, *i.e.*, in extension of that set forth in s. 3 (c. 14, 47 Vict. 1884, B.C.). S. 3 dealing with the mines only says: "and including

B. C.

C. A.

ESQUIMALT & NANAIMO R. CO. v. TREAT.

McPhillips, J.A.

all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder" which would be "all coal, etc.," under the lands coming within the description as contained in s. 3. It is to be noted, too, that in the Dominion grant care is taken to not transcend the statutory grant to the Dominion, that is, although this additional language is used, all is relegated to that which was granted to the Dominion. As we have this language "in so far as such coal, etc., and foreshore rights are vested in us as represented by the Government of Canada." The order-in-council, P.C. 2081, is in no way helpful to the appellant—it recites s. 7 of the Dominion Act (c. 6, 47 Vict. Canada) "in so far as the same shall be vested in Her Majesty"—*i.e.*, the Crown Dominion—and all that can be said to be vested is what was statutorily granted by the province, and the order-in-council, P.C. 2081, recites "that the conveyance shall be made by the description stated in the third clause of the Settlement Act (c. 14, 47 Vict. B.C.)." It is true it goes on and says:—

The determining of the exact boundaries shall be left between the provincial government and the railway company.

This is understandable, as there were to be dealings with the lands within the described area pending the conveyance by the Dominion to the railway company—but nothing is apparent which would admit of any expansion of the described area. There might be and would be a possible reduction of area but no expansion of it.

Now as to what "coast line" means. It was stated by counsel upon the argument that they were unable to refer the court to any precise definition of the meaning to be attached to these words: but counsel for the appellant strenuously argued that the words were comprehensive of the foreshore and the lands under the sea abutting upon the foreshore. In *Att'y-Gen'l for B.C.* v. *Att'y-Gen'l for Canada* (1913), 11 D.L.R. 255, 47 Can. S.C.R. 493, 15 D.L.R. 308, [1914] A.C. 153, the question whether the shore below low water mark to within 3 miles of the coast forms part of the territory of the Crown or is merely subject to special powers for protective and police purposes was tentatively passed upon and said to be not a matter which belonged to municipal law alone and it was further stated that it was not at present desirable that any municipal tribunal should pronounce upon it. In Murray's New English Dictionary, Oxford, vol. 2, at the Clarendon Press, 1893, under "Coast," we find this statement:—

The edge or margin of the land next the sea, the sea shore, (a.) in the full phase, *coast of the sea*. Sea-coast—sea-side. Formerly sometimes land's coast.

See vol. 3 of Halsbury's Laws of England, p. 118.

There is no evidence of the user of the foreshore by the appellant: *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A.C. 92, at 97-8; and *Watcham* v. *Att'y-Gen'l* (1918), 34 T.L.R. 481, Lord Atkinson, at p. 483, and we have the declared exercise of ownership thereof by the Crown by the issuance of the mining license.

The strong presumption then being that the foreshore is the property of the Crown, what language has been used in the provincial statutory grant which can be said to in any way impugn or displace the title of the Crown? Certainly we do not find it in the provincial legislation unless it is covered by "bounded . . . on the east by the coast line of Vancouver Island" (c. 14, s. 3, 47 Vict. B.C.). I do not lay any stress upon the specific language as contained in the Dominion Crown grant, in which the foreshore is mentioned as it is *dehors* the statutory grant from the province. It is clear that there is no mention of foreshore in the provincial statutory grant, or words inclusive of the foreshore; we merely have "coast line." If it had been "bounded by the sea," the foreshore would not have passed as we have seen, save in cases, of which, in my opinion—this is not one (see *Att'y-Gen'l* v. *Jones* (1863), 2 H. & C. 347, 159 E.R. 144; *Re Belfast Dock Act* (1867), Ir. R. 1 Eq. 128; *Beaufort* (*Duke*) v. *Swansea Corporation* (1849), 3 Exch. 413, 154 E.R. 906; *Lord Advocate* v. *Young* (1887), 12 App. Cas. 544). It would seem to me that "sea shore" is much more comprehensive and operative in its effect when it constitutes the boundary than "coast line." We have in the use of the words "sea shore" language, which, in itself, might be said to have application to the foreshore, but yet we find it is not so interpreted. In the Encyclopædia Britannica (11th ed., Cambridge, at the University Press (1911)) vol. 26, in the article on *Surveying*, under the sub-heading "Coast lining," we read:—

In a detailed survey the coast is sketched in by walking along it fixing by theodolite or sextant angles and plotting by tracing paper or station pointer. A sufficient number of fixed marks along the shore afford a constant check on the minor *coast line* stations which should be plotted on or checked by lines from one to the other wherever possible to do so. . . . It is with the high water line that the *coast liner* is concerned, delineating its character

B. C.

C. A.

ESQUIMALT & NANAIMO R. CO. v. TREAT.

McPhillips, J.A.

according to the Admiralty symbols. . . . Coast line may be sketched from a boat pulling along the shore fixing and showing up any natural objects on the beach from positions at anchor.

Then in the article in the same work, vol II., on *Geography*, at p. 632, this is found:—

It is usual to distinguish between the general coast line measured from point to point of the headlands disregarding the smaller bays *and the detailed coast line* which takes account of every inflection shown by the map employed and follows up river entrances to the point where the tidal action ceases.

It is apparent that when the coast line is spoken of, its meaning is high water mark, as, naturally, only at high water mark can the coast line be defined, so that at all times, the line of demarcation is plain to be seen, *i.e.*, with the tide in; the natural or other marks at the low water mark would be non-observable. It is clear that the foreshore cannot be confused with the boundary "coast line"; further, it is in accord with common sense that this should be so especially in the present case where the legislature is making a land subsidy grant of such a vast area of land; the coast line of Vancouver Island being some 285 miles in length, along which the coast line for the greater part lies this subsidy land. It is inconceivable that the Legislature of British Columbia was intending to part with the foreshore and the lands under the sea along this very considerable coast line. It would be a grant so extensive in its meaning, and, as we have seen, so manifestly against the presumption that the title is vested in the Crown, that we must find apt words to so interpret the grant. In my opinion, no ambiguity exists in the description of the statutory grant as contained in the provincial grant, which must be the controlling factor in solving the question we have to decide. Could, however, it be considered that there is any ambiguity in the statutory grant, it is instructive to read that portion of the judgment of their Lordships of the Privy Council as delivered by Lord Atkinson in *Watcham* v. *Att'y-Gen'l, supra*. Treating with the law applicable to latent and patent ambiguities, Lord Atkinson concludes his discussion of the law and cases relative thereto, as to ambiguities in that case by saying, at p. 484:—

Now, applying the principles established by these authorities to the present case, how does the matter stand as regards the first issue upon which the case went to trial, namely, what is the area covered by the original certificate of the Riverside estate granted by the Government to the defendant to which he is now entitled?

And here we have the like inquiry as to the *locus in quo, i.e.*, the title to the foreshore and the lands abutting thereon under the sea. In the case last cited, there was no evidence, as there is no evidence here, what land the appellant went into possession of; certainly no evidence, whatever, that the appellant ever went into possession of the foreshore, or the lands under the sea.

In *Att'y-Gen'l* v. *Chambers* (1854), 4 DeG. M. & G. 206, 43 E.R. 486, it was held that:—

> In the absence of all evidence of particular usage, the extent of the right of the Crown to the sea shore landwards is *primâ facie* limited by the line of the medium high tide between the springs and the neaps.

Unquestionably the *locus in quo* here, and as covered by the mining license, is within the area, title to which is presumed to be in the Crown; and unless there has been a grant thereof to the appellant, the title thereto must be presumed to be in the Crown, and that of course is the Crown Provincial not the Crown Dominion, and any grant from the Crown Dominion would be wholly inoperative and ineffective.

In 28 Hals' Laws of England, p. 361, we have this proposition of law stated:—

> The sea shore or foreshore (for in legal parlance these expressions mean one and the same thing)—*Mellor* v. *Walmsley*, [1905] 2 Ch. 164—is that portion of the realm of England which lies between the high water mark of the ordinary tides and low water mark: *Scratton* v. *Brown* (1825), 4 B. & C. 485, 107 E.R. 1140; *Att'y-Gen'l* v. *Chambers*, 4 De G. M. & G. 206, 43 E.R. 486.

And at p. 363 of the same volume we read:—

> *De jure communi* the Crown is *primâ facie* entitled to every part of the foreshore of this realm between the ordinary high water mark and the low water mark: *Att'y-Gen'l* v. *Emerson*, [1891] A.C. 649; *Malcomson* v. *O'Dea* (1863), 10 H.L. Cas. 593, 11 E.R. 1154; *Gann* v. *Free Fishers of Whitstable* (1865), 11 H.L. Cas. 192, 11 E.R. 1305.

(See also pp. 366-7 of the same volume.)

Here we have no grant "which expressly refers to it by that name," nor have we "words which aptly describe it"; nor have we "user" or "apparent intention," and if the present case could be said to be one of "doubt," which I do not assent to, then, in the absence of user, that doubt would be resolved in favour of the Crown: *Att'y-Gen'l for Ireland* v. *Vandeleur*, [1907] A.C. 369.

Wyatt v. *Att'y-Gen'l of Quebec*, [1911] A.C. 489, 81 L.J.P.C. 63 (on appeal from the Supreme Court of Canada, see 37 Can. S.C.R. 577), is very much in point in the present case. The head-note reads as follows:—

B. C.

C. A.

ESQUIMALT & NANAIMO R. CO. v. TREAT.

McPhillips, J.A.

By letters patent granted in 1883 the predecessor in title of one of the appellants became entitled to lands on the banks of a river proved by the evidence to be navigable. There was no express grant of fishing rights:—*Held*, that the letters patent must be construed according to their terms, which were plain and unambiguous, and could not be added to or diminished by oral or written negotiations or by correspondence between the grantee or Crown officials or by long and uninterrupted enjoyment of fishing from which a large revenue was derived without the expenditure of money.

The language of Girouard, J., 37 Can. S.C.R. p. 592, is exceedingly apposite to the present case. Here we have dealt with that which arises before us, orders-in-council and negotiations leading up to the grant from the Dominion to the appellant. All this and the added words of description in the Dominion grant must be disregarded, as the statutory grant only is the controlling definition of what was to be comprised in the grant to the appellant, the Dominion being merely a trustee to carry out the plain intention of the Legislature of British Columbia. The Crown in right of the Dominion had no real proprietory interest in the lands —was merely the conduit pipe in the matter.

It is clear and beyond question that the legislative grant of the lands, to which the appellant became entitled, did not purport to transfer the foreshore or the lands under the sea, but only tracts of land within certain boundaries, and the boundary "coast line," in my opinion, must be held to halt at, not extend over, the foreshore. There must be apt words to displace the title of the Crown. Were any used? In my opinion, there can only be a negative answer to this question. I would refer to the judgment of their Lordships of the Privy Council in *Wyatt* v. *Att'y-Gen'l of Quebec*, *supra* (81 L.J.P.C. 63), as delivered by Lord Macnaghten at pp. 64-5.

It would seem to me that much of what Lord Macnaghten said is cogent reasoning determinative of this appeal in favour of the respondent.

See also *Att'y-Gen'l* v. *Emerson*, [1891] A.C. 649.

See also what Lord Herschell said in his judgment, and note that he uses the words "*coast line*."

It is apparent that the manors, as found by Lord Herschell, extending "along the coast line," were not in their boundaries inclusive of the foreshore. The right to the foreshore arose because of the "fishery." Note what Lord Herschell said:—

It is not now in dispute that the defendants are possessed of a several

fishery over a part of the foreshore, but it is said, and truly, that this is not inconsistent with the foreshore over which this right is possessed being still in the Crown.

It is apparent that if the title to the foreshore could only be claimed by reason of the boundaries, no title to the foreshore could have been established, and in the present case we have no express grant of the foreshore from the Crown in right of the province, nor the grant of any right to the appellant which can be presumed to confer title to the foreshore. The obvious result, therefore, must be that the title to the foreshore and lands under the sea is in the Crown in the right of the province and has not been parted with to the appellant.

In the inquiry in the present case it is to be remembered that in a grant from the Crown it is not permissible to contend that anything has passed by implication (*Royal Fishery of Banne Case* (1610), Davis 55, 80 E.R. 540), therefore the whole contention must be based upon, and based only upon, the language giving the eastern boundary, namely, "coast line."

In *Scratton* v. *Brown* (1825), 4 B. & C. 485, 107 E.R. 1145, Bayley, J., at p. 498, said:—

> The land between high and low water marks originally belonged to the Crown and can only vest in a subject as a grantee of the Crown.

In *Hindson* v. *Ashby*, [1896] 2 Ch. 1, Kay, L.J., at p. 16, said:—

> The plaintiffs are bound, in order to maintain an action of trespass like the present, either to prove that they are in actual possession of the land in question, or to establish a title which will sustain the action. There is no evidence of any act of ownership by the plaintiffs on any of the land below the bank. They or their tenants have always cultivated the land above the bank, and they claim that their possession of that land is possession of all the land down to the river. But no actual use or occupation of the land below the bank by the plaintiffs or their predecessors in title is proved by the evidence.

In the present case, it is beyond question that the respondent is in possession; the appellant never was.

It is a notorious fact that coal measures are to be found under the foreshore along the eastern coast of Vancouver Island; in fact, large coal workings have been in operation for many years under the sea at Nanaimo, and it is inconceivable that the legislature, without the use of apt words, meant to part with all this coal-bearing area, an area of such magnitude and potential value, a source of revenue to the Crown for years to come; and to so construe the legislation must be because the language is intractable

B. C.
C. A.
ESQUIMALT & NANAIMO R. CO. v. TREAT.
McPhillips, J.A.

and incapable of being given any other meaning: but, in my opinion, such construction is untenable. The words "coast line" are in their meaning descriptive of a boundary, not inclusive of an area. To determine the boundary the "coast line" must be laid down, *i.e.*, surveyed, and a surveyor under instructions to define the "coast line" must necessarily proceed in accordance with known and established practice in surveying, and with "coast line" only as a boundary custom practice, professional knowledge and the law itself points to and the authorities emphasize it to be fixed at high water mark. Had we apt words to indicate any inclusive meaning of "coast line," comprehensive of the foreshore, of course nothing to the contrary could be said: *Smart & Co.* v. *The Town Board of Suva*, [1893] A.C. 301, is an interesting case.

The grant of the subsidy lands, by statute, "to the Dominion Government . . . in trust" as to the eastern boundary, reads:—

> On the east by the coast line of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder. (Statutes of B.C., 1880-1884.)

The coal and other minerals, of course, were granted, but confined to the land specifically described "thereupon, therein and thereunder" (c. 14, s. 3, 47 Vict. B.C. 1884).

For the appellant to succeed, it is incumbent to find that there has been a valid grant conveying the foreshore and the lands under the sea to the appellant, in clear and unambiguous terms, there being in the present case no evidence of acts of user (*Van Diemen's Land Co* v. *Marine Board, supra*).

Parmeter v. *Gibbs*, (1813), 10 Price 412, 147 E.R. 356 (House of Lords), is a case very much in point in the present case. General words in the statutory grant cannot carry the foreshore or the lands under the sea, and the *onus probandi* is upon the appellant. Here we find language confining the grant to high water mark and an entire absence of any express words necessary to extend the meaning to low water mark. The head-note in the *Parmeter* case reads as follows:—

> Affirmance by the House of Lords of the foregoing case. Arguments on both sides in support of the several questions made and points determined. Construction of Grants of the King.
>
> Where a subject claims a specific portion of land, the property of the Crown, under a grant by letters patent, he must shew a specific description

of the particular place as meant to be conveyed by the instrument; for he cannot avail himself of general words.

A grant by the Crown held not to have conveyed some portion of the subject-matter claimed under it with reference to the circumstances.

The authority which in my opinion is decisive in the present case is *Att'y-Gen'l for Nigeria* v. *Holt*, [1915] A.C. 599. The description as contained in the Crown grants there under consideration went to the sea ("bounded by the sea": see the report of the case at p. 600). This was a case of artificial reclamatory work done by the individual owners of the land beyond the foreshore, and the judgment of the Chief Justice (Osborne, C.J.) of the Supreme Court of Southern Nigeria was affirmed, it being held that the foreshore was the property of the Crown and that the accretion to same also was the property of the Crown, the judgment of the full court being set aside which had reversed the judgment of the Chief Justice. In this *Nigeria* case, the facts were dealt with by Lord Shaw as well as the law in a most illuminating way in a very elaborate and instructive judgment, and so clearly dealt with, that, in my opinion, it is only necessary to fully understand the judgment, and any doubts that one may have had in the present case may be forever dispelled.

Here we have no question of change in the foreshore; the foreshore is rock bound; no question of natural and gradual accretion from the sea or artificial reclamatory work adding to the foreshore.

In the present case there is not even possession in the appellant of the foreshore, and no question of accretion, natural or artificial, yet the appellant claims, as set forth in the statement of claim, the following:—

(*a*) A declaration that it is the owner of all the coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever on or under the said lands, the foreshore of the lands . . . and the foreshore rights in respect of the said lands aforesaid, together with the privileges of mining under the foreshore and sea opposite the said lands, and of mining and keeping for its own use all coals and minerals mentioned in the said Crown Grant of the 21st of April, 1887, under the foreshore or sea opposite the said lands;

(*b*) For an injunction restraining the defendant from trespassing upon the said lands.

(*c*) For an injunction restraining the defendant from applying for a coal prospecting license over the said lands in alleged pursuance of the Coal and Petroleum Act and of any Acts.

(*d*) For damages.

In view of this decision of their Lordships of the Privy Council,

B. C.

C. A.

ESQUIMALT & NANAIMO R. CO. v. TREAT.

McPhillips, J.A.

where it was taken as an admitted fact "that the properties were each and all . . . bounded, in fact, by the sea," the titles being evidenced by Crown grant, can there be any question in the present case that the foreshore, and the lands abutting upon the same under the sea, are vested in other than the Crown in the right of the province? The answer must be in the negative, it being clear that originally and now the absolute right of the Crown thereto is established. In the language of Lord Shaw: "there was no express grant of the foreshore made" (in the statutory grant from the province to the Dominion, c. 14, s. 3, 47 Vict. B.C.), "nor can any grant of foreshore be implied looking to the language of description which is employed." The only language of description that the appellant can rely upon is: "On the east by the coast line of Vancouver Island." Is this even as definitive or as complete as being bounded by the sea, the description in the *Nigeria* case? In my opinion, the description in the present case lacks the definiteness and completeness of the *Nigeria* case, which, to the lay mind at least, would seem reasonably to take you to the sea itself, whilst coast line to the same mind would have its indefiniteness always having to be defined. Yet, as we have seen in law, the foreshore was held not to pass in the *Nigeria* case. *A fortiori* in the present case there has not been made use of, in the statutory grant from the province, such apt words as would entitle any declaration being made, that the foreshore and the lands under the sea abutting thereon are other than the property of the Crown in the right of the province. No title thereto in the appellant is possible of being declared. And it is to be noted that in the Crown grant from the Dominion we find this language:—

> And the foreshore rights in respect of such of the said lands as border on the sea together with the privilege of mining under the foreshore and sea opposite any such land and of mining and keeping for its and their own use all coal and minerals herein mentioned under the foreshore or sea opposite and such lands *in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights are vested in us as represented by the Government of Canada.*

And previous to this language as appearing in the grant is recited the Act which conferred upon the Dominion its title, viz., "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province (c. 14, 47 Vict., B.C. 1884). It follows that no greater title could be conferred than that granted to

the Government of Canada; nor is any greater title really intended to be conferred. All is relegated to the root of title and that which was capable of being transferred in furtherance of the trust created by the Government of British Columbia and accepted by the Government of Canada. The lands in dispute in the action could only be transferred if same were transferred by operation of the statute recited, not otherwise. It is further a matter for remark that the Government of Canada in its grant does not really, in terms, pretend to grant the title to the foreshore or the lands under the sea opposite thereto, but foreshore rights only, and mining rights thereunder, and under the sea opposite thereto, so that it is only as to these rights that the Government of Canada, in terms, expands the grant beyond the terms of the statutory grant to it from the province, *i.e.*, the Government of Canada would appear to have construed the statutory grant as conferring these rights. Now, as to the ordinary foreshore rights, undoubtedly these did pass to the appellant, such rights as all riparian land holders have, but no such rights as are above set forth ever pass. The case of *Lyon* v. *Fishmongers Co.* (1876), 46 L.J. Ch. 68; 1 App. Cas. 662, shews what these rights are, but such rights could never be implemented to the degree of mining and keeping the coal and minerals underlying the foreshore and the lands under the sea opposite thereto.

Finally, it can only be upon the construction of s. 3 of the Settlement Act (c.14, 47 Vict., B.C. 1884) that the appellant could succeed, *i.e.*, that the words "coast line" include, in their meaning, the foreshore and the lands under the sea. Lord Atkinson in the *City of London Corporation* v. *Associated Newspapers Limited*, [1915] A.C. 674, at 693, dealt with the principle of construction of statute law. He said:—

> It is a well-established principle to be followed in the construction of the statute that if the words of a statute be ambiguous and susceptible of two meanings, one of which leads to absurd, unjust, or mischievous results and the other does not lead to any results of that character, the latter construction should be preferred, since it is not to be presumed that the legislature meant to bring about results of this kind; but that if the words of the statute are plain and clear, then effect must be given to them irrespective of what results may follow: See *Vacher & Sons* v. *London Society of Compositors*, [1913] A.C. 107.

In my opinion, the words are plain and clear in their meaning, and exclude the foreshore and the lands under the sea. But if

B. C.

C. A.

ESQUIMALT & NANAIMO R. CO. v. TREAT.

McPhillips, J.A.

"ambiguous and susceptible of two meanings" to give them the meaning the appellant claims should be attached to them would lead to "absurd, unjust (and) mischievous results," denude the Crown Provincial of lands and minerals of incalculable value, and seriously affect the revenue of the province. That the legislature intended to do so in such general words descriptive of a boundary line of subsidy lands is unthinkable, therefore, the latter construction, as stated by Lord Atkinson, should be applied, and "coast line" should be held to mean and be confined to *high water mark*. The appellant, in my opinion, has failed to discharge the onus which rested upon it to displace the title of the Crown, in the right of the province, to the *locus in quo*. Therefore, in my opinion, the appeal should stand dismissed and the judgment of the court below affirmed.

Eberts, J.A.

EBERTS, J.A., dismissed the appeal. *Appeal dismissed.*

CAN.

S. C.

Re ORR.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Anglin, and Brodeur, JJ., and Cassels, J., ad hoc. October 8, 1918.

WILLS (§ III—70)—LEGACY—VAGUE, IMPRACTICABLE AND INDEFINITE—LAPSE OF INTO RESIDUE OF ESTATE.

A bequest of $50,000 to be "held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what are at present called hospitals, poor houses, gaols and penitentiaries, or any place that is maintained for the uplifting of humanity," is so vague and impracticable, and indefinite, that it raises no trust which could be carried out and such sum must fall into the residue of the estate.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 40 O.L.R. 567 *sub nom. Re Orr*, reversing the judgment of Sutherland, J., in favour of the appellant.

McLaughlin, K.C., and *Stinson*, for appellant; *Hellmuth*, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The late Mary Helen Orr, who was possessed of large means, left a will, a printed form filled in in writing, of which the individual respondents are the executors. They found it necessary to apply to the court for an opinion as to the meaning and validity of the provisions of the will and certainly there was necessity for so doing.

The will is as follows:—

This is the last will and testament of me, Miss Mary H. Orr, presently residing at Bobcaygeon, Victoria County, Ontario, I hereby revoking all former wills at any time made by me, and being desirous of settling my affairs in the event of my decease and having full confidence in the persons after-named as trustees and executors, do hereby give, grant, assign, dispose, convey and make over to, and in favour of Mr. George Silas Haddock, 9 Crawford St., Roxbury, Christian Science practitioner, Mr. Alfred Farlow 609 Berkley Bldg., Boston, Mass., Christian Science practitioner, Mr. William C. Moore, Bobcaygeon, Ontario, manufacturer, and the survivor of them, as trustees and in trust for the purposes aftermentioned, the whole estate and effects, heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease, together with the whole writs and vouchers thereof, and I nominate and appoint the said Mr. George Silas Haddock, Mr. Alfred Farlow, Mr. William C. Moore and the survivor of them as they may appoint to be my sole executors and trustees of this my will, but declaring that these presents are granted in trust always for the purpose aftermentioned, viz.: (First) I direct my executors and trustees to first pay my just debts, personal and testamentary expenses.

(Second) I give, devise and bequeath unto:—The Mother Church, Boston, ten thousand dollars to be used in spreading the truth. Ten thousand dollars towards encouraging those building C. S. Churches, to be distributed in smaller or larger sums as may be wise, from $100 to $300 to each church. Ten thousand to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually. Ten thousand for the benefit of those who are endeavouring to uplift the needy in Chicago, such as Miss Jane Addams, United Charities, and whatever may seem to require assistance. Five thousand to be used for any necessary or uplifting purpose among father's kin. Five thousand to be used for any necessary or uplifting purpose among mother's kin. Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to show that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called hospitals, poor houses, gaols and penitentiaries or any place that is maintained for the uplifting of humanity. Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilized as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

And I reserve my life-rent, and full power to alter, innovate or revoke these presents in whole or in part. And I dispense with the delivery hereof. And I consent to registration hereof for preservation.

In witness whereof I have subscribed these presents written (in so far as not printed) by myself at Bobcaygeon this twenty-ninth day of August, nineteen hundred and twelve.

Mary Helen Orr.

Signed, published and declared by the above named testatrix as and for her last will and testament in the presence of us both present at the same

CAN.

S. C.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

Fitzpatrick, C.J.

time who at her request and in her presence have hereunto subscribed our names as witnesses.

(Witnesses)

Name, "Mrs Georgenna McKay" (C.S. Practitioner),
Address, 2 College St., Toronto.
Name, "Louise Lewis," Chiropodist,
Address, No. 2 College Street.

The present appeal is confined to the disposition by the judgment *a quo* of the $50,000 for supplying institutions described in vague and general terms and the decision that the concluding sentence in the paragraph containing the bequests made, "The whole of my estate must be used for God only," is a good and charitable bequest of the residue of the estate.

As to the specific bequest of $50,000 the trial judge found that the language in which the legacy is couched is so vague, visionary, chimerical and impracticable, and the objects intended to be benefitted, and the time when the benefit is to accrue, are so uncertain, that no reasonable or intelligible construction of effect can be given to the clause and the legacy must therefore be held to be void.

The Court of Appeal, varying the judgment, declared that the words contained in the will constitute a good and valid charitable bequest and that the intention of the will is that the sum of $50,000 shall be devoted by the executors to the dissemination and teaching of the principles and purposes of the Church of Christ, Scientist, commonly known as Christian Science.

I should have thought it impossible to say that by providing for the establishment of a fund towards helping to supply institutions for the uplifting of humanity the testatrix intended that the capital sum should be devoted by her executors to the dissemination and teaching of the principles and purposes of the Church of Christ, Scientist, commonly known as Christian Science. I should have thought this impossible even if the will had not in the first two bequests made provisions for this same purpose of dissemination and teaching of Christian Science.

The Chief Justice of Ontario, in his judgment, referring to this bequest, says:—

The intention in favour of charity is for the reasons I shall mention when I come to deal with the 9th gift (the residue) found in the provisions that the whole of the estate of the testatrix "must be used for God only," aided to some extent perhaps by the other provisions of the will.

Later on, however, when he comes to deal with the residue, he says:—

It may be suggested that all that the testatrix meant by the provision in question was that the preceding bequests should be "used for God only," but

that view cannot, I think, be supported. The words, "the whole of my estate" are inconsistent with it as is also the fact that the testatrix had already carefully directed the purposes to which the money she had bequeathed should be applied, and it is highly improbable that, having done that, she would have thought of restricting the use to which these benefactions should be put by the much looser expression that they "must be used for God only."

I think his latter view is the correct one and that the will itself, in which the purposes of the specific bequests are set out, contradicts any suggestion that they are to be governed by the words, "The whole of my estate must be used for God only."

The key-note of the purpose of the bequests is, I should say, the uplifting of humanity. We find the word itself used not only in the bequest under consideration, but in three others, and the bequest for loans may be said to be a fifth bequest given for this purpose out of the eight bequests. On the other hand, the $10,000 for Bobcaygeon is expressly restricted "to be used only for such purposes as will elevate the community spiritually."

The uplifting of humanity is a benevolent but not a charitable purpose, *James* v. *Allen* (1817), 3 Mer. 17, 36 E.R. 7.

It is suggested that

> this gift may be supported as a charitable bequest coming under the 4th head mentioned in s. 2 (*s.*) of the Mortmain and Charitable Uses Act (R.S.O. 1914, c. 103),

the opinion being expressed that the courts of Ontario are warranted in looking to it as the courts in England look to the Statute of Elizabeth for the purpose of determining what in law is a charitable gift in the case of personalty.

The law relating to charitable bequests in this province is not the English law, though no doubt like most of our law derived from English law. This law having existed in the province from the beginning I do not think so great a change could be effected by the jurisprudence of the courts. It would require legislation and there is nothing in the Mortmain and Charitable Uses Act even to suggest that by this Act, dealing solely with land, there was any intention of indirectly altering the established law relating to charitable bequests.

I am of opinion that there is no ground for the interpretation which the Appellate Division has put upon this bequest and I think that the trust is so vague and uncertain that the trial judge was right in declaring that the bequest was void and falls into the residue.

CAN.

S. C.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

Fitzpatrick, C.J.

Coming to the question of the disposal of the residue, I can find no ground for holding that the words, "The whole of my estate must be used for God only," constitute a charitable bequest disposing of the whole residue of the estate.

I do not think the words constitute a bequest at all. They occur at the end of the specific bequests in the space left for these in the printed form, and may perhaps be merely a statement of what the testatrix considers is the effect of the bequests. There seems to be some reason for supposing that she thought she had disposed of the whole of her property by the specific bequests and I think a very natural meaning to put upon the expression in the position in which we find it, is that she intended it as an apology or explanation of her leaving no individual or strictly private bequests. I cannot believe that in making use of these words she had the least idea of giving any property.

Meredith, C.J.O., says that he has numbered the bequests for convenience of reference, but he has given an unfair gloss to the words in the last sentence by putting this in a separate paragraph and numbering and speaking of it as gift number 9. There is nothing to justify this. In the will it follows straight on after the disposition made by the specific bequests. But even if the words be held to pass the residue the question still remains whether it is a valid bequest.

I suppose it may be said that every use of property is, or at any rate ought to be, for God. In the case of *Re Darling*, [1896] 1 Ch. 50, Stirling, J., did, indeed, hold that a gift by will "to the poor and the service of God" was a good charitable gift thinking that

> when the service of God is spoken of as it is in this will no one so construing the expression would hesitate to say that service in a religious sense was intended.

The judge was careful to restrict his construction to the service of God *spoken of as it was in the will before him*, and in this he adopted the same reserve as many other learned judges in similar cases. Each case must be considered upon its own special circumstances, and here the words are of the widest.

In *Dunne* v. *Byrne*, [1912] A.C. 407, it was held that a residuary bequest

> to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge conducive to the good of religion in this diocese

is not a good charitable bequest and is void. It seems clear that a use of property that is conducive to the good of religion must be said to be used for God, and the present case would seem to fall clearly within this decision.

Again, whilst in *Re White*, [1893] 2 Ch. 41, it was held that in accordance with the authorities a bequest for religious purposes must be considered as a good charitable gift, the cases all treat these purposes as necessarily of a public nature as was shewn by Wickens, V.C., in *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574, there may well be religious purposes which are not of such a nature and consequently not charitable. No one could deny that a use of property for private devotion or edification was a use for God, and the words in this will must, therefore, be wider than any in which they have been held to make a good charitable gift. The language of the bequest is open to such latitude of construction as to raise no trust which a court of equity could carry into execution: *Baker* v. *Sutton* (1836), 1 Keen 224, 48 E.R. 292.

Perhaps, moreover, it may be said that Christian Science is rather a theory of all things in heaven and earth evolved by the foundress of the Scientist Church, than a religion as commonly understood. The testatrix conceivably did not intend her property to be devoted to religious purposes according to the commonly accepted meaning of these words.

There is, I think, a difference between the present and the *Darling* and the other similar cases which have been referred to. In all of these there was no doubt about the meaning of the testator in speaking of "God" or "My Lord and Master and I trust Redeemer," or in similar expressions. In the appellant's factum it is said that the testatrix was pantheistic in her religious views. I am far from accepting that statement as correct, but on the other hand I am not prepared to agree with the Chief Justice of Ontario. He sets out the religious tenets of Christian Science as found in their authoritative manuals and adds the brief comment that "there is nothing in all this which conflicts with the beliefs of the most orthodox Christian."

In this, I think, he goes further than the facts warrant.

If the testatrix did not accept the Christian religion, which is assumed in all the cases to which reference has been made, I do not know how the court is to say what were her intentions, or that

CAN.

S. C.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

Fitzpatrick, C.J.

the bequest was for religious purposes as ordinarily understood, still less how it is to formulate a trust for giving them effect *cy-près*.

For these reasons I am of opinion that the bequest of $50,000 is void and the money falls into the residue of the estate; and that the residuary estate is not disposed of by the will but passes to the next of kin of the testatrix. The judgment of the Appellate Division should be varied accordingly.

Costs of all parties should come out of the estate.

Idington, J.

IDINGTON, J.:—A number of questions were submitted to the Supreme Court of Ontario for advice and direction of that court respecting the construction of the last will and testament of Mary Helen Orr, a Christian Scientist, and respecting the administration of her estate.

All but three of these have been so disposed of that they need not concern us now; save for purposes relative to these three.

If the judgment of the Appellate Division is right, in regard to the last of these, we need not trouble ourselves with any other.

The will written by the testatrix using, it is said, a printed form, begins by giving to three persons named as trustees and executors:—

in trust for the purposes aftermentioned, the whole estate and effects heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease,

and repeating the purport of this, proceeds in effect as follows:—

First, a direction to pay debts and testamentary expenses.

Second, "I give, devise and bequeath unto," and then follows under that heading a continuous, consecutive stream, as it were, of giving eight legacies, of which the last is thus expressed:—

Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilized as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

The last sentence, "The whole of my estate must be used for God only," forms part of the continuous text and to all appearance is a part of the definition of purpose, attendant on this last gift.

But for the holding of the court below that this must be taken as a residuary bequest, I should have said that it was nothing more

than a pious ejaculation, or possible admonition relative to the spirit in which "the profits accruing" referred to in the next preceding sentence, were to be utilised.

And if I felt clear that it must be read as an intentional disposition of the residue of her estate, I should read it as clearly intending that the said preceding sentence, dealing with part of the residue falling into the hands of the trust, and in no other way disposed of, was comprised within its scope and both sentences be read together in order to grasp the meaning of the testatrix. The residuary bequest would then read:—

> The profits accruing can be utilized as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

I submit that such a construction as may be given these two sentences read together, as they were written, much more truly represents the thought that was in the mind of the testatrix, than does the result embodied in paragraphs 8 and 9 of the formal judgment appealed from, which is intended to be worked out within the lines of the Ontario Mortmain and Charitable Uses Act, as construed by the Master at Lindsay subject to the corrective power of the court.

The said paragraph 8 of the said judgment declares the words I have quoted (omitting the last sentence) do not constitute a valid bequest, and that despite one of the obvious purposes of the trust to produce an income designed to promote religion as the testatrix understood it.

The mode of investment of the fund is only a small part of the trust, and could not help many people, but the fund would produce, or was intended to produce, $600 a year to promote in the way expressed the religion the testatrix held dear.

Not only have we thus, by reason of its immediate context, an expression which sheds light on the meaning of the testatrix's words: "The whole of my estate must be used for God only," but also by the whole preceding bequests in the will.

It is not the residue, but the whole of her estate which is to "be used for God only."

Some of these bequests have no very obvious relation to any such restricted charitable uses, as the court below has confined, by its direction, the application of residue.

CAN.

S. C.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

Idington, J.

I most respectfully submit that the judgment in so wresting the sentence from its context and giving it such interpretation, and directing such an administration of the residue of the estate, is in effect making a will for the testatrix and giving effect to something she failed to express. I agree with Sutherland, J., that there was no residuary bequest.

Indeed, the originating notice of motion does not seem to have been launched with the conception that there was any actual residuary bequest, and merely wanted to know what was to be done with property given in trust yet no definite trust expressed relative thereto.

I also agree that if the words referred to are to be treated as independent of their imme liate context and read only in connection with the words at the beginning of the will expressing an intention to create a trust, they are far too indefinite to be given any effect to.

The Chief Justice seems to rely upon *Re Darling*, [1896] 1 Ch. 50, the judgment of a single judge, and *Powerscourt* v. *Powerscourt*, (1824) 1 Molloy 616, which finds approval from the same judge, but seems to have been followed no place else, and I submit has in effect been overruled by the Privy Council in the case of *Dunne* v. *Byrne*, [1912] A.C. 407, where the expression used and in question was much more definite than anything in either of said cases, yet in law held inoperative. Moreover, the court, deciding the *Powerscourt* case, did not think it needed to form a scheme for execution of the trust.

Indeed, in regard to any one of these three cases, I should have supposed there was much more to be said in favour of upholding the bequest than can be said in this case if regard is to be had at all to the mind and circumstances of the testatrix and her expressed views as interpreting her meaning.

The most recent case, of which the report has only come to hand since the judgment below was delivered, is that of *Houston* v. *Burns*, [1918] A.C. 337, in which interpretation is given the expression, "public, benevolent or charitable purposes," and holding such expression cannot be maintained as establishing a definite trust.

If the testatrix had been asked to define her meaning of the words now in question I have not the slightest doubt she would

have given a like definition. Her whole trend of thought, as exemplified in the language of her will, convinces me such was what she thought and meant to be a giving "for the use of God."

It is her understanding and intention we must have regard to in the first place, as the courts did that passed upon the wills respectively in question in the *Darling* case, and *Powerscourt* case, and even there in light of the judgments in the *Houston* case, just cited, clearly holding public and benevolent purposes mean nothing in such a connection.

It has been repeatedly held by the highest authority that the mere expression of any trust as for public or benevolent or philanthropic purposes, unless expressly defined by indicating some specific object within the meaning of such words, cannot create a trust which the law will recognise. Yet in many of these cases so deciding the subject-matter and the object might have fallen within the scope of the words "use of God" had the court felt such a wide range of purpose as within the law enabling courts to maintain such a trust.

If, I submit most respectfully, the court deciding the *Houston* case, I refer to, or *Blair* v. *Duncan*, [1902] A.C. 37, had been as astute to find a charitable purpose as the court below, they could, and no doubt would have discarded all but the word "charitable" and given effect to the trust.

My only difficulties in this appeal have been, and are, the questions: First, as to the $50,000 which is to be

held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what are at present called hospitals, poor houses, gaols and penitentiaries or any place that is maintained for the uplifting of humanity,

and next, as to that raised by what I firstly set forth and quoted above, and is dealt with by par. 8 of the formal judgment.

As to the former, with some very grave doubts, I would let it stand as adjudged, but in doing so I cannot see why the equally obvious intention of the other should not be allowed to stand. I imagine it has not been so treated because of a misconception of the whole clause, in assuming that lending money to worthy people was the purpose thereof; instead of that being an incident in the

CAN.

S. C.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

mode of carrying out a main purpose which I have already explained, or something like it.

I would, therefore, amend, in order to be consistent, the said par. 8 of the judgment, and declare the bequest valid and the profits from such investments to be devoted to the like purposes as defined in par. 7 of said judgment.

Idington, J.

Since writing the immediately foregoing hesitating expression of opinion, I learn that the majority of the court have come to the conclusion that both these bequests are invalid, and I agree, content with my expressions of doubt.

In my opinion the appeal should be allowed; the so-called residuary clause declared invalid, and the formal judgment be rectified in pars. 7 and 8 accordingly.

Anglin, J.

ANGLIN, J.:—After such careful consideration as I have been able to give to the judgments of the judges of the Appellate Division, and to the factums and oral arguments of counsel, I am, with respect, of the opinion that upon the two questions involved in this appeal the judgment of the learned judge of first instance was right and should be restored. Assuming that the clause, "The whole of my estate must be used for God only," should be treated as a residuary bequest—which, I think, open to the gravest doubt—I cannot regard the phrase, "for God only" as equivalent to "for the service of God," words which have been held to import "services in a religious sense—service similar to such service as is referred to when . . . service in the church is spoken of," *Re Darling*, [1896] 1 Ch. 50. The use of money "for God only" may include many things not religious or charitable within the sense in which English law restricts "charitable bequests"—just as a bequest of money to be used and expended as the donee may judge conducive to the good of religion within a defined area, may include purposes not strictly religious and therefore not necessarily charitable in the eyes of the law. *Dunne* v. *Byrne*, [1912] A.C. 407. Moreover, the testatrix has by her specific gifts—at least two of which have been held not valid as charitable bequests—in my opinion, clearly indicated that, as used by her, the words "to be used for God only" (which she has made applicable in explicit terms to every bequest in her will) were not intended to restrict the use of her money to purely religious purposes or even to purposes charitable in the eyes of the law, I am, therefore, unable

to regard the clause under consideration as a valid residuary charitable bequest.

Nor in the view which I take of their true import the words, "to be used for God only," aid the respondents in the consideration of the $50,000 legacy, the other subject of appeal. Some of the purposes indicated by the testatrix as objects of her bounty in that bequest are clearly not "charitable" in the legal sense; others may or may not be so. Moreover, I have utterly failed in my endeavour to find an intelligible meaning in the words:—

such institutions as may in the future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive.

Anglin, J.

I agree with Sutherland, J., when he says of this bequest:—

After repeated perusal and consideration of this clause of the will I have come to the conclusion that the language in which the legacy is couched is so vague, visionary, chimerical and impracticable and the objects intended to be benefitted and the time when the benefit is to accrue, are so uncertain that no reasonable or intelligible construction or effect can be given to the clause and the legacy must therefore be held to be void.

I, of course, confine myself to the questions raised on the appeal, and to the grounds necessary for the disposition of them. I desire to guard, however, against being understood as holding that the impugned bequests may not be assailed on grounds broader and more far-reaching.

I would allow the appeal and would restore the judgment of the learned judge of first instance to the extent sought by the appellant. Having regard to all the circumstances, costs of all parties should be paid out of the estate.

Brodeur, J.

BRODEUR, J.:—The first question submitted to this court is whether the $50,000 bequest is a charitable one. The court of first instance decided that it was not a charitable bequest. The Appellate Division came to a different conclusion.

The will appointed trustees and provided for certain specific bequests, and the testatrix said that:—

$50,000 will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what are at present called hospitals, poor houses, gaols and penitentiaries or any place that is maintained for the uplifting of humanity.

Miss Orr, the testatrix, was a Christian Scientist; and it is contended that the bequest was for religious purposes. She had,

CAN.

S. C.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

Brodeur, J.

however, made legacies to her Mother Church and to encourage the construction of Christian Science churches; but the language of the bequest of $50,000 would be open to such latitude of construction, is so vague, and so indefinite, and I would add with Sutherland, J., "so visionary, chimerical and impracticable" as to raise no trust which a court of justice could carry into execution. (*Baker* v. *Sutton*, 1 Keen 224, 48 E.R. 292.)

The Privy Council, in 1912, decided in the case of *Dunne* v. *Byrne*, [1912] A.C. 407, that a residuary bequest to be used and expended by a trustee, a Roman Catholic Archbishop, in the way most conducive to the good of religion in his diocese, is not a good charitable bequest and is void.

I would rely also on the decision of the Privy Council in *Att'y-Gen'l of New Zealand* v. *Brown*, [1917] A.C. 393.

The other question raised in this appeal is with regard to the residue of the estate.

The testatrix, after having mentioned specific bequests, adds: "The whole of my estate must be used for God only."

It was decided in first instance by Sutherland, J., that such an expression is too broad, indefinite and controversial to be capable of being carried out and that there is no residuary clause in the will. The Appellate Division came to the conclusion that such a clause constituted a good and valid charitable bequest and covered the residue of the estate.

I am unable to agree with the opinion of the Appellate Division. Those words: "The whole of my estate must be used for God only," do not constitute a good residuary bequest. They should be considered as an advice to all those who receive any portion of her estate to spend their share in such a manner that will be agreeable to God.

It may be that the testatrix had a general charitable intention; but she has not expressed it in words; and the court cannot give effect to an unexpressed intention. *Hunter* v. *Att'y-Gen'l*, [1899] A.C. 309.

The appeal should be allowed and the judgment of Sutherland, J., restored, the costs of all parties in this court and in the courts below to be paid out of the residuary estate of the deceased.

Cassels, J.

CASSELS, J.:—The appeal in this case is limited in this court to two points.

The appeal is from the decision of the Appellate Division of the

Supreme Court of Ontario in respect to their finding as to the proper construction to be placed upon the clauses in the will of the late Helen Orr.

These clauses are numbered in the very able reasons of the Chief Justice of Ontario 7 and 9. There is no numbering in the will, but it is convenient to adopt the method followed by the Chief Justice.

The clauses of the will in question read as follows:—

7. Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called hospitals, poor houses, gaols and penitentiaries, or any place that is maintained for the uplifting of humanity.

9. The whole of my estate must be used for God only.

After the best consideration I can give to the case and with great respect for the opinion arrived at by the learned judges of the Appellate Division, I cannot bring my mind to the conclusions arrived at by them.

I think the trial judge arrived at the proper conclusion. Some propositions laid down in the various reasons are beyond doubt correct. If possible, a construction which should avoid an intestacy should be given to the will.

On the other hand, if such a construction be given to the will as would permit the executors and trustees to give the trust funds to purposes other than charitable bequests as to which the *cy-près* doctrine should be invoked, then the bequests are void for uncertainty. *Houston* v. *Burns*, [1918] A.C. 407; *Blair* v. *Duncan*, [1902] A.C. 37; *Hunter* v. *Att'y-Gen'l*, [1899] A.C. 309, at p. 314.

Consider the bequest referred to in provision 7. It cannot be contended that "gaols and penitentiaries" are in any sense charities of such a character, so that the *cy-près* doctrine could be invoked to save the bequest. It is difficult to place any meaning on this seventh bequest (so numbered). It is too uncertain to be given effect to. If not void for uncertainty the trustees might devote $50,000 for Godly purposes other than charitable purposes.

Then as to clause 9 as numbered: "The whole of my estate must be used for God only."

If the testatrix intended by this bequest to include all the previous legacies as well as the residue of the estate then the

CAN.

S. C.

CAMERON v. CHURCH OF CHRIST, SCIENTIST.

Cassels, J.

court must add to her will the words: "For Godly purposes," which might harmonise with the previous bequests.

If, on the other hand, this bequest merely applies to the residue of the estate undisposed of, I fail to see how the court can interpolate into the will the words, "For the service of God only."

The cases cited by the Chief Justice where the words used are for the service of God to my mind are not applicable.

In the case of *Dunne* v. *Byrne*, decided by the Privy Council and reported in [1912] A.C. 407, it was held

that a residuary bequest to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge conducive to the good of religion in this diocese

is not a good charitable bequest and is void.

In delivering the judgment of the Board, Lord Macnaghten, at p. 411, uses the following language:—

In the present case their Lordships think that they are not bound to treat the expression used by the testator as identical with the expression "for religious purposes," and therefore, not without reluctance, they are compelled to concur in the conclusion at which the High Court arrived.

To my mind there is great similarity between this case last referred to, *Dunne* v. *Byrne*, [1912] A.C. 407, and the present case. I think the appeal should be allowed and the court should declare the bequests 7 and 9 void for uncertainty and that there was an intestacy as to the $50,000 and as to the residue.

As to costs: This case is a peculiar one. Having regard to the rule laid down by the House of Lords and the Privy Council, there being a considerable divergence of judicial opinion, and the litigation having been occasioned by the unfortunate wording of the will of the testatrix, the costs of all parties to this appeal as between solicitor and client should be paid out of the residuary estate.

Appeal allowed.

ALTA.

S. C.

McINTYRE v. ALBERTA PACIFIC GRAIN Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and Hyndman, JJ. December 6, 1918.

RULES OF COURT (§ I—1)—AMENDMENT OF—POWERS OF JUDGES—REDRAFTING.

Under rule 713 of the Alberta rules the Judges of the Supreme Court are "authorized to alter and amend any Rules of Court or tariff of costs or fees for the time being in force or make additional rules or tariffs." This rule includes the redrafting of a rule in entirely different language if what is done is in reality merely an alteration.

ALTA.

S. C.

McINTYRE v. ALBERTA PACIFIC GRAIN CO.

Harvey, C.J.

APPEAL by the defendant from an order of the Master made on the application of the plaintiff directing a trial by jury, which was referred to the Appellate Division by the judge before whom it came. The action is on an alleged contract of sale for a sum of about $1,800.

Lougheed & Co., for appellant; *I. W. McArdle*, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—Rules 172 and 173 provide for the method of trial and the present rules were substituted by the judges for the former rules on April 24 last.

Under the present r. 172, there is no doubt that, in this action, either party is entitled to a trial by jury if he desires it, there being no discretion to refuse it. Under the former rules it would be a matter for the judge's discretion. The contention by the defendant is that the judges had no authority to substitute the new rules and that the old rules are still in force.

The argument in support of this contention raises the subject of the legislation affecting juries and it is somewhat interesting to trace it from the beginning.

By c. 25 of the Statutes of Canada for 1886, passed on June 2, 1886, amending the North West Territories Act, provision was first made for the creation of the Supreme Court of the North West Territories. By s. 29 of that Act, it was provided that the Lieutenant-Governor in Council, the then legislative body for the Territories, might make ordinances in respect to the mode of calling juries in both criminal and civil cases and in respect of all matters relating thereto. The Act was not to come into force until proclaimed, but it was provided that any ordinance passed under s. 29 in the meantime should come into effect when the amending Act came into force. On November 16, following, the Lieutenant-Governor in Council passed an ordinance, No. 4 of 1886, making provision for the qualification and summoning of juries. The Dominion amending Act was brought into force on February 18, 1887, by proclamation issued on January 21, 1887.

In the meantime, a revision and consolidation of the Dominion statutes had been made, which, by proclamation, dated January 24, 1887, were brought into force on March 1, 1887.

S. 29 of the amending Act is to be found in its very terms in s. 16 of the Revised Statute, c. 50, and, apparently, has remained to the present day without change other than the substitution of

ALTA.

S. C.

MCINTYRE v. ALBERTA PACIFIC GRAIN CO.

Harvey, C.J.

the legislative assembly for the council. C. 50, however, also contains in s. 71, under the title "Administration of Criminal Law," the provision that "persons required as jurors shall be summoned by a judge from among such male persons as he thinks suitable," and that the jury required on a trial shall be called from among such persons.

S. 88, also under the title "Administration of Civil Justice," provides, among other things, the class of cases in which there may be a trial by jury which shall consist of six persons "summoned in the manner hereinbefore provided as to criminal trials." By s. 91 power was given to the Governor-in-Council, by proclamation, to repeal any or all of ss. 88, 89 and 90 and by amendment in 1894 (c. 17) similar power was given in respect to s. 71.

The ordinance respecting juries of 1886 apparently was in force after February 18, 1887, but in 1888 there was a revision of the ordinances, which as revised were enacted on December 11 of that year to take effect on March 1, 1889. By that enactment, ordinance No. 4 of 1886 was repealed but a new ordinance, C. O., c. 60, was enacted quite different in its terms, but dealing with the same subject matters. By s. 20 of that ordinance it was provided that it should come into force from and after the repeal of ss. 71 and 88 of the North West Territories Act.

That ordinance has remained, with apparently only one insignificant alteration, to the present day.

In *Hansen* v. *C.P.R. Co.* (1907), 6 Terr. L.R. 420, it was held by the court *en banc* of the North West Territories that the Jury Ordinance, now c. 28, C. O. 1898, was not in force in this province, ss. 71 and 88 being still in force. No proclamation has since been issued repealing these sections, and in view of the provisions of the Alberta Act, it is probable that they could now be repealed only by Act of the Provincial Legislature, and no such Act has been passed.

At the last session of the legislature, by s. 54 of c. 4, an amendment was made to the Jury Ordinance, c. 28 C. O. 1898. The amendment deals with the subject matter of rr. 172 and 173, and is quite inconsistent with their terms, and if in force, would entirely annul those rules. Probably the natural interpretation for a court to put on the amendment would be that it was to become effective when the ordinance became effective, the court assum-

ing that the legislature was aware of the condition of its own legislation.

The judges, however, as a body, authorized to amend the rules and not as a court, were under no obligation to make any such assumption, and being of opinion that the legislature intended by the amendment to make an immediately effective provision decided to obviate the possibility of any question by altering the rules to comply with the terms of the amendment. In doing this, it is contended that they exceeded their authority.

In *Hubbard* v. *City of Edmonton* (1917), 37 D.L.R. 458, 12 A.L.R. 115, this Division held that the then rules 172 and 173 were rules relating to practice and procedure and were consequently within the power of the Lieutenant Governor in Council to pass.

Since then, by s. 5 of the same Act (c. 4 of 1918) as amended, the Jury Ordinance, the Consolidated Rules of Court are given statutory authority and declared to have been in force since September 1, 1914.

S. 24 of the Supreme Court Act, c. 3, of 1907, provides that:—

> The Lieutenant-Governor in Council may make and authorize the promulgation of rules of court governing the practice and procedure in the court . . . and may alter and annul any rules of court . . . and may make any further and additional rules for carrying this Act into effect, or may authorize the judges of the court to make and promulgate such rules . . . or to alter and annul any of such rules . . . or make additional rules, as hereinbefore mentioned.

The present rules purport to be made under the authority of that section, and r. 713 provides that:—

> The judges of the Supreme Court are hereby authorized to alter and amend any rules of court or tariff of costs or fees for the time being in force or make additional rules or tariffs.

This rule appears to be quite authorized by the section quoted, but, in any event, it is one of the rules given legislative sanction by s. 5 of c. 4 of 1918, above referred to.

But it is urged that it gives the judges no authority to repeal rules and substitute new ones therefor, as is done in the present case.

This objection, in my opinion, considers form rather than substance. While it is true that all the words of the old rr. 172 and 173 have gone and new rules, in entirely different terms, have been substituted, can it really be said that what has been done

ALTA.

S. C.

MCINTYRE v. ALBERTA PACIFIC GRAIN CO.

Harvey, C.J.

has been anything other than an alteration of the rules prescribing the practice relating to jury trials? It could be described in other words, of course, but it would, notwithstanding the form of words used, be nothing more or less than an alteration of the rules and, as such, in my opinion, entirely within the authority of r. 713.

I would, therefore, dismiss the appeal, with costs.

Appeal dismissed.

CAN.

S. C.

HART-PARR Co. v. WELLS.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. November 18, 1918.

SALE (§ II D—44)—SALE OF ENGINE—WARRANTY—CONDITION—NOTICE OF DEFECTS—REPUDIATION—DAMAGES.

A clause in a contract for the purchase of an engine requiring notice to be given in case of any defect in "workmanship or material" does not apply to a warranty that the engine will develop certain horse-power, but only to the warranty that it is well made and of good material.

[*Hart-Parr Co.* v. *Wells*, 40 D.L.R. 169, affirmed.]

Statement.

APPEAL from a decision of the Court of Appeal of Saskatchewan, (1918) 40 D.L.R. 169, 11 S.L.R. 132, affirming the judgment of Haultain, C.J.S., at the trial in favour of the defendant.

This is an action for the purchase price of an engine sold by the plaintiff to the defendant under an agreement in writing. Under the heading of "warranty," the plaintiff warranted "the said tractor to be well made of good material and if properly operated will develop its rated brake horse-power." It was also provided that:—

> The purchaser shall not be entitled to rely upon any breach of above warranty, unless notice of the defect complained of, whether such defect be in workmanship or material, containing a description of the same and setting out the time at which the same was discovered is given to the vendor . . .

The plaintiff claimed the balance of the purchase price of the engine; and the defendant fyled a counterclaim. The trial judge gave judgment for the plaintiff on its claim and judgment for the defendant for the amount equivalent to the purchase price for breach of warranty.

Bastedo, for appellant; *Gregory*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—This action was one brought by plaintiff to recover the balance of the purchase price of an engine sold by it to defendant under an agreement in writing made between the parties in April, 1913.

Haultain, C.J., who tried the case, held, I think, properly, that the defence of misrepresentation had not been proved, but he also found that the engine "was sent to the defendant in a very bad shape" and that "the evidence that it practically never did satisfactorily work was overwhelming."

He also held that the plaintiff company had waived the conditions in the clauses of the contract requiring notices to be sent to the company with respect to the engine in case it was found defective and did not comply with the warranty given. He found as a result that the evidence as a whole "established the fact that the engine did not comply with the warranty and failed to do work to any reasonable amount," and awarded defendant as damages an amount equal to the price agreed to be paid for it and a return to defendant of the $500 paid by him on account of the purchase money.

An appeal to the Appeal Court of Saskatchewan was dismissed. Newlands, J., held that defendant was entitled to recover damages on his counterclaim by virtue of the breach of the warranty that the engine would develop its rated brake horse-power and that the clause in the contract that the purchaser should not be entitled to rely on any breach of the above warranty unless certain notices were given applied only to the warranty that the engine was well made and of good material and not to the warranty that it would develop a stipulated horse-power. Lamont, J., agreed with Haultain, C.J., that the plaintiff company had in the letter of defendant of August 9, received and answered by it got the necessary notices called for by the contract and had failed to remedy the defect. In the result the judgment of Haultain, C.J., was confirmed.

With regard to the questions raised by counsel for the plaintiff company that the pleadings did not warrant the judgment appealed from, I am of the opinion that the controversy between the parties alike as to the right of the plaintiff to recover for the price of the engine and the right of the defendant to damages for non-compliance with the warranty as to the development of its rated horse-power was fully thrashed out at the trial between the parties, and that under these circumstances any necessary amendments to those pleadings can and should be made even now.

CAN.

S. C.

HART-PARR CO. v. WELLS.

Davies, C.J.

As to the meaning of the warranty clause requiring certain notices to be given the company in case of defects in "workmanship or material containing a description of the same," I agree with Newlands, J., that the provisions in clause 9 of the contract prohibiting the purchaser from relying upon any breach of warranty therein given unless these notices were given does not apply to the warranty that the engine would develop certain horse-power, but only to the warranty that the engine was well made and of good material.

The nature and particulars required to be given in these notices convince me that they do not cover the case of any engine failing to develop the warranted horse-power from some cause not known to the purchaser and which he was unable to specify.

The construction that, if defects of material or workmanship were complained of, notices should be given as the contract required or the defendant precluded from afterwards setting up breach of warranty may be held to be not unreasonable. These defects were capable of being known and the vendors informed of them so that they might have the opportunity of remedying them; not so if there were no apparent defects in workmanship or material, but nevertheless the engine failed to develop the rated horse-power contracted for. To construe the contract as applying to such a case would be unjust and unreasonable.

Having reached these conclusions on the construction of the notice clauses of the warranty in question and on the findings of fact of the trial judge of the failure of the engine to develop its rated horse-power, I am of the opinion that the appeal should be dismissed with costs and that in this court we should not interfere with the amount of damages awarded by the trial judge and confirmed by the Court of Appeal.

Idington, J.

IDINGTON, J.:—It may be possible in law to so frame a contract that the vendor may be enabled thereby to acquire the right to use the courts to get all he desires from the vendee and retain same yet give him nothing, and at the same time so bind him that he cannot complain aloud or attempt to secure that he bargained for unless, and so far only, as graciously permitted by the vendor; and also forever debar his vendee from acquiring by mutual contract between them any relief or right thereto.

It would be well in such attempts for the vendor to steadfastly ignore any and all of the opportunities of the deluded vendee, looking for rectification of the wrong done him, lest by listening thereto a new contract based on conduct may be inferred by some court applied to for the purpose of enforcing the original contract.

In all events, the vendor framing (as appellant did that in question), such a contract of sale designed to accomplish such a comprehensive purpose, should make its meaning so clear and its purpose so beyond doubt and dispute, that the vendee can have no rights thereunder and that he alone is under any obligation arising therefrom.

The contract in question falls far short of accomplishing such purpose. Indeed, having given its ambiguous nature much consideration, I am of the opinion that Newlands, J.'s construction thereof is correct. Though the failure of the machine to develop its rated horse-power does fall within the covenant and is thereby expressly provided for, yet a breach of that part does not seem to fit into and fall within the verbal subsidiary provisions which are relied upon by appellant to nullify its operation and should, if read as applicable to such a breach as failure to develop rated brake horse-power, render it an absurdity, unless and until demonstrated that the failure is in fact attributable to defect of material or workmanship. That has not been done. I agree that want of specific rate of horse-power may exist with first-class material and workmanship. It may have been so designed.

The alternative view of the Chief Justice who tried the case, that the appellant waived these provisions, is also, I think, tenable, though to my mind more difficult.

The finding he makes of the overwhelming character of the evidence relative to the worthlessness of the machine seems well founded.

The argument of appellant's counsel that a case of the actual horse-power it is capable of developing could only be determined by a scientific test, might have been well taken if only a narrow margin of the measure of power had been in question. No such doubtful question can exist on the evidence, and such machines are only of value to a farmer if, by use thereof, he can

CAN.

S. C.

HART-PARR CO. v. WELLS.

Idington, J.

economize in way of horse or man-power he has to employ in ploughing or other operations on the farm.

When representations as to its capacity fall so far short of realizing the reasonable expectations of such a purchaser as this one seems to have done, there is not much need for further test.

The representations made in the first attempted contract beyond doubt operated as intended on the mind of the respondent as an inducement to purchase the machine in question, and he was entitled to rely thereupon, though not in the sense of misrepresentation presented to the mind of the learned trial judge.

Much was said in the argument by the counsel for appellant as to the pleadings and the effect thereof, which might have been effective if he had not chosen to fight the case out on the lines on which it was fought and decided.

This is one of the many cases in which we should regard what the parties in fact have tried out regardless of the form of pleading.

It becomes too late after such a trial, and appeal therefrom, to fall back here upon the form of pleading.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I am of the opinion that this appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The material facts of this case sufficiently appear in the judgments of the appellate judges, 11 S.L.R. 132, 40 D.L.R. 169. The evidence, in my opinion, abundantly warranted the conclusion of the Chief Justice who tried the action that the tractor delivered to the defendant did not fulfil the warranty in the contract of sale, that it "will develop its rated (60) brake horse-power."

I agree with Newlands, J., that the provision for notice in clause 9 does not apply to this warranty, but is confined to "defects in workmanship and material."

It is, in my opinion, likewise the proper construction of clause 11 to restrict its application to "defects" within clause 9.

It may be that the plaintiff was rightly held not entitled to rescission because of his user of the engine with knowledge of its incapability to develop the rated horse-power. But I find nothing which debars him from setting up the breach of warranty relied upon as the basis of a claim for damages.

CAN.

S. C.

HART-PARR CO. v. WELLS.

Anglin, J.

As to the alleged insufficiency of the pleadings, so much relied upon by counsel for the appellant, I agree with the view expressed by Lamont, J., to which I would merely add that evidence on the issue of breach of warranty was fully gone into at the trial and the observations of the Chief Justice and of counsel during the course of it make it clear that it was well understood that this issue was one with which the court intended to deal. There was no surprise of which the appellant can complain. While it would probably have been better had the pleadings been formally amended at the trial, any amendment necessary to make them fit the issues actually tried and disposed of may be made even now. Supreme Court Act, s. 54.

Having found upon evidence warranting that conclusion that the engine was "useless to the defendant" by reason of its failure to fulfil the warranty as to horse-power, the Chief Justice was justified in assessing the damages for breach of that warranty at the price agreed to be paid. With that assessment, affirmed by the provincial Appellate Court, we should not interfere.

Brodeur, J.

BRODEUR, J.:—The appellant contends that no issue has been raised as to breach of warranty and that the damages awarded by the trial judge to the respondent as a result of that breach could not be granted.

The allegations in the defence and counterclaim are sufficient to support a claim for damages for breach of warranty. This is a question of practice and procedure on which the courts below have passed judgment, and that decision should not be interfered with by this court, whatever the view which we might have taken, had we had to deal originally with it on the merits. I am of opinion that the judgment below is well founded. The facts of this case and the provisions of the contract are much less favourable than those in issue in the case decided this term of *Schofield* v. *Emerson* (1918), 57 Can. S.C.R. 203, 43 D.L.R. 509.

The appeal should be dismissed with costs.

Appeal dismissed.

ONT.

S. C.

BAILEY COBALT MINES Ltd. v. BENSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. July 15, 1918.

COSTS (§ I—2c)—FOREIGN COMPANY—UNSUCCESSFUL—APPEAL—SECURITY FOR.

If a foreign person or company is brought into an action in Ontario, either by being properly served abroad, or on his application to be added as a party defendant, and after having been heard is unsuccessful and desires to appeal, the court has power to order such person or company to give such security as will enable the resident parties to recover their costs if they succeed. The amount fixed should be sufficient only to cover the costs of the appeal.

Statement.

APPEAL by the defendant from an order dismissing an appeal from an order of the Master in Chambers, by which the appellant company was required to "give further security to answer the plaintiffs' costs of the action, reference, and proceedings." Leave to appeal from the order was given by Sutherland, J., for the following reasons:—

One Edwin A. Benson, a director of the Bailey Cobalt Mines Limited, which company is one of the plaintiffs herein, obtained a judgment bearing date the 11th June, 1914, against that company, for $90,788.89 and costs. On the 26th June, 1914, an order for the winding-up of the said company was made. On the 15th February, 1915, for an alleged consideration of $5,000 and other valuable consideration, Benson assigned his said judgment to the Profit Sharing Construction Company, a foreign corporation.

An action was commenced by the plaintiffs, against Benson and other directors of the said company in liquidation, for damages for "fraud and misfeasance in office in relation to the company," in which the said judgment obtained by Benson against the company was attacked. The Profit Sharing Construction Company was not originally made a defendant, but subsequently applied to be added as a defendant. Thereupon a motion for security for costs was made by the plaintiffs, and an order thereupon obtained, which order the Profit Sharing Construction Company complied with.

Certain references were directed to the Master in Ordinary, who made certain reports pursuant thereto. One of these bears date the 22nd December, 1917, from which the Profit Sharing Construction Company is appealing.

ONT.

S. C.

BAILEY COBALT MINES LIMITED v. BENSON.

The plaintiffs applied to the Master in Chambers for and obtained an order that the defendant company "give further security in the sum of $3,000 to answer the plaintiffs' costs of the action, reference, and proceedings;" and "that the defendant company's proceedings be stayed until such security be given." The defendant company appealed therefrom, and its appeal was dismissed by order of Falconbridge, C.J.K.B., dated the 9th April, 1918.

This is a motion under Rule 507 for leave to appeal from the said last-mentioned order.

Now that the said defendant company has been properly made a defendant, and having regard to what Kekewich, J., said in *In re Miller's Patent* (1894), 11 R.P.C. 55, 70 L.T.R. 270, at p. 271, namely—"If he is without the jurisdiction, and comes within the ordinary rule with regard to security for costs, he certainly would be stopped from making that application until he had given security for costs, that is to say, the costs of that application; but having succeeded after giving security, and having got an order that he be made defendant, there is no further security for costs. He is a defendant out of the jurisdiction, and he is at liberty to defend without giving security for costs"—I think this leave should be given.

The decisions are somewhat conflicting: and the report of the Master involves matters of considerable importance to the defendant company, which might be finally determined against it unless the order for security were complied with. Reference also to *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351; *Apollinaris Co.* v. *Wilson* (1886), 31 Ch. D. 632; *Ward* v. *Benson* (1901), 2 O.L.R. 366.

Costs of the motion in the cause.

R. S. Robertson and *G. H. Sedgewick*, for appellant company.

W. Laidlaw, K.C., for respondents.

Hodgins, J.A.

HODGINS, J.A.:—Appeal, by leave, from the order of the Chief Justice of the King's Bench dismissing an appeal from the order of the Master in Chambers, who directed the appellant company to give security to the extent of $3,000 on its appeal from a Master's interim report in the winding-up of the above-named company.

It is not necessary to go into the particular facts of this case.

ONT.

S. C.

BAILEY COBALT MINES LIMITED v. BENSON.

Hodgins, J.A.

There is enough apparent in the proceedings to warrant security being given on the appeal for the costs thereof, if attention is to be paid to special circumstances.

But the point is really one of practice, and can be stated thus. If a foreign person or company is brought into an action here, either by being properly served abroad, or on his application to be added as a party defendant, and, after having been heard, is unsuccessful and desires to appeal, is there power to treat such person or company as the Rules would treat them if they came here originally to sue?

I think there is inherent power in the Court so to deal with them, notwithstanding that an appeal is in this Province merely a step in the cause. Such a person or company becomes, on the appeal, an actor desiring relief against the rights decreed to other parties, and, being outside the jurisdiction, should give such security as will enable the resident parties to recover their costs if they succeed.

In the case of *J. H. Billington Limited* v. *Billington*, [1907] 2 K.B. 106, the decision is based upon the inherent power of the Court to order security to be given in any case where it is thought just so to do. This authority exists in the Supreme Court of this Province, as well as in the English Superior Courts. *Stow* v. *Currie*, (1910) 20 O.L.R. 353, much relied on, depends upon the then Rule 1208, under the Judicature Act, and is based upon the fact that the security which already had been given covered past as well as future costs.

While, therefore, the jurisdiction of the Court may be maintained to order security, the amount fixed should be sufficient only to cover the costs of an appeal, which will be to a Judge in Court: *Re Sarnia Oil Co.* (1891), 14 P.R. (Ont.) 335; *Re McLean Stinson and Brodie Limited* (1910), 2 O.W.N. 435.

The amount mentioned should, therefore, be reduced to $200.

The proceedings appear to have been somewhat misconceived. The order is styled in an action which came to a conclusion when its end was served. Winding-up proceedings had been begun, and the action was brought by leave in those proceedings. The only reason for the bringing of an action, apart from the winding-up proceedings, is because it is thought that a conclusion reached by

ONT.

S. C.

BAILEY COBALT MINES LIMITED v. BENSON.

Hodgins, J.A.

the trial of an action will be more satisfactory than one worked out in the Master's office, or because of difficulties as to parties.

But when, on the 24th January, 1917, Mr. Justice Masten directed that the matters in question in the action be referred to the Master in Ordinary, "to be heard and determined by him in the winding-up proceedings and as part thereof," he decreed the termination of the action as a proceeding collateral to the winding-up, and decided that all the benefit of the action might in the future be obtained in and as part of the winding-up. It could not thereafter have any separate existence or be still covered by the leave originally given, as against the subsequent order of the Court making it part of the winding-up proceedings before the Master. There is no such thing as consolidation of an action and a winding-up: *per* North, J., in *Lovatt* v. *Oxfordshire Ironstone Co.* (1886), 30 Sol. J. 338.

The Master in Chambers had no jurisdiction to make the order in question, having regard to the order of reference, which is, it is stated, in the usual form: *Re Joseph Hall Manufacturing Co.* (1884), 10 P.R. (Ont.) 485; *Re Sarnia Oil Co.* (1893), 15 P.R. (Ont.) 182. The proper person to apply to for the order in question would have been the Master in Ordinary, who had charge of the reference, and before whom it is still pending: *Re Sarnia Oil Co.*, 14 P.R. (Ont.) 335. But, treating the order of the learned Chief Justice of the King's Bench as a substantive order, notwithstanding what is pointed out in *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 3, 32 D.L.R. 441, it may, after amendment of the style of cause so as to limit it to the winding-up proceedings, be affirmed save as to the amount, which should be reduced to the sum already named, which should be stated to be security only for the costs of the proposed appeal.

No costs of this appeal.

MEREDITH, C.J.O., and MAGEE, J.A., agreed with HODGINS, J.A. MACLAREN, J.A., dissented.

Meredith, C.J.O. Magee, J.A. Maclaren, J.A.

Order below varied.

N. S.

S. C.

THE KING v. GRAVES.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley, and Drysdale, JJ., Ritchie, E.J., and Mellish, J. November 30, 1918.

MILITIA (§ I—8)—DESERTION FROM—WHAT IS—CHARGE BEFORE STIPENDIARY—ABSENT WITHOUT LEAVE.

The defendant was charged before the county stipendiary for that "he did on or about the 14th day of May, 1916, desert" (from the active militia of Canada) "and was absent from the same as a deserter until apprehended on the 31st day of August, 1918." The court held that the gist of the charge that the accused was absent as a deserter involved being absent without leave and he was properly convicted under par. 13 of the Canadian order-in-council passed 9th November, 1917.

Statement.

APPLICATION under the Liberty of the Subject Act for the discharge from custody of defendant, a prisoner confined in the county jail for the County of Halifax under a warrant of commitment made by R. A. McLeod, a stipendiary magistrate for the county, the defendant having been convicted on his plea of guilty of the charge that he the said Cornelius Graves did on or about May 16, 1916, at Sandwich Battery in the county aforesaid, having previously been taken on the strength of the Composite Battalion, a unit of the Active Militia of Canada, on active service, unlawfully desert from the same, and was absent from the same as a deserter until apprehended on August 31, 1918.

James Terrell, K.C., in support of application; *Major Russell, contra.*

Drysdale, J.

DRYSDALE, J.:—This application ought to be refused. The conviction is, in my opinion, good on its face. The charge and conviction are for desertion. Desertion means absence without the intention of returning. The charge was that he, defendant, was absent without the intention of returning until the laying of the information. The conviction follows the charge and is, I think, good.

I would refuse the application.

Harris, C.J.
Russell, J.
Longley, J.
Ritchie, E.J.

HARRIS, C.J., RUSSELL and LONGLEY, JJ., and RITCHIE, E.J., refuse application.

Mellish, J.

MELLISH, J.:—The defendant was charged before the County Stipendiary, R. A. McLeod, for that

He did on or about the 14th day of May, 1916, desert (from the active militia of Canada) and was absent from the same as a deserter until apprehended on the 31st day of August, 1918.

He pleaded guilty to this charge, but his counsel objected that the magistrate had no jurisdiction to convict for desertion which took place more than 6 months before the date of the information.

The magistrate, however, convicted the prisoner in the terms charged, and his discharge is now sought under the Liberty of the Subject Act.

Par. 13 of the Canadian order-in-council passed November 9, 1917, is as follows:—

> Every one who deserts or is absent without leave from . . . the Active Militia of Canada is guilty of an offence and liable upon summary conviction under Part XV. of the Criminal Code with or without hard labour to a term not exceeding two years.

I think the charge capable of being read as meaning only that the accused, having deserted in 1916, was still absent as a deserter until August 31, 1918 (a date within 6 months of the information), the gist of the charge being that the accused was absent as a deserter, which involves being absent without leave. The accused pleaded guilty to this charge, and, in view of the law as to the time limit for laying an information which the magistrate is presumed to know, more especially as it was brought to his attention on behalf of the accused, I think we should interpret the language so as to give effect to the conviction as one for being absent without leave.

It will be observed in this connection that the magistrate's commitment refers to the conviction as for an "offence."

Major Russell, on behalf of the prosecution, argued that the information charged only the offence of "deserting," which continued each day the accused was absent as a deserter. I prefer to base my judgment upon the ground above stated.

Under the circumstances, it cannot be conceived that the magistrate intended to convict the accused of an offence committed before the 6 months preceding the information, or before the passing of the order-in-council creating the offence and giving him jurisdiction. The prisoner is admittedly guilty of the offence of being absent as a deserter within the requisite time, and whether or not such offence be called "deserting" or "being absent without leave" it would appear that the accused cannot possibly have suffered any injustice, if such is a material consideration.

I think the application should be refused.

Application refused.

CAN.

S. C.

CANADIAN PACIFIC R. Co. v. WALKER.

Supreme Court of Canada, Sir Louis Davies, C.J., and Idington, Duff, Anglin and Brodeur, JJ. November 18, 1918.

RAILWAYS (§ II—30)—RAILWAY RULES—SWITCHSTAND AND FIXED SIGNAL—DIFFERENCE BETWEEN—NEGLIGENCE—DAMAGES.

A switch stand is not a fixed signal within the meaning of the railway rules and regulations and is governed by different rules; an engineer is not guilty of negligence in passing a red light on a switch stand although compelled by the railway rules to stop where such light is shewn as a fixed signal.

Per Anglin, J.:—The words "must know" in rule 401 do not import knowledge acquired by use of the engineer's own eyes to the exclusion of every other source of knowledge however reliable.

Statement.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1918), 40 D.L.R. 547, 11 S.L.R. 192, affirming, on equal division, the judgment of the trial court with a jury which maintained the plaintiff's action. Affirmed.

Reycraft, K.C., for appellant; *P. M. Anderson*, for respondent.

Davies, C.J.

DAVIES, C.J. (dissenting):—This was an action brought by the plaintiff, respondent, to recover damages for injuries sustained by him in a head-on collision which occurred between the east-bound express, of which he was the engineer in charge, going out from Moose Jaw to Regina, and the west-bound express coming in to Moose Jaw, about a mile east of that station. The collision was the result of the plaintiff's train improperly getting across from its proper track to the track of the west-bound express, and the broad question to be determined is whether the plaintiff contributed by his negligence to the collision which caused his injuries. The jury found in his favour and awarded him $15,820 damages, made up of special damages $2,320, and general damages $13,500, and the trial judge entered judgment for that amount.

On appeal to the Appeal Court of Saskatchewan the court was equally divided. The Chief Justice and Elwood, J.A., being to allow the appeal and dismiss the action, while Newlands, J.A., and Lamont, J.A., were to dismiss the appeal, so that the judgment in plaintiff's favour stood.

This is an appeal from that judgment of the Court of Appeal.

The two judges of the Court of Appeal, Newlands and Lamont, JJ.A., who supported the judgment in plaintiff's favour, did so on the sole ground that, in their opinion, the switch light was not a "fixed signal" according to the rules of the company and that plaintiff therefore did not break r. 401 requiring that "engineers must know the indications of all fixed signals before passing them."

Newlands, J.A., says:—

It was admitted by counsel on the argument before this court that if a switch light is a "fixed signal" the plaintiff, respondent, should not have passed this point without ascertaining that this light was burning and if so, the colour of it,

and Lamont, J.A., says:—

It was not a question of construing the rule. The rule is clear. It is a question of determining whether or not a disc or light placed on a switch brings it within the rule and this, in my opinion, is a question for the jury.

The other two judges held, as did also the trial judge, that it was a fixed light and they pointed out that the plaintiff himself admitted in his evidence that there was nothing to which the definition of a target signal would apply except the disc or target set on a switch stand.

There was no difference of opinion in the Court of Appeal as to what the result should be if the switch lights were held to be fixed signals.

As to the damages awarded plaintiff, which is made a ground of appeal as being excessive, I am inclined to think them very large and beyond what the evidence justified, but in the view I take of the law and the evidence upon the other points of the case I do not feel it necessary to deal with the question of damages.

The essential points on which this appeal must be decided are whether the disc or target on a switch stand is a "fixed signal" within the rules, and whether the engineer was justified in passing upon the occasion in question the switch signals at points X and Y shewn on the sketch of the railway track at Moose Jaw without knowing the indications they gave would lead the train from No. 3 track, which was its proper track, to No. 2 track, which was the track of the incoming express with which the plaintiff's train collided.

The Tri Cities Express, so called, with plaintiff as engineer in charge, left Moose Jaw about 10 p.m. for Regina on the night of January 4, 1916.

The plaintiff had been running as an engineer over the route for a year and five months previous to this date, and always left the depot at Moose Jaw by the same tracks as on the night of the accident and was well acquainted with defendant's east yard at Moose Jaw.

In my opinion, the trial judge properly charged the jury on the question as to whether the target signal on the switch stand

CAN.
S. C.
CANADIAN PACIFIC R. CO. v. WALKER.
Davies, C.J.

was a "fixed signal" or not, but the jury ignored his direction and found, contrary to the evidence, which was all one way, that the switch stand and target signals at X and Y did not comply with the rules defining a target signal. Even Walker himself admitted that there was nothing to which the definition of target signal would apply except the disc or target set on a switch stand. I think in the light of the trial judge's charge to them on this point the finding of the jury that these signals were not "fixed signals" was "perverse," and I cannot understand why, after having charged them as he did on the point, the trial judge left the question to them at all.

A "fixed signal" is stated in the rules to be a "signal of fixed location indicating a condition affecting the movement of a train."

Now a target on a switch is a fixed location and admittedly indicates "a condition affecting the movement of a train."

For myself I do not entertain a doubt upon the question.

That leads us to the second question, whether the engineer was justified in passing the switch signals at points X and Y on the plan of the track without knowing the indications the lights gave that they would lead his train from its proper track No. 3 on to track No. 2, which was the track of the incoming express.

R. 401 says "that engineers must know the indications of all fixed signals before passing them."

The reason why such imperative language is used is obvious. The lives in many cases of hundreds of innocent passengers may be imperilled by the engineer of an express train ignoring the rule. In the case before us the engineer not only did not know but took everything for granted and did not attempt personally to acquire knowledge of what indications the signal lights upon them gave. He knew all about the incoming express, all about the "cut-off" at the switches X and Y which, if improperly set, would carry him over to the west-bound express track. He knew the location of these two switches and what the lights upon the target of the switch stand indicated. It appears to me after carefully reading his evidence that he knew everything necessary to be known by an engineer in charge of an express passenger train to induce him to take special precautions before passing these switches X and Y to assure himself beyond doubt and to know, as the rule states, "the indications of all fixed signals before passing them."

If these signal lights shewed green, then he could safely go straight ahead along his own track, while, if they shewed red, he would know that the switches were set for a divergence to the west-bound main line, in which case, of course, he must stop and have the switches properly set.

As a fact, though unknown to plaintiff, signal lights on these two switch stands X and Y shewed red, and consequently the train passed over the cut-off to the west-bound line and proceeded along it some three quarters of a mile until a head-on collision occurred.

Neither before or when his train passed across from its proper track to the west-bound track or afterwards did the engineer know anything about the lights or what track he was on. He neither looked himself nor did he instruct the fireman to look. He ran his train across to the west-bound track in ignorance, inexcusable, I think, of what the signals indicated.

The plaintiff's excuse for not knowing how the switches were set and what the lights on their targets indicated was that he could not see them from his side of the engine as they were on the left, or fireman's side, of it and the wind was blowing the smoke and steam past his, that is, the plaintiff's side of the engine cab. It was a stormy night and one which called for more than ordinary precautions. The train was going very slow, just crawling through the station yard and for about seven car lengths before coming to the switches the fireman, to plaintiff's knowledge, was not looking out. Curiously enough, although, as he says, he had instructed him to watch for the signals on the several switch stands which they had at first passed on leaving the station, he did not instruct him to look out for these in question. The plaintiff knew the fireman had ceased to keep a lookout when the engine was at least seven car lengths or 140 yards from the switches in question, as Walker himself testifies. The fireman was attending to his fire, plaintiff knew he was so attending. Two paces across the car would have enabled him to see and know for himself whether the lights on the targets of these switch stands entitled him to go on or required him to stop and avoid going over to the west-bound track. But the plaintiff neither took this, what one would think, necessary precaution nor instructed the fireman to look out and see what the signals indicated, and so the train passed across to the wrong track and along it for three-quarters of a mile till it

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. WALKER.

Davies, C.J.

collided with the incoming express. The plaintiff simply ignored r. 401, which said, "engineers must know the indications of all fixed signals before passing them."

But this man not only did not himself know or find out what the signals indicated before passing them, nor did he instruct the fireman to see although he knew the latter had given up looking out and was attending to his fires for some considerable distance before reaching the signal lights on these two switch stands X and Y. The fact is he took everything for granted, ignored the rule I have quoted and assumed all was right.

In the face of the facts I have stated, the perfect knowledge the plaintiff possessed with regard to all the necessary facts relating to this railway yard; the location of the different switches, the indications which the signals gave as to the train's movements, &c.; the necessity imposed upon him of knowing the indication of all fixed signals before passing them, and the utter ignorance he acknowledges himself to have been in as to the indications of the signal lights on the switches X and Y when he diverged to the west-bound track. I am at a loss to understand how any jury could be found in the face of the judge's charge to them as to what were "fixed signals" to say that plaintiff was not guilty of negligence in passing these switches at the time he did and without any knowledge of the indications they gave.

In my humble opinion, the plaintiff should have been nonsuited on his own evidence. As he was not, I can only hold the verdict to have been perverse.

The excuse put forward that he got what he called a high ball or proceed signal from the switch tender at the station and that this entitled him to assume that the line was safe and the switches all right for him is not, in my judgment, worthy of consideration. That he did not believe in it himself is shewn by his own evidence that as they were leaving the station he instructed his fireman "to keep a sharp lookout" for the switches, which, he says, he did until the train reached what is shewn on the plan in evidence as the Creek Bridge, when the fireman got down from looking out and said all right. But this place where the fireman got down from looking out was quite a distance from the switches in question, some seven car lengths plaintiff says, and the train was just crawling at a rate of two to four miles an hour. During all this

time no one was looking out and the plaintiff simply assumed, without knowing, as the rule required him to do, that the switches were set properly for his train's track. The plaintiff himself, on his evidence, shewed clearly why he was so careless and negligent respecting the indications which the light signals of switches X and Y gave. He relied upon the signal given to him, as he says, by the switch-tender when he was leaving the station.

Q. Do you think there was no duty after you passed those switches to see again whether you were on the right track or not? A. No, as long as I got the signal from that man, whose place and duty it was to line up those switches, and has always done so.

Q. That is Mr. Weeler? A. Yes, as long as he gave me the signal that all those switches were lined up, that relieved me.

Q. Having got the signal of high ball from the switch-tender at the station? A. Yes.

Q. You then felt perfectly warranted to go ahead? A. Yes.

Q. Notwithstanding you could not see your track? A. Yes. Because he gave that signal to me to say that those switches were all lined up.

Q. Having got the signal from Mr. Weeler on the station, and started on the right track, you would have felt in consequence of that you would have felt perfectly safe in going on without anything further? A. Yes. I did.

Q. And there was no further duty cast upon you? A. Yes.

His Lordship:—Why did you tell the fireman to keep an extra lookout? A. As an extra precaution.

Those clear and explicit statements of the plaintiff himself as to why he passed the fixed signals X and Y without knowing what they indicated as to his proceeding or stopping effectually disposed of the other excuses offered by him as to his not crossing the engine cab and seeing for himself what these signals indicated, one of these excuses was that possibly he might, by crossing over, miss seeing a fusee burning or flaring on the track indicating danger. The fact being that he had already sworn positively that remaining in his post on his right hand side of the cab he could see nothing outside of the track because of the wind blowing the smoke and steam on his side of the car. This fusee excuse in the light of his sworn reasons for passing the switch stands without knowing the indications they gave respecting the movements of his train seems to me to be simply an afterthought and a very questionable one at that.

My conclusion, after a very full study of the evidence and after hearing the arguments at bar, is that the signals on the target of a switch stand are "fixed signals," within the meaning of the rules beyond reasonable doubt, and that the plaintiff, in run-

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. WALKER.

Davies, C.J.

ning his car across the "cut-off" at the switch stands X and Y on to the west-bound track, did so in ignorance of what these signals indicated and in careless and negligent assumption that they indicated all was right for him to go ahead on his own proper track because of the signal or high ball, as he called it, he got from the switch-tender when leaving the station; and that, in acting on such unwarranted assumption, he violated rule 401, which required him unless and until he knew what the signals indicated to stop his train and find out; that the train was running at a very slow rate and could be stopped in a moment, as he himself said, and that there was nothing to justify him in acting as he did upon his unwarranted assumption that the signals indicated all was right for him to proceed; that his duty clearly was if his fireman was busy with his fire in order to get speed up to step across the engine cab before reaching the switch stand and see for himself what their lights indicated, and if anything prevented his doing that to stop the train till he did know whether safety or destruction lay ahead of him.

I think the appeal should be allowed and the action dismissed.

Idington, J.

IDINGTON, J.:—The question raised herein of the interpretation and construction of rules bearing upon the duty of the engineer in charge of a locomotive drawing a train when it involves, as herein, the determination of whether a switch stand in a railway yard constitutes a fixed signal or not, is of such technical character as to require expert evidence to assist the learned trial judge in order that he may direct the jury aright.

Notwithstanding the apparent simplicity of such a phrase as "movement of a train," I am unable to hold that these rules, so far as defining a fixed signal when using such said phrase, are framed in such plain ordinary language that the judge could and must, unaided by such like evidence as I have indicated, direct the jury as to the meaning thereof in the way that the law requires relative to documents framed in plain ordinary language.

I take the law to be correctly laid down in Taylor on Evidence, 10th ed., at pp. 45-6, as follows:—

> Matters of great nicety arise in connection with this subject. But the clear general rule is that the construction of all written documents is for the court alone. The construction of these is, as we have said, for the court alone so soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury;

and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. The term "written documents" includes Acts of Parliament, judicial records, deeds, wills, negotiable instruments, agreements and letters. A misconstruction by the court is the proper subject of appeal to a court of error; but a misconstruction by the jury cannot in any way be effectually set right. The effect of the rule consequently is to render the law certain. A marked instance of its application occurs in the case of the construction of the specification of a patent, for, though the interpretation of such an instrument—relating as it does to matters of science and skill—would seem peculiarly adapted to the practical information of jurors, the court must construe it after merely ascertaining from the jury an explanation of technical terms. Again, the construction of all written contracts is for the court.

The onus of making appellant's contention in that regard clear rested upon it; in order to establish that respondent had been guilty of contributory negligence. It failed at the trial to adduce any evidence save such as elicited by its counsel in the cross-examination of the respondent. That evidence clearly declared that none of the switch stands passed by him in the Moose Jaw yard at the time in question were fixed signals. He had long experience and before that had passed an examination on these rules and acted according to his understanding thereof.

The requirements of the rules as to fixed signals, in relation to switch stands in the yard, do not seem to have been observed, for he passed three or four of them in the same yard in his usual manner; which was hardly consistent with the rigid and literal observance of his duties relative to actual "fixed signals" well known to be such. Indeed, such observance would hardly be practicable in a station yard where many switches had to be passed in the course of shunting trains.

Moreover, the switch-tender's signal, given the respondent, seems to have been something intended to have been done and acted upon in the usual manner, and as if a necessary requirement which he was accustomed to observe; clearly in disregard of the switch stands being treated as fixed signals.

The incident of the non-observance strongly suggests that the switch stands in the yard were not considered by any one in appellant's service as fixed signals.

There were two trials in this case and if such a vital point as raised herein really in fact is seriously intended to be determined,

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

I should have expected the appellant to have met it fully and fairly and to have put beyond doubt the true solution of the question involved by proving that switch stands were in fact part of that which expert railwaymen understood by the ambiguous term in question.

The trial judge submitted the question to the jury and they answered adversely to appellant.

I am not surprised at the result in face of the evidence. Nor, leaving aside the propriety of the submission of the question, can I see how the appellant can complain.

Indeed, it seems to me that the plain duty of the appellant was to have proved conclusively that such switch stands were fixed signals which every engineer knew and in relation to which the respondent was bound to observe duties relative thereto as such. Failing to do so, or even to make an attempt to aid the court in the way the law as laid down in the above quotation and much more from Taylor indicates, I cannot see how it can now complain.

Had it done so and proved as it now claims instead of the contrary as its counsel seems to have intentionally or otherwise done, I could see some ground of complaint.

The minor inferences and arguments based on suggestions of other neglect on the part of respondent were clearly all for the jury and its verdict final.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J. (dissenting):—I am to allow this appeal with costs.

Anglin, J.

ANGLIN, J.:—The plaintiff was the engineer on an east-bound train of the defendants running from Moose Jaw to Saskatoon. On a cold and windy winter night this train collided on the west-bound track with a west-bound train about a mile and a half east of Moose Jaw. It is now admitted that the plaintiff's train had been diverted to the west-bound track owing to the misplacing of two switches controlling a "cut-off" or cross-over track connecting the two main tracks, at a point about three-quarters of a mile west of the place of collision and that this constituted actionable negligence imputable to the defendants which renders them liable unless the collision should be ascribed to fault or negligence of the plaintiff.

If the mechanism of the switches in question was not out of

order, of which there is no evidence—and no such suggestion was made at the trial—set as they were for diverging tracks they must have shewn red lights. Had he seen or been otherwise informed that the switch stands shewed these lights the plaintiff would have known that should his train proceed it would pass from the east-bound to the west-bound track. He was under orders to proceed on the east-bound track.

The defendants assert that in passing these red switch lights as he did, the plaintiff not merely was grossly negligent, but that he broke a definite rule of the company sanctioned by the Board of Railway Commissioners. They also charge him with further neglect in having failed to discover that he was on the west-bound track before the collision became inevitable.

In reply he asserts that from the right hand side of the engine cab—admittedly "the engineer's side" on which he says it was his duty to be—he was unable, owing to clouds of escaping steam and drifting snow obstructing his vision, to see the switch lights in question, which were on the left-hand side of the track, and that he passed them without being aware that they were set for the "cut-off" and did so in reliance on his fireman's assurance that they were "all right"—an assurance which he the more readily accepted (as he maintains he was entitled to do) because he had already received from the switch tender what is known as a "high ball" signal to the same effect. In his evidence he says that owing to the slow speed of his train he did not feel any motion that would cause him to realise that he had diverged at the "cut-off," and that, after it had passed to the west-bound track, although he was looking out, the clouds of steam and drifting snow prevented his noticing that there was a parallel track to his right which would not have been there had he been on the east-bound track.

The plaintiff's fireman was killed in the collision, and the only evidence of the circumstances preceding it is given by the plaintiff himself. The defendants offered no evidence. Upon a charge not objected to at the trial, or now, the jury has found that there was no negligence on the part of the plaintiff. This implies that they believed the plaintiff's evidence and found all controverted matters of fact bearing upon that issue in his favour. They accepted as sufficient his explanation of his inability to see the indicating lights of the switches set against him and of his failure

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

to realize that his train had passed to and was proceeding on the west-bound track. These were matters which it was within their province to pass upon, and I am not prepared to hold that their implied findings in regard to them were so clearly perverse that we should set them aside.

It follows that, unless the defendants can establish that the plaintiff disregarded some rule which he was bound to obey at all hazards—a rule so imperative that failure to comply with it would conclusively debar him from recovery regardless of any considerations of negligence or reasonable excuse—the judgment for the plaintiff cannot be disturbed. The defendants submit that rule 401 is such a rule, and that it was disregarded by the plaintiff. The relevant part of that rule reads as follows:—"Engineers must know the indications of all fixed signals before passing them."

Conceding this rule to be so imperative, the plaintiff answers the defendants' contention based upon it by averring that the switch stand signals which he passed although set against him were not "fixed signals," and that if they were, he complied with the requirements of the rule properly interpreted.

On the first of these two questions there has been much divergence of judicial opinion. The trial judge asked the jury to determine it and acted upon their negative answer. The Court of Appeal would appear to have regarded it as a question proper to be dealt with by the court. The four learned appellate judges were equally divided in opinion upon it, Newlands and Lamont, JJ., agreeing with the construction placed by the jury on the term "fixed signals," and the Chief Justice of Saskatchewan and Elwood, J.A., holding that switch stand signals are "fixed signals" within the definition of that term contained in the book of rules.

It would almost seem to be a hardship for the plaintiff should he, against his sworn statement of his understanding to the contrary, which the jury must have accepted and without any expert or other evidence in support thereof, to be held bound, at the peril of being held blameworthy should he act on the contrary view, by an adverse interpretation of this term as used in rule 401, as to which learned judges have disagreed. While there is a great deal to be said for the opposite view, with such light as we now have on the question I would be inclined to agree with the contention put forward by the defendants, substantially for the reasons stated by

Elwood, J.A., 40 D.L.R. 547, 552. I am satisfied, moreover, that without any such special rule as that under consideration, an engineer's disregard of a switch stand signal or indicator set against him, whether it be technically a "fixed signal" or not, would disentitle him to recovery for injury sustained in an ensuing collision, if he saw, or if, under the circumstances, it should be held that but for his own fault he would have seen that it was set against him. But I find it unnecessary, and on this record I think it would be unwise, to express a definite or concluded opinion on the question whether switch stand signals are or are not "fixed signals."

Assuming that they are, whether the plaintiff did or did not comply with rule 401 depends, in my opinion, on the meaning to be attached to the words "must know." In the strict sense knowledge is, of course, incompatible with error. One cannot know that which is not the fact. But nobody contends that r. 401 means that fault on the part of an engineer will be conclusively established should he proceed under a mistaken conviction as to the indication of a switch light although he had exhausted every means humanly possible to ascertain the fact. "Must know" does not import that there must be a certainty which is quite beyond our finite and fallible powers to attain—does not imply that mistake, however caused, will always be inexcusable. The defendant's contention is not that. It is that the engineer is obliged to have a conviction that the indication of every fixed signal entitles him to proceed, based on personal ocular observation, before he does so; that if he proceeds without "knowledge" thus acquired he does so at his peril. If the words "must know" import exclusively, as the defendants contend, knowledge acquired from the testimony of the engineer's own eyes, r. 401 admittedly was not obeyed. If, on the other hand, information on what a reasonably prudent man would, under the circumstances, have been justified in believing that there was certainly, as great as the limitations of human fallibility permit should exist, that the switches in question were set in his favour suffices as the foundation of the "knowledge" of that fact demanded by the rule, and the jury was satisfied, as it must have been, that the plaintiff had information of that character, his right to recover cannot be sufficiently impugned although the switch signals were in fact set

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. WALKER.

Anglin, J.

adversely to him and personal observation, if feasible, might have so informed him.

I have selected the following definitions of the active verb "to know" from standard English dictionaries:—

To have cognizance of (something) through observation, inquiry or information; to be aware or apprised of (F. savoir, Ger. wissen) to become cognizant of, learn through information or inquiry, ascertain, find out:

To be cognizant, conscious, or aware of (a fact), to be informed, to have learned; to apprehend (with the mind) to understand. With various constructions: a. with dependent statement, usually introduced by that. Murray.

To be convinced or satisfied regarding the truth or reality of; to be informed of; as, to know things from information. The Imperial.

To perceive or understand as being a fact or truth (primary definition) and, in a general sense to have definite information or intelligence about; be acquainted with either through the report of others or through personal ascertainment, observation, experience or intercourse. The Century.

To perceive or apprehend as true; to recognize as valid or as a fact on the basis of information possessed, or of one's understanding or intelligence, to have mental certitude in regard to, together with a clear comprehension of; to perceive with understanding and conviction. Webster.

A moment's reflection will suggest any material truths within our certain knowledge of which, although not founded upon any testimony afforded by our eyesight, we would immediately challenge any denial. Knowledge based on the testimony of our fallible senses is far from being universally accepted as the highest or the most certain. There are other sources of moral certitude.

Walker, in his evidence, asserts that he had duties to discharge which required him, at least while running within the Moose Jaw yard limits, to remain on the right-hand side of his engine. He particularizes the necessity of his being in a position to see a possible flagman's signal or a burning fusee on his side of the track which, were he on the left-hand side of his engine, might escape his attention. R. 11 forbids passing a burning red fusee. A flagman's light swung across the track would have required him to stop (r. 12). Any object waved violently by any one at or near the track is a signal to stop (r. 13). Common knowledge tells us that he might have added that the position of the throttle, the lever and the air-brake controller, all of which he might be suddenly required to use with the utmost promptitude to meet an emergency, also made it incumbent upon him, at least while within yard limits, to retain his position on the right-hand side of the engine cab. While there appears to be no rule imposing on the engineer in explicit terms the duty of remaining on his own, or the

right-hand side of the cab, r. 35, in three places, implies such a duty:—

35. A yellow flag or a yellow light placed beside the track on the same side as the engineer of an approaching train, indicates that the track 3,000 feet distant is in condition for speed of but six miles an hour unless otherwise instructed, and the speed of the train will be controlled accordingly. A green flag or a green light, placed beside the track, on the same side as the engineer of an approaching train, at a point beyond the slow track, indicates that full speed may be resumed.

A "slow" sign placed beside the track, on the same side as the engineer of an approaching train, may be used to mark a point where a slow order is in effect.

Having regard to the definitions, the uncontradicted evidence, and the passages from the rules to which I have referred, I have no hesitation in concluding that the words "must know" in r. 401 do not import knowledge acquired by the use of the engineer's own eyes to the exclusion of every other source of knowledge, however reliable. The rule may be satisfied by knowledge acquired by inquiry or information from the fireman, when the engineer cannot himself see the signal indicated from the place he occupies in the cab, provided he takes adequate precautions to ensure, as far as reasonably possible, the accuracy of such information. Thus the engineer may rightly be required to see that his fireman, if he is relying upon him to communicate information as to signals, is in a position to see them, has taken what appear to be reasonably sufficient means to ascertain what they are and has communicated the information in such a manner as to obviate any reasonable possibility of misunderstanding. The plaintiff has sworn that he discharged his duty in all these particulars, and the jury whose function it was to pass upon his credibility, have accepted his statement. I find nothing in the rules which prevents an engineer, under these circumstances, from relying upon the information given by his fireman that the switch stand signals or indicators on the left-hand side of the track which he may be unable to see himself appear to be in order and "ranged up" to allow the train to proceed. On the contrary, were an engineer obliged to cross over to the left-hand side of the cab to verify with his own eyes the indication of every switch light on the left-hand side of the track encountered in a yard such as that at Moose Jaw, not only would the running of trains be seriously impeded but other dangers above indicated, against which it was his duty to guard, would not be provided for.

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

Upon the findings of the jury the proper conclusion, in my opinion, is that Walker had the "mental certitude"—the "conviction" based on information—necessary to satisfy r. 401.

If I thought that on its proper construction rule 401 imposes on the engineer the duty under all circumstances of ascertaining by personal observation the indications of every switch stand light on the left-hand side of the track before passing it, I should have had to consider very carefully indeed before holding the plaintiff disentitled to recover, whether the discharge of duties inconsistent with the observance of it was not also required of him, and, if so, whether the defendants could invoke against him a failure to comply with that rule caused by the necessity of fulfilling such other duties.

The verdict is no doubt large, but it is not so excessive that it is possible to say that the jury must have been influenced by improper considerations in arriving at it, and while I might, if trying this action, have reached different conclusions as to some facts deposed to by Walker relevant to the question of contributory negligence, I could not, without usurping the functions of the jury in regard to these matters, substitute my views for theirs.

I would, for these reasons, dismiss this appeal.

Brodeur, J.

BRODEUR, J.:—This is a railway accident in which the plaintiff, respondent, was seriously injured. He was the engineer on a passenger train of the appellant company and he was bound to go east on a double track.

His train was then on track No. 1 at the station at Moose Jaw, and in order to reach track No. 3 or the east-bound main track, on which he was to run to reach the next station, the switches had to be lined up by an employee called the switch-tender.

Having received from the conductor of the train the order to start, and having received from the switch-tender the high ball signal indicating that the switches were properly laid, he started his train, which went down on the east-bound track; but by a very serious and evident mistake of the switch-tender the switch at the end of the yard through which the train could be transferred from the east-bound track to the west-bound track had been left open and the train engaged itself on the west-bound track and came into collision with another train a few minutes after.

It is common ground that the switch, which I will call the Y

switch because it is indicated in that way on the plan filed in the case, was not properly set. There was negligence on the part of the company's employees in giving Walker instructions to proceed with his train when that switch was not properly lined up. Then there is no doubt as to the company being liable for that neg'igence.

But the contention of the company is that the proximate cause of the accident was the negligence of Walker, because he should have ascertained and known the indication that this switch was set in such a way that his train would be brought on a west-bound track instead of being kept on the east-bound track. He is then charged with having failed in the duties which he had to perform and with being guilty of contributory negligence.

The jury found in favour of the plaintiff on the question of contributory negligence and that verdict was accepted by the trial judge and confirmed by the Court of Appeal.

Counsel for the company relied on r. 401 of the General Train Rules, approved by the Railway Commission, which says:—

Engineers must know the indication of all fixed signals before passing them. At railway crossings, drawbridges, junctions or train order offices, they will require the fireman to observe and communicate the indications of signal.

It is contended on the part of the respondent that he had ascertained through his fireman that the Y switch was properly set and that he could proceed, and, besides, he adds that a light on a switch stand is not a fixed signal and that r. 401 does not apply in this case.

The accident happened during the night of January 4, 1916. It was a dark, stormy and very cold night, 30 below zero. A strong wind was blowing from the north and the steam coming from the engine was passing over to the right side of the engine, the engineer's side, so that the latter was enveloped in a fog, it being practically impossible for him to see on his side. His fireman had been instructed to keep a look-out. The switches were on the side of the fireman, and he reported that everything was all right. The poor fireman was killed as a result of the collision and his evidence unfortunately was not available at the trial.

The jury has found, as I have said, that the engineer, in those circumstances, was not guilty of contributory negligence. He could not himself see, in view of the fog which was surrounding his

CAN.

S. C.

CANADIAN PACIFIC R. CO. v. WALKER.

Brodeur, J.

side of the engine, and it was proper for him to instruct his fireman to look.

Besides, has that rule any reference to the lights on the switch stand? I do not think so, because then there would be a conflict between the rr. 10 and 661 and r. 401. R. 10 says that a red light means that the train should stop. R. 661 says:—"Trains or engines may be run to, but must not be run beyond a signal indicating stop."

These two rules read together mean that when a red light is seen the engine must stop and the train must not go further. It could not apply to lights on switch stands, because there the trains are not bound to stop; but the lights on the switch stand simply indicate that the green is set for the main track and the red is set for the diverging track. If r. 401 was to be read as applying to switch stands, then the duty of the engineer in this case would have been to stop at the four red lights which were on the switch stands before he reached the Y switch, and nobody contends that.

The plaintiff has said in his evidence, and it was not contradicted, that those switch stands are simply indicators and not fixed signals as included in rule 401. I think he was right in his contention; because otherwise there would be conflict between the rr. 10 and 661 on one side and r. 401 on the other.

I have come to the conclusion that the jury was right in declaring that there was no contributory negligence on the part of plaintiff.

The appeal should be dismissed with costs.

Appeal dismissed.

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.

REX v. CARSWELL.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. January 28, 1918.

INTOXICATING LIQUORS (§ III E—79)—*Duplex house—Private dwelling — Ontario Temperance Act.*] — Motion for an order quashing the conviction of the defendant, by a magistrate, for having intoxicating liquor in a place other than the private dwelling-house in which the defendant resided, contrary to sec. 41 (1) of the Ontario Temperance Act, 6 Geo, V. ch. 50.*

G. H. Kilmer, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—The accused was convicted of having liquor in a place other than a private dwelling-house in which he resided, and fined $200, under sec. 41 (1) of the Ontario Temperance Act.

The liquor was in one section of what is commonly called a "duplex house." Under one roof there are two dwellings—the lower flat constituting one and the upper flat the other. There is no inside communication between the flats; each has its separate front and back door; the doors of the upper dwelling being reached by outside stairs.

The magistrate has erroneously assumed that this situation is covered by my decision in *Rex* v. *Purdy* (1917), 41 O.L.R. 49. The question here is quite different.

* Section 41 (1) of the Act is as follows:—

"41.—(1) Except as provided by this Act, no person, by himself, his clerk, servant or agent, shall have or keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license."

By the interpretation section of the Act, 2 (i), "'Private dwelling-house' shall mean a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence."

But there is a sub-clause (i.) which provides:—

"(i.) Without restricting the generality of the above definition of a private dwelling-house, among other things which the expression 'private dwelling-house' does not include or mean, it shall not include or mean and shall not be construed to include or mean . . . any house or building the rooms or compartments in which are leased to different persons. . . ."

ONT.
S. C.

Undoubtedly the dwelling is a "private dwelling-house," as defined by the Act, unless it can be brought within the exceptions. The Crown contends that the dwelling ceases to be a "private dwelling-house" because it is a "house or building the rooms or compartments in which are leased to different persons:" sec. 2 (*i*), clause (i.), of the Act.

I do not think this contention is well-founded. The exception is confined to a subdivision of that which constitutes a private dwelling-house. An ordinary house ceases to be a private dwelling if there are boarders, or meals are sold, or the rooms are let to different persons. In similar circumstances, a duplex house ceases to be a private dwelling; but this clause does not destroy the character given to the duplex house as "a private dwelling-house," by the main provision, merely because the different dwellings have different tenants.

The question in the *Purdy* case depended upon other parts of the same clause, which provided that no building in which there was an office or shop could be a private dwelling-house within the meaning of the statute.

I think the conviction must be quashed, and the fine should be refunded, with costs. *Conviction quashed.*

Re HEWITT AND HEWITT.

Ontario Supreme Court, Latchford, J. June 25, 1918.

INSURANCE (§ IV B—172)—*Life—Change of beneficiary—Preferred class—Declaration in writing—Sufficiency—Soldier's will—Insurance Act—Policy payable in Ontario—Domicile British Columbia.*]—Motion on behalf of Sarah Hewitt for an order declaring her entitled to the insurance moneys payable under a policy of insurance issued by the Crown Life Insurance Company upon the life of James T. Hewitt, the applicant's son, who was killed in battle.

The moneys were also claimed by Gwendoline E. Hewitt, the widow of the deceased.

The following statement of facts was agreed upon by counsel for the two claimants respectively:—

1. The deceased, while a resident of and domiciled in Winnipeg, Manitoba, took out an insurance policy for $2,000 in the Crown Life Insurance Company, a corporation having its head office in

ONT.
S. C.

Toronto. The policy bears date the 7th November, 1904, and is number 12607. By the said policy the loss is payable to the assured's mother, Sarah Hewitt, who for the past 30 years has resided in Toronto. The said policy is exhibit 1 hereto.

2. The deceased was married in Winnipeg, in or about the year 1905, and his then wife died in Vancouver, B.C., in or about the year 1912.

3. The deceased, after having lived in Winnipeg until the year 1906, moved to and became domiciled in British Columbia, where he remained domiciled until his death.

4. While a resident of and domiciled in British Columbia, the deceased enlisted in the British Expeditionary Forces, such enlistment having taken place in August, 1915. Subsequent to his enlistment, namely, in June, 1916, the deceased married Gwendoline Emily Neat, at the city of Vancouver, British Columbia, and she is now his widow.

5. Before leaving for overseas, namely, on the 17th January, 1917, the deceased made his will on a printed form furnished by the Dominion Government, a copy of the said will being attached hereto, as exhibit 2. The said will, so far as is known, was never revoked or altered by any written instrument.

6. During the whole of the past many years, including the period when the deceased was a widower, he regularly sent money to his mother, who actually held the said policy of insurance, and his said mother paid several premiums on the said policy, amounting to about $112.50.

7. The deceased was killed in action in France on the 11th November, 1917.

8. On the 23rd October, 1917, while at the front in France, the deceased wrote his widow, the said Gwendoline Emily Neat, the letter marked exhibit 3 hereto.

9. On the 13th November, 1917, being 2 days subsequent to the deceased's death, his mother, the said Sarah Hewitt, received by mail from the said James T. Hewitt a letter dated the 23rd October, 1917, marked exhibit 4 hereto.

10. The policy of insurance in question herein was the only policy of life insurance carried by the said deceased.

11. The mother of the deceased is a widow, aged about 73 years.

12. The Crown Life Insurance Company has consented to pay

ONT.
S. C.

the moneys due under said policy of insurance to whichever of the claimants may be declared entitled thereto.

In the letters referred to, the deceased James T. Hewitt intimated an intention of changing the beneficiary of the policy, substituting his wife for his mother.

The will was on a printed form, the blanks being filled up in writing. The will as it stood when executed was as follows, the words written in being italicised for convenience:—

Form of Will.

I, *James Thomas Hewitt* (Name in full) Regimental Number ——— serving in *173rd Battalion* of the Canadian Expeditionary Force, do hereby revoke all former Wills by me made and declare this to be my last Will.

I bequeath all my real estate unto

Gwendoline Emily Neat Hewitt
Suite 19 Mt. Crown Block
North Vancouver B.C.

} Name and address of person or persons to whom it is to go.

absolutely, and my personal estate I bequeath to

Gwendoline Emily Neat Hewitt
Suite 19 Mt. Crown Block
North Vancouver B.C.

} Name and address of person or persons to receive personal estate* (See note).

Important Note this *17th* day of *January* A.D. *1917*.

This must be signed and dated by the soldier himself.

James T. Hewitt Signature of soldier.

*N.B.—Personal estate includes pay, effects, money in bank, insurance policy, in fact everything except real estate.

Signed and acknowledged by the Testator as and for his last Will in the presence of us both present at the same time, who in his presence, at his request, and in the presence of each other have hereunto subscribed our names as Witnesses.

The two witnesses must sign here

Signature of First Witness *J. M. Reid*,
Address of Witness *1306 Carders St. Vancouver, B.C.*
Occupation of Witness *soldier*
Signature of Second Witness *Leonard Sydney McGill*
Address of Witness *763 Twelfth Avenue East, Vancouver, B.C.*
Occupation of Witness *Military officer.*

ONT.
S. C.

The question was, whether the change of beneficiary was validly effected.

A. R. Hassard, for the applicant.

R. H. Parmenter, for the widow of the assured.

LATCHFORD, J.:—It is conceded that unless this case can be distinguished from *Re Monkman and Canadian Order of Chosen Friends* (1918), 42 O.L.R. 363, the claimant, as the beneficiary named in the policy, must fail.

The assured, a soldier on active service, bequeathed to his wife, the respondent, all his personal estate, using the "Form of Will" adopted officially, and, it must be said, stupidly, for the use of members of the Canadian Expeditionary Forces.

The policy is declared to be payable at the head office of the insurers, in Toronto, and was effected while the assured was a resident in Manitoba. By R.S.M. ch. 98, sec. 47, a policy issued by an insurance company registered in that Province, as this company doubtless was, shall be payable in that Province, "when the assured resides therein." The assured, however, was not residing in Manitoba when the policy became payable; and I do not think the law of Manitoba has any application to the case. The assured, when he made his will, and when he was killed in action in France, undoubtedly resided and had his domicile in British Columbia.

The law of the domicile governs, it is contended; and the change in the designation is by that law ineffective.

The British Columbia statute of 1911, ch. 115, sec. 8, follows verbatim the wording of sec. 160 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 160, until nearly the end of the section. The portion omitted is not material here. The law of British Columbia as to the requisites necessary when a change in the designation of beneficiaries is made is the same as the law of Ontario was when *In re Cochrane* (1908), 16 O.L.R. 328, and *Re Earl* (1910), 1 O.W.N. 1141, 16 O.W.R. 901, were decided. No amendment corresponding to 2 Geo. V. ch. 33, sec. 171 (5), now R.S.O. 1914, ch. 183, sec. 171 (5),* was ever enacted in British

*171.—(5) Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration.

ONT.
S. C.

Columbia. Accordingly it is argued that the decisions of our Courts based upon the amendments of 1912 do not apply, and that, as in such cases as *In re Cochrane*, the policy must be "*identified* by number or otherwise."

This argument is, I think, unanswerable if the law of British Columbia govern the case. But, in my opinion, the law of that Province does not apply. I adopt the principles stated by Middleton, J., in *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, at p. 32, 28 D.L.R. 424, approved in the judgments of Riddell and Masten, JJ., in the same case. The power which the testator exercised is, or is analogous to, a power of appointment, and is governed, not by the law of the Province in which he resided, but by the law of this Province, and the will was effective to substitute the testator's wife for his mother as the person entitled to benefit by the policy.

The case is one in which the costs of each party, fixed at $25, may be paid out of the fund.

FOXWELL v. POLICY HOLDERS MUTUAL INSURANCE Co.

Ontario Supreme Court, Falconbridge, C.J.K.B. March 8, 1918.

INSURANCE (§ III F—145)—*Life—Lapse of policy by non-payment of premium—Evidence of revival—Acceptance by agent of premium after lapse—Terms of policy.*]—Action by the widow of Walter E. Foxwell, deceased, to recover the amount for which his life was insured in her favour by a policy issued by the defendants.

D. W. Saunders, K.C., and *E. C. Ironsides*, for the plaintiff.

H. R. Frost, for the defendants.

FALCONBRIDGE, C.J.K.B.:—Action by widow and beneficiary on a policy of insurance on the life of her husband.

Defence, that the policy lapsed and became void by reason of non-compliance of the insured with the terms thereof, in failing to pay the premium due thereunder on the 15th July, 1917, or within one calendar month thereafter, and also in subsequently failing to produce evidence satisfactory to the company that he was in good health, in addition to tendering the amount of such overdue premium to the agent of the company.

ONT.

S. C.

In the body of the policy appears the following clause:—

"Premiums are due and payable at the office of the company on or before the fifteenth day of the month in which they fall due, which day shall be known as the premium due date of the policy. A grace of one calendar month from the actual due date therefor will be allowed for the payment of all premiums hereon (except for the first), during which time the insurance will continue in force. If death occurs within the month of grace the unpaid portion of the premium for the current policy year will be deducted from the amount payable hereunder."

Among the *conditions and privileges* endorsed appears the following:—

"When a premium falls due and is not paid in cash within the calendar month's grace, if the said reserve (after deducting the accumulated indebtedness on this policy) is less than the annual premium, or if the accumulated indebtedness at any time exceeds the reserve as above, this policy shall lapse and become void; but the company will, nevertheless, within five years thereafter, revive the policy on production of evidence, satisfactory to the company, that the insured is in good health, and on payment of any overdue premiums, with interest, as above stated, and of such a sum as shall reduce the indebtedness to an amount not exceeding the reserve. The reserve referred to herein shall be calculated for the number of full years' premiums paid, and not for any fractional part of the policy year."

Under the general provisions, also endorsed, appears:—

"4. If any premium is not paid on or before the date when due, the liability of the company shall be only as hereinbefore provided."

Also endorsed is the following notice:—

"Notice is hereby given that no receipts for payment shall be valid or binding upon the company except those issued from the head office in Toronto, upon the company's printed forms, signed by the president or vice-president or manager or secretary. Premiums are payable at the head office, but, for the convenience of the insured, they may, when not overdue, be paid to an agent of the company in exchange for the official receipt signed as above stated and countersigned by the agent."

The husband died on the 22nd August, 1917, having been ill

ONT.
S. C.

for one week. On the day before (the 21st), the plaintiff paid to Frederick Marsh, city manager and district agent of the defendants, the overdue amount, $3.32, and he gave her the following receipt:—

"Aug. 21st, '17. Received from Mrs. Foxwell sum of three dollars 32-100, being premium for month July and August, official receipt to follow.

"FRED MARSH."

This premium had been overdue since the 15th July.

The plaintiff says that Marsh made no objection, but just said that the official receipt would follow. She denies that he said anything about a declaration that her husband was in good health. She says she had never read the policy. Marsh was called for the defence, and says he told her that he or she would have to sign a certificate of good health; that nothing was said about his state of health. He did not give her a health certificate form, because, he said, he did not have one with him. This is the only question of fact in dispute in the whole case. Marsh gave her an unconditional receipt; and, as it seems to me that he is endeavouring to qualify that receipt, the onus is upon the defendants; and, the witnesses being of apparently equal credibility, I accept her statement as to what took place.

Marsh, who was going out of town, took the money to the bookkeeper of the defendants and asked him to send the official receipt. Marsh said that the bookkeeper in sending it was acting for him, Marsh, and not for the company. This is of course a question of law and not of evidence. The bookkeeper, on the morning of the 22nd, sent the official receipt, which is as follows:—

"The Policy Holders Mutual Life Insurance Co.

"Head Office, Toronto, Ont.

"No. 15350

"Policy No. A-1288, on the life of Walter E. Foxwell.

"Number of Months paid	Amount Paid	Agents are not authorised to receive premiums after the expiration of the thirty days of grace. Any person making such payment does so on the agreement that the acceptance thereof by the company shall not be claimed or regarded as evidence of waiver of any of the terms or conditions of the policy
2	$3.32	

"Received this day the sum of
"Three Dollars and 32-100, being the amount of two months premium on the above mentioned policy.
"Countersigned at Toronto this 22nd day of August, 1917.
"F.M. "A. M. Featherston,
"Agent. "Manager.
"No receipt is valid unless signed by the manager and countersigned by the agent."

The plaintiff said she did not read it. The plaintiff's father notified the defendants of the death. The defendants repudiated all liability and endeavoured to return the identical money, which had remained in an envelope until Marsh should return. The money being refused, they purchased an express order in her favour, which was also returned to them.

Even giving the plaintiff the benefit of the finding of fact above noted, I am of the opinion that she cannot recover. The policy had lapsed; the onus is on the plaintiff to shew that it was revived; and she is confronted with abundant notice of the conditions under which alone it could be revived.

Mr. Saunders does not contend that there is estoppel on the company by reason of what took place, but he says there was a waiver. I am unable to see how they could waive the forfeiture without notice or knowledge of the fact that the insured was then *in articulo mortis*. See *Smith* v. *Excelsior Life Insurance Co.* (1912), 4 D.L.R. 99, 3 O.W.N. 1521.

The money never "got home" to the company, in the sense that it was accepted by them and went regularly through their books. It was entered in the cash-book only, but never entered on the policy-card, and it did not form part of the bank-deposit of that day. As I said before, it remained in the envelope until Marsh should come back, and then efforts were made to return the money in specie, as before set forth.

There is at least one element in each of the cases cited for the plaintiff which distinguishes it from the one in hand: for example, *Whitehorn* v. *Canadian Guardian Life Insurance Co.* (1909), 19 O.L.R. 535, and *Horton* v. *Provincial Provident Institution* (1888-9), 16 O.R. 382, 17 O.R. 361, where the company had, by a practice and course of dealing, waived the lapsing of the policy.

Wells v. *Independent Order of Foresters* (1889), 17 O.R. 317, is

ONT.
S. C.

very like this case, and so is *Bissell* v. *American Tontine Life Insurance Co.* (1871), 2 Bigelow Life and Accident Insurance Cases 150.

Note also the language of Collins, M.R., in *Handler* v. *Mutual Reserve Fund Life Association* (1904), 90 L.T.R. 192, 193; and see *Frank* v. *Sun Life Assurance Co.* (1893), 20 A.R. (Ont.) 564, affirmed in *S.C.* (1894), 23 Can. S.C.R. 152, note; and *Knights of Macabees* v. *Hilliker* (1899), 29 Can. S.C.R. 397.

The action must accordingly be dismissed, but, under all the circumstances, without costs. *Action dismissed.*

TEMISKAMING TELEPHONE Co. Ltd. v. TOWN OF COBALT.

Ontario Supreme Court, Middleton, J. March 21, 1918.

TELEPHONES (§ I—8)—*Telephone company—Powers of—Right to maintain poles in streets—Charter preceding incorporation of town—Rights under charter—Agreement with corporation—Municipal Act 1903 secs. 331, 559—Municipal Franchises Act R.S.O. 1914 c. 197.*]—Action for a declaration of the plaintiff company's right to maintain and operate its telephone system in the town of Cobalt; for an injunction restraining the defendant, the Municipal Corporation of the Town of Cobalt, from interfering with the plaintiff company's poles and wires; and for damages.

I. F. Hellmuth, K.C., *M. H. Ludwig*, K.C., and *F. L. Smiley*, for the plaintiff company.

H. H. Dewart, K.C., for the defendant corporation.

MIDDLETON, J.:—The question involved in this action is the right of the plaintiff company to maintain and operate its telephone system in the town of Cobalt. The defendant claims that it has the right to prevent the plaintiff company from using the streets of the town for its pole-lines, and to require it to remove its poles and wires.

Coleman township was first surveyed in 1904; the instructions were given on the 16th May, and the plan is dated the 1st October.

Mining locations were patented from that time on. Patents have been put in as follows:—

27th October, 1904: part R.L. 401 to M. J. O'Brien.

4th February, 1905: part R.L. 401 to Nipissing Mining Co.

25th May, 1905: T.S. 14 to Duncan M. Martin.

ONT.

S. C.

11th December, 1906: R.L. 400 & W. part R.L. 402 to M. J. O'Brien.

27th May, 1908: J.B. 4 to La Rose Mines Limited.

On the 19th January, 1906, by an order-in-council, the "town-site," as shewn upon the survey, was vested in the Temiskaming and Northern Ontario Railway Commission, under "An Act to amend The Temiskaming and Northern Ontario Railway Act," 4 Edw. VII. ch. 7, sec. 3 (O.)

On the 1st December, 1906, the Town of Cobalt was incorporated, and the "town-site" and some adjacent territory were included in the limits. By a subsequent order-in-council, additional territory was included, but this is not of importance here.

On the 5th April, 1905, the plaintiff company was incorporated by charter, under the seal of the Province, under the Ontario Companies Act, with power:—

"To carry on within the District of Nipissing the general business of a telephone company and for that purpose to construct erect, maintain and operate a line or lines of telephone along the sides of or across or under any public highways, roads, streets, bridges, waters, watercourses or other places subject however to the consent to be first had and obtained and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated and to such terms for such times and at such rates and charges as by such councils shall be granted, limited and fixed for such purposes respectively."

The date of the charter is important, as the Town of Cobalt was not incorporated until some seven months later, and the Township of Coleman was not organised until the 14th April, 1906.

On the day before the incorporation of the company, the 4th April, 1905, the Haileybury and Cobalt Telephone Company received a similar charter.

Both companies constructed lines, and portions of these lines ran across certain portions of the lands now included in the town, following in a general way certain of the streets and roads now existing, before the incorporation of the town. The main lines led from Cobalt and the mines in and near it to Haileybury.

The Haileybury and Cobalt Telephone Company went into liquidation, and its liquidator sold all its assets to the plaintiff

ONT.
S. C.

company on the 15th April, 1906. After the incorporation of the town, other lines were constructed within the town-limits without any municipal sanction.

On the 2nd April, 1910, an agreement was made between the town and the company, by which the town was permitted to use the poles of the company, but it is provided that the "agreement shall not be construed in any way as an admission by the said corporation that the said company has any right, privilege, or franchise of any kind whatsoever to erect the telephone poles of the said company in the streets of the town of Cobalt or to string wires or other apparatus thereon."

In view of this provision, I do not regard this agreement as of any importance.

In 1912 an agreement was authorised by by-law 202 of the town. This agreement bears date the 19th June, 1912.

There is first the recital:—

"Whereas the company is about to make such changes to its system at the town of Cobalt and in the neighbourhood thereof as will enable it to secure a long distance connection for its subscribers at that exchange and has expended a considerable sum to that end and intends making further expenditure for that purpose and has petitioned the town before the expenditure of any further sum to make definite the rights of the company to the use of the streets of the town."

The important clauses of the agreement are:—

"1. The town hereby consents to the company exercising its powers by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town, provided the opening up of such highway, square, or other public place for the erection of poles, or for carrying wires underground, shall be done under the direction and supervision of the town engineer, or such other officer as the town may appoint, and that the surface of such street or other public place shall in all cases be restored to its former condition by and at the expense of the company."

"7. The town agrees that it will not, during the period of five years from the 19th day of June, 1912, give to any person, firm, or company (other than the Temiskaming and Northern Ontario Railway Commission and the Temiskaming Telephone Company

ONT.
S. C.

Limited) any license or permission to use any highway, square, or other public place within the limits of the town for the purpose of placing in, upon, over, or under any such highway, square, or other public place within the limits of the town, any poles, ducts, or wires for the purpose of carrying on a telephone business."

The remaining provisions relate to rates, the use of the poles for fire alarm system, and minor details.

By an agreement of the 5th April, 1916, some variation is made in matters of detail.

The municipal council considered that, on the expiry of the five years mentioned in this agreement, the right of the company to maintain its poles and wires upon the streets of the municipality came to an end, and notified the company to that effect and required the company to remove its poles, wires, and equipment from the streets; and, upon the company's refusing to do so, the municipality itself proceeded to cut down the poles and wires; and thereupon this action was brought.

The contention of the company is: first, that the company derives its right to operate from the charter which confers the right, subject to the consent of the municipal corporations; but that, as at the date of the charter and of the erection of the earlier lines there were no municipalities, no consent was necessary; and, when the municipalities were created, they were only entitled to regulate and control, but not to prohibit, the operation of any company then upon the ground.

In the alternative, it is contended that the agreement is a general consent to the operation of the company, both under its charter and under the authority of municipal law, and that such covenant, once given, is good for all time and cannot be revoked. The provision in clause 7 of the agreement in no way restricts the wide and general effect of the consent in clause 1, but is the further grant of an exclusive right for the period of five years under sec. 331 of the Municipal Act, 1903. At the expiry of the five years the right of the company to operate did not come to an end, but its right to a monopoly did, and the company from that time on became subject to competition.

Before dealing with these contentions it is convenient to set out the statutory provisions which relate to the matters in issue.

The Municipal Act, R.S.O. 1897, ch. 223, sec. 559 (4) (and the

ONT.
S. C.

same section and sub-section in the Municipal Act, 1903), authorises the councils of cities, towns or villages to pass by-laws:—

"For regulating the erection and maintenance of electric light, telegraph and telephone poles and wires within their limits."

By an amendment to the Act coming into effect on the 14th May, 1906 (6 Edw. VII. ch. 34, sec. 20), this section was repealed, and it was enacted that the councils of cities, towns, villages *and townships* might pass by-laws:—

"For permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality."

In the present revision of the Municipal Act, R.S.O. 1914, ch. 192, this section has been changed again, and appears in this form, as sec. 399 (50):—

"Subject to the Municipal Franchises Act for regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires and poles and wires for the transmission of electricity upon the highways or elsewhere within the municipality."

By the Municipal Act of 1903 and earlier statutes, power is granted by sec. 331, which at first sight would seem to be merely an exception to the general provisions of sec. 300 against the granting of a monopoly, but which may be, and I think is, far more radical.

The section enacts:—

"The council of every city, town and village may pass by-laws, granting from time to time, to any telephone company, upon such terms and conditions as may be thought expedient, the exclusive right within the municipality, for a period not exceeding five years at any one time, to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same, poles, ducts and wires for the purpose of carrying on a telephone business, and may on behalf of the municipal corporation, enter into agreements with any such company not to give to any other company or person for such period any license or permission to use such streets or lanes for any such purpose."

In 1912, by 2 Geo.V. ch. 38, sec. 39, this section (331) is repealed; and, by sec. 8 (1) of that Act, it is enacted that the council may,

ONT.
S. C.

with the assent of the municipal electors, pass a by-law "granting to a telephone company, upon such terms and conditions as may be deemed expedient, the right to use any of the highways, squares, or lanes in the municipality for placing in, upon, over or under the poles, cables, ducts and other wires for the purpose of its business." And, by sub-sec. (2), this right may be "an exclusive right, limited to a period not exceeding five years at one time."

This statute had been passed at the time of the agreement of the 19th June, 1912, but it did not come into effect until the following 1st July (see sec. 40).

This is the first enactment that gives to a municipal council in general terms the power to grant to a telephone company the right to use the streets of the municipality.

But the repealed section must, I think, be taken not merely as enabling the granting of a monopoly, but as conferring upon the council the power to grant the right to use the streets for the purpose of a telephone line.

It may be that it was assumed that the council had the power to grant this right, and that all that was present to the mind of the draftsman of the section was the giving of the right to grant this privilege as a monopoly; but, if there was not in the municipality any inherent or conferred right to grant the privilege, the section as it stands is wide enough to permit it being granted as a monopoly.

The section in its amended form is much to be preferred, as it draws the distinction between the grant of the privilege under sub-sec. (1) and the grant of the monopoly under sub-sec. (2).

The existence of the sections as they stood after the amendment is to me cogent evidence that the Legislature did not consider the provision of sec. 559 as to "regulating" and "permitting and regulating" wide enough to cover the granting to the telephone company of the right to use the streets and highways.

Of a provision of this character it was said:—

"These powers of the corporation are, however, of a restrictive, not of a donative, character. They do not enable the corporation to give, grant, or confer any right, power, or privilege whatsoever upon the company. Their only function is to circumscribe, or impose conditions upon, the exercise by the company of the rights, powers, and privileges already conferred upon it by the Legislature:" *British Columbia Electric R. Co. Limited* v. *Stewart*, [1913] A.C. 816, 824, 14 D.L.R. 8, 12, 16 Can. Ry. Cas. 54.

ONT.
S. C.

It is elementary that a telephone company has not the right to plant its poles upon a highway without sanction derived from the Legislature or from Parliament. The municipality has no inherent legislative power to grant the right; and, unless there is to be found some authority emanating from Parliament, when the undertaking is under the jurisdiction of Canada, or from the Legislature, when the undertaking is under the jurisdiction of the Province, or from the municipality, when the Legislature has given power to the municipality, this non-natural use of the highway is unlawful.

As well put in *Domestic Telegraph Co.* v. *Newark* (1887), 49 N.J. Law 344, 346:—

"The public easement in highways is vested in the public and can be divested by nothing short of an exercise of the sovereign power. . . . The Legislature, representing the public, may release the public right by vacating the highway, may modify the public use by granting a right to use the highway for a horse railroad, or may restrict the public use by granting a right to erect poles and other obstructions in the highway. What the Legislature may thus do it may delegate authority to do . . . . Authority has frequently been conferred on municipalities. . . . But the delegation of such power must plainly appear, either by express grant or by necessary implication."

Confining inquiry, in the first place, to the delegation of power to the municipal councils, I conclude from what has been said as to the sections quoted that until a date subsequent to the making of the agreement in question the municipality had no power beyond that conferred by sec. 331; and that, under this section, the right to operate as a monopoly for the period of five years could alone have been given.

I am not certain that this is what the agreement itself expresses. It may be that what was intended by the draftsman was to express by clause 1 the consent of the municipal council requisite under the charter, and that clause 7 was regarded as the exercise of the power of the municipality under sec. 331.

The letter of the 4th November, 1909, shews that this was the interpretation placed by the contracting parties on the Act as it then stood, as the solicitor for the plaintiff writes making "application for a franchise for the telephone company for five

ONT.
S. C.

years, the legal term permitted by the Municipal Act." This fact, and the passing of the by-law on the eve of the coming into force of the new Act, which required the assent of ratepayers, remove any sympathy one might have if convinced that the plaintiff company had spent money upon some other view of the law.

Little need be added to indicate that the other contention put forward by the plaintiff cannot prevail. The charter of the company, issued under the Companies Act, is not the action of the Legislature; nor can it be regarded as a grant of Crown property. Any such grant must be, not under the seal of the Province, but under the hand and seal of the Lieutenant-Governor: sec. 1 of an Act to Prevent Trespasses to Public Lands, R.S.O. 1897, ch. 33.

But the charter is the creator of the artificial person—the company—and the provisions of the charter must be regarded subjectively. They confer upon it the powers of a natural person so far as such powers are enumerated. A natural person has the power to own and operate a telephone line, but has not that right unless and until he acquires it. This company had the power under its charter, but it had not any right to exercise that power until it acquired it in accordance with the general law of the land. The whole scheme of the Companies Act is to confer power upon the companies chartered, and it gives no right to those issuing the charter to deal with the rights of the public upon highways or to interfere with the public domain.

Since the granting of the charter in question, sections have been added to the Companies Act (now found as R.S.O. 1914, ch. 178, sec. 153), relating to the incorporation and powers of companies intended to operate and control a public or municipal franchise; and this statute, read with the Ontario Telephone Act, R.S.O. 1914, ch. 188, and the Municipal Franchises Act, R.S.O. 1914, ch. 197, and other statutory provisions, makes a consistent and compact body of legislation, but this has been the result of growth. The difficulty has arisen from the fact that this company had its charter and the contract before the law had assumed its present form.

I have not overlooked the Municipal Franchises Act, but have concluded that its provisions do not apply to a telephone company.

The action fails for these reasons.

Action dismissed with costs.

[Reversed on appeal, December 20, 1918.]

ONT.

S. C.

Re McCONKEY ARBITRATION.

Ontario Supreme Court, Middleton, J. March 20, 1918.

LANDLORD AND TENANT (§ III A—47)—*Ground lease—Buildings of tenant—Lessor to pay for buildings at end of term—Fixtures or things—Provisos—Arbitration.*]—Case stated by arbitrators, under sec. 29 of the Arbitration Act, R.S.O. 1914, ch. 65, upon an arbitration to determine the value of buildings upon demised premises.

See *Re Toronto General Trusts Corporation and McConkey* (1917), 41 O.L.R. 314.

E. T. Malone, K.C., for the landlord.

M. H. Ludwig, K.C., and *A. W. Ballantyne*, for the tenant.

MIDDLETON, J.:—A preliminary objection was made, based on *Re Geddes and Cochrane* (1901), 2 O.L.R. 145, to the case being heard in Weekly Court. When that case was determined, it was provided that, when a proceeding was directed to be taken before the Court in which the decision of the Court is final, the matter should be heard before a Divisional Court of the High Court (Judicature Act, R.S.O. 1897, ch. 51, sec. 67 (1) (*a*)). There being no appeal provided from the order pronounced upon a stated case under the Arbitration Act, it was held that the stated case must be heard by a Divisional Court.

But sec. 67 (1) (*a*) has been repealed, and the only section applicable is sec. 43 of the present Judicature Act, R.S.O. 1914, ch. 56, which requires all proceedings in the High Court Division to be heard and disposed of by a Judge, who shall constitute the Court.

The arbitration is under a lease dated the 1st November, 1896, made by Richardson to Wilson. In this lease is a covenant by the lessor to pay, after the expiration of the term, "the just and proper value at that time (namely at the expiration of the said term) of such buildings and improvements as may then be erected and standing on the said hereby demised premises"—such value to be determined by arbitration—or grant a new lease at a rental to be determined by arbitration. The arbitration is to fix the value of the buildings.

At a later page in the lease there is found this proviso:—

"Provided always that in determining the amount of the worth or value of any buildings erections or improvements standing and being upon the said demised premises at the end of any twenty-one

years the said arbitrators are to judge of such buildings erections and improvements abstractedly and without reference to site or renewal value but are only to consider the cost of erection and deducting for age decay wear and tear and damages sustained."

Under the lease the tenant may refuse to renew, and in such case the lessor is to pay two-thirds of the value of the buildings and improvements upon the demised premises, to be determined in the same way.

The expression used in the covenants to pay in the alternative events is the same—it is to pay the value (or two-thirds of the value) of "such buildings and improvements" as may be upon the premises at the expiry of the term.

In other parts of the lease various expressions are used with astonishing irregularity and laxity.

There is first a covenant to keep and maintain on the demised premises one or more stores or houses to be composed of good brick, stone, or iron, or other substantial material, of the value of not less than $4,000: and in the same clause a covenant to insure the stores and houses now erected and "all future erections."

There is then the covenant to pay, already quoted, and a proviso for arbitration wherever there is any question touching the value "of any buildings fixtures or things now or hereafter to be erected or being on the demised premises."

And then the proviso quoted as to the way in which the value of "any buildings, erections or improvements" is to be determined. I cannot bring myself to the view that the use of these varying expressions in any way modifies or controls the words of the main covenants, or that the words actually used in these covenants are to be read as modified or controlled by the expressions in the other parts of the lease.

The covenant is to pay for "buildings and improvements" upon the demised premises, and these are the words that must be interpreted, and not the words "buildings fixtures or things," or "buildings erections or improvements."

Nor should the words actually used in the covenant to pay be cut down from their natural meaning so as to exclude from their meaning all that might be more aptly described as "fixtures and things," or as "erections," because these words are found in other parts of the lease and not in the covenant in question. The texture of the whole document is too lax for that.

ONT.
S. C.

A series of questions upon the interpretation of the lease are now propounded by the arbitrators, who deem it expedient to have them resolved before they proceed with the arbitration.

The first question relates to the proviso as to the mode of valuation quoted.

The landlord contends that the value of the buildings and improvements must be ascertained on the basis of the actual cost of erection, and from the actual outlay there is to be deducted some proper sum for depreciation due to age, decay, wear and tear, and damage sustained.

The fundamental idea is indemnity for cost, less depreciation due to age and use.

The tenant contends that "cost of erection" means what it would cost to erect at the expiry of the lease, less the amount proper to allow by reason of the buildings being old and more or less decayed and depreciated by wear and tear—the fundamental idea being that the landlord is to pay the value of what he receives, that is, what it would cost to build now, less depreciation by age and use.

It is said that the cost of building has advanced so much between the actual date of erection and the expiry of the term that on the right solution of this problem a considerable sum depends. Both material and wages have doubled in cost, it is said.

The meaning of the expression used must be the same whether cost has advanced or declined; but, as usual in all cases of sale, the arguments are shifted from vendor to purchaser as the market rises and falls.

The main covenant affords the key—the landlord is to pay "the just and proper value at that time," i.e., the expiry of the lease, and this value is to be determined in accordance with the proviso.

This requires the "worth or value" of the buildings to be determined:—

(a) "Abstractedly."

(b) Without reference to site or renewal value.

(c) On the basis of "cost of erection," less depreciation.

From this proviso, I do not gather any intention to depart from the requirement of the covenant that the value shall be the just and proper value at the expiration of the lease, but rather

an intention to exclude from the consideration of the arbitrators the element of suitability for the particular site and the "renewal value" of the buildings. This is what is meant by the unusual phrase "abstractedly."

The value is to be judged in the abstract, apart from the local situs or particular use, and upon the basis of cost only.

It was not the intention to give to the landlord any advantage arising from increase in value of materials etc., nor to saddle upon him any loss due to the decrease in value or the improvident bargain of the tenant.

"Renewal value" does not mean cost of replacement, but the value upon the renewal of the lease, as a factor in determining his rent.

The second question is: "Are the arbitrators to include only such buildings and erections as will be a benefit to the demised premises and to the owner thereof and to exclude improvements made or erected by the lessee for his special business purposes and which are of value only to a person who may carry on a similar business to that carried on by the lessee at the termination of his tenancy?"

The covenant is to pay the value of all "buildings and improvements" erected and standing on the demised premises, to be determined in the manner pointed out in the proviso. The element of use and value to the landlord or any new tenant is not a factor in the valuation.

Next the question is asked, "Are fixtures, 'buildings and improvements' within the covenant?"

According to *West* v. *Blakeway* (1841), 2 M. & G. 729, 133 E.R. 940, "improvements" is a word of large significance; and, when it is used in a lease, it is intended to have a wider and less technical operation than the word "fixtures."

I do not think this would cover purely chattel property, but that due weight must be given to the other words used, "erected and standing on the . . . demised premises;" and that all that in any fair sense falls within this description, without entering into any technical discussion as to landlord's fixtures, tenant's fixtures, or trade-fixtures, if in good faith brought upon the demised premises and forming an integral part thereof, must be paid for by the landlord.

ONT.
S. C.

It is not without importance to notice that there is not in the lease the statutory or any covenant permitting the tenant to remove his fixtures.

Unless there is some agreement as to costs, I make no order as to them.

LYNCH-STAUNTON v. SOMERVILLE.

Ontario Supreme Court, Masten, J. June 19, 1918.

COSTS (§ II—26)—*Solicitors—Bill for services rendered—Lump sum charged for specific items of services—Solicitors' Act R.S.O. 1914 c. 159 s. 34—No proper bill delivered—Action prematurely brought.*]—Action by a barrister and solicitor to recover $1,089.90 for services rendered. Action dismissed.

J. G. Farmer, K.C., for plaintiff. *H. S. White*, for defendants.

MASTEN, J.:—The plaintiff's claim is for $1,089.90 for legal services rendered, as appears by the special endorsement on the writ of summons. In his affidavit indicating his defence, and filed pursuant to the Rules, the defendant Balfour says, among other statements:—

"I and my co-defendant say that no proper bill of fees, charges, and disbursements to the amount of the said sum of $1,089.90 for the services rendered by the plaintiff pursuant to the said retainer, was, more than one month or at any time prior to the issue of the said writ of summons herein, delivered by the plaintiff to the defendants. I and my co-defendant are advised by our solicitors herein and believe that the failure of the plaintiff to deliver a proper bill as aforesaid constitutes a good defence to the plaintiff's action, and in this regard rely on the provisions of the statute commonly known as 'The Solicitors Act,' being chapter 159 of the Revised Statutes of Ontario 1914.

"A reference to the said bill referred to in the next preceding paragraph hereof will shew that it is made up of items treated generally speaking in two separate and distinct ways: (a) items covering interviews, conferences, attendances, and preparation of papers, for which details are given shewing the amounts charged for each individual service and for disbursements; (b) items covering interviews, conferences, and attendances, for which no details are given shewing the amounts charged for each individual service.

ONT.

S. C.

"With reference to the items referred to in sub-paragraph (b) of paragraph 9 hereof, for which no details are given shewing the amounts charged for each individual service, the said bill contains a lump charge of $700, apparently intended to cover all of the said items. The defendants, without in any way waiving any of the objections hereinbefore set forth to the said bill as a whole, particularly rely on the provisions of the said Solicitors Act so far as the said items and the said lump charge of $700 are concerned."

The bill of costs rendered by the plaintiff, and upon which the action is founded, is filed as exhibit No. 1. In that bill there appear certain items, Nos. 1 to 16, in respect of which no charge is made against each particular item of service, but at the end of the bill there appears the following:—

"Fee on negotiations as above set out and recovering property of the value of $60,000 subject to a payment of $30,000 . . . . $700."

The bill as rendered contains many other items in respect of which a specific charge is made on each occasion.

The defendants stand on their strict rights, and contend, on the grounds above set out, that this action must be dismissed.

The plaintiff seeks to distinguish the present case from previous decisions on two grounds:—

The services in question might in their nature have been rendered either by a barrister or by a lay agent as well as by a solicitor; none of them are services which it was essential should be performed by a solicitor. While it is common ground that the plaintiff was, at the time when these services were rendered, a solicitor authorised to practise as such, yet it appears from the plaintiff's evidence, and is uncontradicted, that he did not in fact carry on in the ordinary manner the practice of his profession as solicitor; on the contrary, when it was determined by the clients (the present defendants) to issue a writ for the enforcement of their claim, the plaintiff insisted that the writ should be issued and the action should be conducted by some solicitor other than himself, he agreeing to afford assistance only as counsel. From a perusal of the bill rendered by the plaintiff (exhibit No. 1) it appears that the services rendered by the plaintiff in his capacity as counsel have been specifically charged for. I refer as examples to the following items:—

"Dec. 21. Long consultation with and attendances on Mr.

ONT.
S. C.

William Somerville and Mr. St. Clair Balfour and advising as to Somerville's rights under an agreement of April, 1904, in 87-89-91 McNab street north, Hamilton, on the south-west corner of McNab and Vine streets, occupied by the Dominion Canners, and taking instructions ..... $50.00.

"April 8. Attending on Mr. Counsell and revising statement of claim..... $10.00."

This makes it evident to me that in rendering the bill the plaintiff intended to make specific charges for the several services rendered by him in the capacity of counsel, and that the charge for negotiating the settlement has not been treated by the plaintiff as a counsel fee, but as a separate and distinct service rendered by him in some capacity other than counsel.

If then this service was not rendered by him in his capacity of a barrister, was it rendered in his professional capacity as a solicitor, or was it rendered as a lay agent?

Having regard to the whole evidence in this case and to the law as laid down by Armour, C.J., in *Re McBrady and O'Connor* (1899), 19 P.R. (Ont.) 37, at p. 43, I think that it must be held that the employment was so connected with his professional character as to afford a presumption that his character as a solicitor formed the ground of his employment by the client.

My conclusion is, therefore, against the plaintiff on the first point, and I find that his claim in this action is subject to the provisions of the Solicitors Act.

Then, on the second ground: does the bill as rendered comply with the provisions of sec. 34* of that Act?

Recognising as I do the convenience and desirability of the course here adopted, and fully realising that if an individual charge were extended in the bill of costs in question opposite to each of the

*34.—(1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, subscribed with the proper hand of such solicitor . . . has been delivered to the person to be charged therewith . . . or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.

(2) In proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements subscribed as required by sub-section 1, or enclosed in or accompanied by such letter, was so delivered, sent or left; but the other party may shew that the bill so delivered, sent or left, was not such a bill as constituted a compliance with this Act.

16 numbered items, it would be wholly artificial, and that the only way of fairly estimating the proper charge to be allowed for these 16 items is to consider the whole service as one, including the time spent, the amount involved, the skill displayed, and the success of the effort, I have tried to find some legitimate ground on which to distinguish this case from *Gould* v. *Ferguson* (1913), 29 O.L.R. 161, 14 D.L.R. 17, *Re Solicitor* (1917), 12 O.W.N. 191, and from the earlier cases which they follow, but regret that I have been unable to find any such ground of distinction.

If there were no other items in the bill except the 16 items here in question, there could be no doubt but that the case would be absolutely and literally on all fours with the cases I have just quoted. The fact that the services relate to one single subject-matter appears to make no difference, if the services extend intermittently over a period of time, and it plainly can make no difference that in this case the bill of costs contains other additional items of services in respect of which a specific charge is carried out.

The result is, that, no proper bill having been rendered, the action is prematurely brought, and must be dismissed, unless the plaintiff chooses to accept the sum of $500 paid into Court by the defendants.

If the action is dismissed, it will be expressed to be without prejudice to any other action which the plaintiff may choose to bring 30 days after delivery of such a bill as the practice demands.

Costs must follow the result.

[Reversed on appeal, December 31, 1918.]

Re CITY OF TORONTO AND TORONTO R. Co.

Ontario Supreme Court, Middleton, J. February 4, 1918.

EXECUTION (§ I—11)—*Order of Dominion Board of Railway commissioners directing payment by railway company of sum representing part of cost of bridge—Dominion Railway Act R.S.C. 1906 c. 37 secs. 46, 56.—Order made rule of Supreme Court—Writ of Fi. Fa. thereon—Motion to stay execution—Jurisdiction.*]—Motion by the railway company for an order staying the writ of fi. fa. issued by the city corporation against the railway company, upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, pending the determination of the right of the corporation to receive payment of the money

ONT.
S. C.

for the levying of which the writ was issued, and for an order directing the trial of an issue to determine such right.

D. L. McCarthy, K.C., for the railway company.

C. M. Colquhoun, for the city corporation, objected that the Supreme Court of Ontario or a Judge thereof had no jurisdiction to entertain the motion.

MIDDLETON, J.:—The grounds assigned are:—

(1) The property of a public utility cannot be sold under an execution.

(2) The order of the Board under which the execution was issued is without jurisdiction.

(3) The order is not lawfully an order of this Court, the procedure of the Court being a matter for the Province, and not for the Dominion.

(4) The order is not final and conclusive in its nature.

The matter giving rise to this litigation is the construction of a bridge upon the line of Queen street over the river Don and over certain railway tracks upon the banks of the river. The construction of the bridge was ordered in 1906, and there was then argument as to the way in which the cost of construction was to be provided, and how it was ultimately to be borne. The city corporation paid the cost in the first instance, but the ultimate incidence of the cost remained an open question until the 23rd June, 1909, when a decision was given, afterwards embodied in the formal order of the 3rd July, 1909, to the effect that the Toronto Railway Company should pay 15 per cent., other railway companies being ordered to pay 70 per cent., and the city corporation the remaining 15 per cent.

While this order was final in its nature, it contained no definite direction to pay, and matters were allowed to remain in an unsettled shape until 1917, when an order was made, on the 30th November, for payment by each of the other contributing parties, to the city corporation, of a named sum which, in the opinion of the Board, would be well within the ultimate sum payable—the payment so directed being without prejudice to the contention of any party as to the correctness of the accounts presented by the city corporation.

The amount which the Toronto Railway Company is directed to pay is $80,000. This order has now been made a rule of Court, and execution has been issued upon it.

ONT.

S. C.

An application was made to the Board on the 15th September, 1909, for leave to appeal to the Supreme Court of Canada from the order of the 3rd July, 1909; the Board refused leave, upon the ground that the contention of the company was not "a question of law," within sec. 56 (3) of the Dominion Railway Act, R.S.C. 1906, ch. 37, which can be reviewed by the Supreme Court of Canada when leave is granted by the Board, but "a question of jurisdiction," as to which an appeal will lie to the Supreme Court of Canada by leave of a Judge of that Court (sec. 56 (2)).

An application was made to a Judge of the Supreme Court of Canada to permit an appeal, and dismissed; and so the decision of the Board became, by virtue of sec. 56 (9),* final and incapable of being "questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari*, or any other process or proceeding in any court."

The intention of the statute is to give finality to the decision of the Board, unless there is an effective appeal in the way pointed out by the statute. Unless there is an appeal upon a question of jurisdiction, the decision of the Board as to its own jurisdiction is thus given finality.

The decision of the Privy Council, in 1914, in *British Columbia Electric R. Co. Limited* v. *Vancouver Victoria and Eastern R.W. Co.*, [1914] A.C. 1067, 19 D.L.R. 91, against the jurisdiction of the Board in the case then under consideration, and the decision of the Supreme Court of Canada in *Toronto R.W. Co.* v. *City of Toronto* (1916), 53 Can. S.C.R. 222, 30 D.L.R. 86, in favour of the jurisdiction of the Board, were both obtained upon appeals launched in accordance with the Act.

*The three sub-sections of sec. 56 here referred to read thus:—

2. An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, but such appeal shall not lie unless the same is allowed by a Judge of the said Court upon application and upon notice to the parties and the Board, and hearing such of them as appear and desire to be heard; and the costs of such application shall be in the discretion of the Judge.

3. An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, upon leave therefor having been first obtained from the Board; . . . . and the granting of such leave shall be in the discretion of the Board.

9. Save as provided in this section,—

(*a*) every decision or order of the Board shall be final; and

(*b*) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari*, or any other process or proceeding in any court.

ONT.
S. C.

The liability of the company being thus determined by the Board, and the statute giving finality to this decision, I should not attempt to delay its enforcement by directing the trial of an issue already concluded.

This disposes of the motion in its most important aspect—that covered by the second ground of attack.

The first ground is not well-taken. It may well be that the sheriff cannot take possession of and sell the railway under a *fi. fa.*, but that does not prevent the issue of the writ, and concerns only its execution. There may be assets which can be taken and sold without interfering with the "public utility" which is being operated by the company. Also a writ of *fi. fa.* may be a necessary preliminary to the taking of the appropriate proceedings for realisation.

Then the procedure provided by sec. 46* for the making of the order a rule of this Court is attacked.

This and the preliminary objection taken by Mr. Colquhoun may be considered together.

The Dominion Act, I think, makes the provincial Courts, so far as their executive and ministerial officers are concerned, ancillary to the Court or Board constituted by the Act for the purpose of determining the rights which come within the purview of the statute. These rights determined by the Dominion tribunal are to be enforced by the machinery of the provincial Courts. The decree of the Board, on being presented to the Registrar of the provincial Court, is to be entered of record, and thus becomes automatically a judgment of the Court, to be enforced in the same way as an ordinary judgment pronounced in due course. This is a simple and convenient mode of enforcing the judgment of the Court, and many analogies may be found.

This in effect means no more than the adoption by the Dominion of the machinery provided by the Province. That the Dominion may provide for the enforcement of the decrees of its Courts or Boards is beyond question; and I can see no reason why the course here adopted should be regarded as incompetent.

*46. Any decision or order made by the Board under this Act may be made a rule, order or decree . . . of any superior court of any province of Canada, and shall be enforced in like manner as any rule, order or decree of such court.

2. To make such decision or order a rule, order or decree of any such court, the usual practice and procedure of the court in such matters may be followed; . . .

ONT.

S. C.

But this does not give to the provincial judiciary any control over orders of the Board so directed to be enrolled and enforced.

When an Irish or Scotch judgment is enrolled in England for the purpose of execution there, this does not confer upon the English Court any jurisdiction to interfere with the judgment.

Finally, it is said that the order of the Board is not final, and so no execution can issue upon it. While in one sense the order is not final, yet it does finally and unconditionally direct payment of this $80,000, and is quite sufficient in form to warrant the issue of execution for this amount.

In the case of *Grand Trunk R. Co.* v. *City of Toronto* (1904-5), 4 O.W.R. 450, 6 O.W.R. 27, *City of Toronto* v. *Grand Trunk R. Co.* (1906), 37 Can. S.C.R. 232, there was no specific order to pay any sum, and an action was brought for an accounting to ascertain the sum payable.

For these reasons, the motion fails, and must be dismissed with costs. To enable the railway company to determine what course it will follow, I direct that this order shall not issue for a week.

STOKES-STEPHENS OIL Co. v. McNAUGHT.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and Hyndman, JJ. December 11, 1918.

ARBITRATION (§ III—17)—*Agreement to submit dispute to—Appointment of arbitrators—Appeal from—Objection that arbitrators had not dealt with matters submitted.*]—Motion to set aside an award and remit the matter to the arbitrators. Motion dismissed.

A. M. Sinclair, for appellant; *A. H. Clarke*, for respondent.

The judgment of the court was delivered by

HARVEY, C.J.:—This is a motion by the oil company to set aside an award and remit the matter to the arbitrators. The agreement between the parties was for the drilling of a well for oil. It contains a provision for the submission of disputes to arbitration. There have been two arbitrations. There have been two actions. The matters in dispute have been before this Division three times and have once reached the Supreme Court of Canada. If the purpose of the provision for arbitration was to avoid litigation and save expense it would seem to have at least partially failed. The earlier material facts are set out in the reasons for

ALTA.
S. C.

judgment in this Division in (1917), 34 D.L.R. 375, 12 A.L.R. 501. An attempt to set aside the first award was the occasion for the second appearance before us and the report of the reasons for refusal to set it aside will be found in (1918), 43 D.L.R. 7.

The award having held the contractor entitled to payment for the work done, which was the sinking of the well to a depth of 2,400 ft., he subsequently withdrew and removed the casing with the result that there was a caving-in of the well. There was a provision in the contract that the owners could become entitled to the casing upon certain conditions. On May 6, 1918, more than 2 years after the drilling had ceased, the company appointed an arbitrator and notified the contractor to appoint an arbitrator "to deal with the following matters and questions and all other matters and questions of fact or law arising out of the facts hereinbefore alleged: 1. Whether the contractor was entitled to withdraw the casing from said well as aforesaid, or whether such withdrawal was improper, unauthorized, tortious and in breach of the agreement between the parties. 2. Whether the effect of such withdrawal was to destroy the said well. 3. Whether the contractor abandoned the said well and the work of drilling therein. 4. Whether the result of such abandonment with accompanying withdrawal of casing had the result of destroying the well. 5. If the contractor was not so entitled to withdraw the casing from said well, but if on the contrary such withdrawal was improper, unauthorized and tortious and in breach of said agreement, then the amount of damages which the contractor should pay the owner for so withdrawing said casing and for the resulting damage to or destruction of said well. 6. The amount of damages which the contractor should pay the owner for the contractor's failure to afford to the owner any opportunity to exercise its option to purchase said casing whereby the owner lost the benefit of the increased value and price thereof.

The formal appointment by the company recites certain provisions of the contract, including the provision for arbitration, and that the contractor did not complete the well but abandoned it and destroyed it by withdrawing the casing and afforded the owner no opportunity to purchase the casing or otherwise protect the well and that as a result the well became worthless and the moneys paid, lost, and that casing had greatly advanced in price.

ALTA.

S. C.

The arbitrator appointed by the company was a barrister. The contractor in his turn appointed a barrister and they selected a civil engineer as the third arbitrator. The award was made by two arbitrators, the company's arbitrator not joining. It is in the following terms:—

On February 25, 1915, the Stokes-Stephens Oil Co., Ltd., entered into an agreement in writing with one Joseph Young McNaught for the drilling of a well for the purpose of discovering oil or natural gas. Under clause 4, sub-section B, of the agreement, all questions between the parties were on May 26, 1916, referred to arbitrators. The company appointed an arbitrator without prejudice, as it was expressed, and the arbitrators proceeded with the arbitration. The company, however, declined to appear before them.

On July 6, 1916, the arbitrators made their award in favour of the contractor, finding as follows:—

(1) That it is not now economically practicable to complete the well contracted to be drilled under the said agreement, beyond its present estimated depth of 2,400 ft., at the present diameter of 10 inches.

(2) That the delay in arriving at a decision as to the course to be adopted for the completion of the well is attributable to the Stokes-Stephens Oil Co. Ltd. and C. W. McMillan.

And we do further award and direct that the contractor is entitled to payment at the contract price for the drilling to an estimated depth of 2,400 ft.

We further award and direct that Stokes-Stephens Oil Co. pay to J. Y. McNaught his costs of the reference to be taxed as between party and party and the costs of this award.

In witness whereof we have hereunto set our hands this 4th day of July, 1916.

(Sgd.) Geo. A. McKenzie,
(Sgd.) P. D. McLaren,
(Sgd.) A. W. Dingman.

On March 25, 1918, the Supreme Court of Canada held that arbitration was the proper method under the terms of the contract to determine all questions between the parties.

On May 6, 1918, the company, claiming to act under the provisions of the agreement of February 25, 1915, appointed an arbitrator to determine certain questions therein set forth.

On May 7, 1918, the contractor appointed an arbitrator without prejudice to his right to object to the company's right to this second arbitration. The arbitrators, on May 27, 1918, appointed a third arbitrator, Mr. P. Turner Bone, and proceeded with the arbitration, subject to the objection.

The hearing of evidence was completed on September 18, 1918, all parties having been represented by counsel throughout. The time for making of the award of this Board was extended by the arbitrators in writing from time to time until October 1, 1918.

We consider that this Board of Arbitrators has no legal right to consider any questions which were open for presentation before the first Board of Arbitrators. This first Board made their award on July 6, 1916, and found as a fact, as we construe their award, that the contractor had completed his contract with the company to drill a well so far as any obligation was imposed

ALTA.
S. C.

on him. The company did not appear before the first Board, but it had the right and opportunity to do so, and to present for consideration nearly all the questions presented to our present Board.

After the award of July 6, 1916, the company were bound under s. 4, sub-section D, of the contract to notify the contractor in writing how much casing, if any, it wished left permanently in the well. The contract is silent as to the time within which notice must be given, but a reasonable time is implied. The contractor waited until about September 7, 1916, and then pulled the small remaining amount of casing that had not been pulled in the spring of 1916, except about 300 of the 8-inch casing. By November, 1916, the contractor had removed all his tools and machinery. He filled in the top of the well with a cable and rubbish.

The company expressed no wishes one way or the other after July 6, 1916, but ignored the contractor completely. We find, therefore, that the contractor, in pulling the said casing, acted within his rights and that the company are entitled to no damages therefor; nor are they entitled to damages because the contractor retained the casing for himself. This casing was his, and the company had no right except under its contract to buy the casing to remain permanently in the well.

We, the majority of the Board of Arbitrators, therefore award and direct that the claims of the Stokes-Stephens Oil Co., Ltd., be disallowed.

We further award and direct that the said company do pay to the said Joseph Young McNaught his costs of the reference to be taxed as between party and party and the costs of this our award.

In witness whereof we have hereunto set our hands this 24th day of September, A.D. 1918.

(Sgd.) P. Turner Bone,
Chairman.
(Sgd.) Clifford T. Jones.

It is objected on behalf of the company that the arbitrators have not dealt with all the matters submitted, that there is an error in law in their conclusion that they could not deal with anything that might have been dealt with by the other arbitrators which was not in fact decided by them, and that the former arbitrators did not in fact decide on the "reasonable practicability" of continuing the drilling with the eight and a-quarter-inch casing, but only found that it was not "economically practicable to continue it with a 10-inch diameter" without making any reference to the term of the contract which required the well to be completed with a 6-inch casing if it was not reasonably practicable to complete it with an eight and a-quarter-inch casing.

There is no doubt that this court is not a court of appeal from the arbitrators' finding, but the House of Lords, in *British Westinghouse Electric etc., Co.* v. *Underground Electric R. Co.*, [1912] A.C. 673, at p. 686, pointed out that it was well-established law that where error in law appears on the face of an award the court may

review it. But it is pointed out that, since that decision, there has been reiterated in *Re King and Duveen*, [1913] 2 K.B. 32, the view that where the question of law is submitted to the arbitrators their decision though erroneous is not subject to review.

Mr. Clarke, for the respondent, contends that on this submission the questions of law as well as of fact were directly referred to the arbitrators and in my opinion the contention is well founded.

The clause of the contract providing for arbitration submits to the arbitrators "any dispute, difference or question between the parties . . . touching the said work, or the construction, meaning or effect of these presents, or anything herein contained, or the rights or liabilities of the parties." Now it is perfectly clear that if any dispute arose about the construction of any portion of the contract it would be on a question of law and it is to be determined not by a court of law, but by the arbitrator or arbitrators under the contract. To determine the rights of the parties questions of both law and fact might arise, and, having regard to what precedes, it seems reasonable to conclude that the submission intended that both should be determined in the arbitration.

That this is the construction put upon the submission by the applicant and acquiesced in by the contractor is shewn by the term of the appointment by the applicant of an arbitrator and by the appointment by each of them of a barrister as arbitrator. The term of the appointment referred to is the clause specifying the appointment of the arbitrator

> to deal with the following matters and questions and all other matters and questions of fact or law arising out of the facts hereinbefore alleged.

The questions of law dealt with by the arbitrators, to the conclusion on which exception is taken, relates to the previous allegation of non-completion of the well, the arbitrators deciding that these were matters which were cognizable by the former arbitrators and, therefore, not within this jurisdiction.

It appears to me, therefore, that it is not open now for the applicant to question the decision of the legal point by the arbitrators.

Having reached this conclusion it is not necessary to consider whether there was legal error in the decision of the arbitrators, but I would like to add that it seems unimportant whether the arbitrators were right or wrong in deciding that they could consider nothing which might properly have been, but was not, decided

ALTA.
S. C.

by the former arbitrators for they appear in fact to have dealt with everything that was submitted to them, which had not been decided by the former arbitrators and certainly they could not consider anything that had been decided by the earlier award.

The first question was whether the contractor was entitled to withdraw the casing. This, as well as (2), (3) and (4) apparently is only for the purpose of the consequent relief of (5) and (6). The first was decided in favour of the contractor and (5) only arises in the event of the finding being the other way; (2), (3) and (4) also appear to be of no material consequence in view of that finding; (6) is partly involved in the finding on (1) and partly depends on the construction of the contract. There seems no room for argument that, as far as the latter is concerned, the view of the arbitrators was right that the casing was the property of the contractor unless the company exercised its option to buy which, in my opinion, the arbitrators correctly decided must be exercised within a reasonable time. What would be a reasonable time would be a question of fact with which this court can have no concern.

The first award was only of importance as a starting point and it was accepted by the arbitrators as establishing that the contractor had completed the drilling so far as there was any legal obligation on him to do. Though the award does not so find in terms it seems to me that it does so impliedly as otherwise the arbitrators could not award him full compensation for the work done.

In my opinion, therefore, there was no error of law on this point and the award does find on all material questions submitted. On both grounds, therefore, I think the applicant fails. I would, therefore, dismiss the application with costs.

Application dismissed.

Re EDMONTON BREWING & MALTING Co.

Alberta Supreme Court, Walsh, J. December 14, 1918.

COMPANIES (§ VI A—313)—*Insolvency—Winding-up—Petition by creditor—Others opposing.*]—Petition by one of the creditors of an insolvent brewing and malting company for the winding-up of the company. Dismissed.

G. B. O'Connor, K.C., for petitioner; *Frank Ford*, K.C., for

ALTA.
S. C.

the company and opposing creditors other than the Union Bank; *N. D. Maclean*, for the Union Bank.

WALSH, J.:—This winding-up petition is before me again after my enlargement of it from April last. I then held that the petitioner had made out a *primâ facie* case of insolvency. That condition is accentuated by the auditor's report for the year ending on September 30, 1918, which is now before me. It shews that the company's liabilities to creditors and shareholders largely exceed the value of its assets, even though the land, buildings and plant of the new brewery are put in at their original cost of $475,183.01, when, of course, no sum even approximating that amount could now be realized for them. The report shews, however, that in the year covered by it a profit of nearly $24,000 resulted from the company's operations, and that is, I should say, a satisfactory showing under the circumstances.

The conditions, to which I referred last April, still prevail. The federal legislation, by order-in-council, to which I then alluded, is still effective, but it is a war measure which will end, I assume, with the signing of the treaty of peace, early next year, and there is no indication of the form, if any, which parliamentary action upon the subject will then assume. Certainly no one would buy the plant until the situation is cleared in that respect. It has been demonstrated that the company can operate with some resulting profit under circumstances which cannot conceivably become worse, so far as this trade is concerned and which may be materially bettered in the near future. There is nothing available for creditors which cannot be got at and realized upon as well by the sheriff under his execution as by a liquidator. There is not, as was the case in *Re South East Corporation* (1915), 23 D.L.R. 724, some unpaid capital which can only be made available for creditors by a winding up. The subscribed capital is treated as all paid up, though the company holds the notes of some of its shareholders for the balance owing by them, but these are exigible under execution. If I was to exercise my own discretion, unfettered by authority, as to the wisest course to pursue in the handling of this property in the best interests of all concerned, creditors as well as shareholders, I would unhesitatingly refuse the order, as, in my opinion, the only thing to do with it is to run it along as well as that can now be done and the most disastrous thing that could happen it would be to put it into liquidation.

ALTA.
S. C.

The company strenuously opposes the order, but I think that, so far as it is concerned, the petitioners' right to it is *ex debito justitiæ*. The Appellate Division of this court in the *South East Corporation* case, *supra*, adopted the judgment of the English Court of Appeal to that effect in *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327. If, therefore, the contest was one between the petitioner and the company I would feel bound by authority to grant the order in spite of my strong opinion as to the unwisdom of it.

It is equally clear, however, that, as between the petitioner and the other creditors, there is no such *ex debito* right. Buckley, J., from whom the appeal was taken, in the *Crigglestone* case puts it thus at p. 331:—

> The order which the petitioner seeks, is not an order for his benefit, but an order for the benefit of a class, of which he is a member. The right *ex debito justitiæ* is not his individual right, but his representative right. If a majority of the class are opposed to his view and consider that they have a better chance of getting something by abstaining from seizing the assets, then, upon general grounds and upon s. 91 of the Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right, not of the individual but of the class, that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority of the unsecured creditors are entitled to prevail but on which the debtor has no voice.

In a later case in the Court of Appeal, *Re Oilfields Finance Co.* (1915), 59 Sol. Journal, p. 475, Pickford, L.J., said that as between himself and the company, though not as between himself and other creditors, a creditor was entitled *ex debito justitiæ* to a winding-up order if the company was unable to pay its debts.

These judgments rest, to some extent, upon s. 91 of the Act of 1862 and s. 145 of the Act of 1908, which enact that the court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors as proved to it by any sufficient evidence. There is no section of the Winding-up Act which corresponds in phraseology with this, but I think that in substance s. 61 is practically the same, except in the method that it provides for ascertaining the wishes of the creditors. I think, for this reason, that I should be governed, as were the English courts, by the wishes of the creditors as established by the evidence before me.

The petitioner is an unsecured creditor. Its status, therefore, is as a representative of the class of which it is a member. My

ALTA.
S. C.

duty, I think, is to ascertain, and as far as possible, give effect to the wishes of the majority of that class.

Now, what are the facts? The total of the unsecured liabilities to creditors is $84,893.67, exclusive of taxes and a small sum appearing as credits in customers' accounts. This sum I arrive at by deducting from the total liabilities (less these taxes and credits), as shewn by the auditor's balance sheet, including the petitioner's claim, which is therein classed as a contingent liability, the amount for which the Union Bank admittedly holds security upon the company's assets and the amount of the Hudson Bay Co.'s claim, which is, I think, fully secured. The petitioner is the only creditor who asks for a winding-up order. Originally another creditor, Pfandler & Co., supported the application, but a compromise of its claim has since been made in respect of which it still remains a creditor for $1,500. Its support of the petition has been withdrawn, however, and Mr. O'Connor's affidavit describes its present position as being one neither in support of nor in opposition to it. One alien enemy, residing in either Germany or Austria-Hungary, is a creditor for $4,099.91. The sympathies of two creditors are unknown, namely, the Strathcona Brewing & Malting Co. for $213 and the Wallis Crown Cork & Seal Co. for $435. Three creditors have appeared before me in vigorous opposition to the order, namely, the Union Bank of Canada, whose unsecured claim I place at $66,494.48, being the difference between its total claim as shewn by the auditor's report and the amount for which it admittedly holds security, though the statement of its solicitor before me does not correspond exactly with that, the Crown Cork & Seal Co. for $721.46 and the R. W. Lines Estate for $361.23. Two other unsecured creditors, D. R. Ker for $20 and W. H. Sheppard for $264.25, though not represented before me, have made strong affidavits in opposition to the order. I take all of these figures from the auditor's report. The situation may, therefore, be summarized as follows:—1 creditor supporting the petition representing $10,783.64; 5 creditors opposing it representing $67,862.12; 1 neutral representing $1,500; 1 alien enemy representing $4,099.91; 2 creditors with unknown sympathies representing $648; total, $84,893.67.

Upon the surface, it would appear as if there was an overwhelming majority in value against the winding-up, even if the

ALTA.
S. C.

neutral and the alien enemy and those whose sympathies are unknown joined hands with the petitioner. There is, however, an argument put forward by Mr. O'Connor, with which I must deal, namely, that only one of the five creditors who are opposing the order is really an unsecured creditor, namely, the Crown Cork & Seal Co., a creditor for $721.46.

It is admitted that the only thing which the Union Bank holds, by way of security, for the portion of the liability upon which it now seeks to rank as an unsecured creditor is what is called a gold bond mortgage covering its undertaking and all its property whatsoever and wheresoever, both present and future, taken in May, 1915, as collateral security for the payment of the final balance on current account. This portion of the liability was incurred 2 years after the giving of this mortgage. The position which the bank takes is that this mortgage is not a security to it for this indebtedness, and in my opinion that position is well taken. I do not see how, in the face of the provisions of the Bank Act, it could possibly hold this mortgage in security for the payment of a liability contracted, as this was, two years after its date. Failing that, the petitioner suggests that, because the bank is admittedly secured with respect to the rest of its claim, it cannot be said to be an unsecured creditor at all, even though it has no security whatever for this large sum. I cannot agree with that contention. I think that it is both a secured and an unsecured creditor. S. 62 of the Winding-up Act provides that in ascertaining the wishes of creditors regard shall be had to the amount of the debt due to each creditor. I should say without question that the Union Bank could vote as an unsecured creditor to the extent of its unsecured claim.

With respect to the rest of the claim of the Union Bank, for which both it and the petitioner admit before me that it holds security, the position is rather peculiar. The petitioner has brought action in this court to set aside this security as being fraudulent and void as against itself and the other creditors of the company, and that action is still pending. There seems to be some inconsistency in the attitude of the petitioner in this respect. Before me it says the bank has security and elsewhere in this court it says that such security is no good and therefore cannot avail the bank. One would think that the petitioner

should not be allowed to thus blow hot and cold, but that there should be an estoppel against it, either in this proceeding or in the action, so that, if it succeeds here, because of this security, it should not afterwards be entitled to set it aside, or if it succeeds in setting it aside, it should fail in its attempt to have the bank here treated as a secured creditor under this impeached security. This, however, is merely *en passant*, as I am treating this as a valid security for the purposes of this application.

Objection is taken to the opinion of the estate of R. W. Lines being considered because one of the executors is a former officer of the company and another is the present manager of the company and the estate is a shareholder. The position of Ker and Sheppard, as unsecured creditors, is open to the same criticism, each of them being a shareholder and the latter being the general manager.

If these objections to my right to consider the views of the Union Bank and these three other creditors are well founded the result would be that one creditor, representing about 12% of the unsecured liabilities, could impose his will upon the remaining 88%, for upon the basis prescribed by s. 62 I would have to give effect to its wishes, as its debt is larger than that of the other admittedly unsecured creditors combined. I do not think that anything so unfair as that should happen. The fact that these creditors have other interests which may be of greater importance to them than their claims as unsecured creditors may, perhaps, warp their views in the latter capacity and justify a more careful scrutiny of their motives in opposing a winding-up than would otherwise be the case, but it should not disfranchise them. Warrington, L.J., in the *Oilfields* case, *supra*, drew attention to a somewhat similar position there. The remarks of Buckley, J., at p. 334 of the *Crigglestone* case, seem to indicate the possibility of such a dual interest in those opposing a winding-up application and of a separation of such interests upon the hearing of it.

Making all due allowance, as I do, for the facts upon which my right to consider the views of 4 of the 5 opposing creditors is thus challenged, I think that it would not be proper to make the order, for I do not see how, under any circumstances, I could entirely disregard the wishes of more than two-thirds in value of the unsecured creditors. I am not influenced to this opinion by

ALTA.
S. C.

the fact that the company's liability to the petitioner is an indirect one, being based upon a guarantee by the company of the indebtedness of one of its customers to the petitioner, while the claims of all of the other creditors constitute a direct liability of the company. The petitioner is just as much a creditor as are the others, and is entitled as such to just as much consideration at the hands of the court as they are.

Recent instances of the refusal of the court to order a winding-up at the instance of one creditor in the face of the opposition of other creditors may be found in the cases of *Re East Kent Colliery Co.* (1914), 30 T.L.R. 659, and *Marsden* v. *Minnekahda Land Co.* (1918), 40 D.L.R. 76, the latter being a judgment of the British Columbia Court of Appeal, although the facts in each of these cases differ essentially from those here present. See also *Re Ocean Falls Co.* (1913), 13 D.L.R. 265, which is very like this case in its facts.

I dismiss the application with costs, but only one set of costs will be allowed to those who opposed the petition.

Application dismissed.

SASK.
S. C.

BRAUN v. PETERS.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 31, 1918.

CONTRACTS (§ II D—145)—*Purchase of goods—Payment of freight—Interpretation of contract—Evidence.*]—Appeal from the trial judgment in an action on a promissory note given for the price of goods sold. Reversed.

S. Lemon, for appellant; *D. Buckles*, for respondent.

The judgment of the court was delivered by

LAMONT, J. A.:—The plaintiff sues on a promissory note made by the defendant in 1914 in favour of the Altona Machinery Co., Ltd.

In June, 1907, the defendant purchased a threshing outfit from the American-Abel Engine & Thresher Co., and gave therefor his promissory note for $3,650 payable November 1, 1907, with interest thereon from September 1. The deal was made through the Altona Machinery Co., who were acting as agents for the American-Abel Engine & Thresher Co. The defendant not having paid the note when it fell due, an agent of the Altona Machinery

Co. and an agent of the American-Abel Co. called on him for payment. Their instructions were to get cash if possible, if not, to get the best settlement they could. The defendant had paid $175 in cash, and claims that he was entitled to a credit of $160 on account of freight. He says this sum was added to the price of the machinery and included in the note, and he further says that it was agreed that if he paid the freight he was to get a credit of $160 on the note. The defendant paid the freight, but it did not amount to $160. The settlement made with the agents was the giving of two notes dated November 11, 1907; one for $1,716.79, due November 1, 1908, and the other for $1,717 due November 1, 1909, which said notes were signed by the defendant's father and one Isaac Funk, his brother-in-law, as well as by the defendant. The defendant says these notes were a settlement in full of the $3,650, which note, he says, the agents agreed would be returned to him. The two notes taken on December 11, 1907, were subsequently paid, but the $3,650 note was not returned. In the fall of 1914, the Altona Machinery Co. sent its representative, Jacob J. Regier, to the defendant with a note filled up for $479.48, claiming that that sum was due by reason of the fact that the two notes taken December 11, 1907, did not settle the $3,650 note which the company claimed had been assigned to them by the American-Abel Co. The defendant disputed his liability. He said he might owe them a little money, but not the amount claimed. The company threatened to sue him. The defendant was a Mennonite, and it was against the principles of his religion to go to law. So, after Regier told him that unless he signed the note the company might make him trouble, he signed it for the amount claimed, which note is the one now sued on and which, after maturity, was assigned to the plaintiff.

The defendant disputes his liability to pay the note on the ground that he did not owe the company anything at the time the note was signed. He explains his statement to Regier—that he might owe the Altona Machinery Company some money—by pointing out that in 1907 he purchased from the company coal grates which he was then under the impression had not been paid for. The price of these coal grates, however, he now claims was taken out of the $175 paid by him in 1907.

At the trial, the original contract for the threshing outfit was

SASK.

S. C.

not produced. Without its production, the trial judge held that he could not give the defendant credit for the freight claimed, as the document was necessary to determine whether the defendant or the American-Abel Co. had to pay the freight.

In this, I think the trial judge erred. The plaintiff testified that, at the time he purchased the machinery, the sum of $160 was added to the price and included in the note to cover the freight, and that it was agreed that if he paid the freight, whatever it might be, he was to receive a credit on the note of $160. His testimony in this regard is corroborated. It is true that J. J. Loewen, the president and general manager of the Altona Company, did say that, so far as he could remember, the defendant was at the time he gave the $3,650 note settling for the machinery "F.O.B. Winnipeg." But on cross-examination, when confronted with his own written statement in which he allowed to the defendant a credit of $118.50 on account of freight, he admitted that he was then aware that the freight was included in the note. As there was no contradiction of the defendant's statement that $160 was the amount inserted to cover freight, he was, on the settlement on December 11, 1907, entitled to a credit for that amount. The question is, how much was then due, and did the representatives of the two companies take the two notes for $1,716.79 and $1,717 respectively, in full settlement of the defendant's indebtedness to the American-Abel Co. as he has testified?

The account on December 11, 1907, would appear to stand as follows:—

Principal of note		$3,650.00
Less freight included		160.00
Liability of defendant after he paid freight		$3,490.00
Interest on $3,490 at 7% from Sept. 1 to Nov. 1, 1907		40.71
Due November 1st		$3,530.71
Interest on $3,530.71 from Nov. 1st to Dec. 11th, at 10%		42.27
		$3,572.98
Credits:		
Cash $175, less $68 for coal grates and 75c. exchange		106.25
Balance due December 11th		$3,466.82
Settlement Notes	$1,716.79	
	1,717.00	
	$3,433.79	

SASK.

S. C.

There was then $3,466.82 due the American-Abel Co. on December 11. The company was desirous of getting the defendant's father and brother-in-law to sign the notes along with the defendant. The defendant testified that his father and brother-in-law refused to sign for an amount over $3,400. Finally, it appears they did sign for $3,433.79, and the defendant says the agents agreed that the $3,650 note would be returned. Neither of the agents were called to contradict this.

It is in my opinion, reasonably apparent what took place. The amount which the agents claimed over and above the $3,400 was split in two, and the defendant's father and brother-in-law signed for the additional $33.79. Under these circumstances, and as the agents who took the notes were not called to deny that they had agreed to return the original note, the defendant's statement that they did so should have been accepted.

The original note was, therefore, paid in full and should have been returned to the defendant. When the defendant signed the note sued on, he was not indebted to the Altona Machinery Co. in any amount whatever. As the plaintiff took the note after maturity, he stands in no better position than the Altona Company from whom he took it.

The appeal should, therefore, be allowed with costs, the judgment below set aside and judgment entered for the defendant with costs. *Appeal allowed.*

GLADUE v. WALCH.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, and Fullerton, JJ.A. December 10, 1918.

BROKERS (§ II B—8)—*Sale of land—Agent—Sub-agent—Commission—Privity of contract.*]—Appeal by plaintiff from a judgment directing a non-suit in an action to recover a commission for the sale of land: Affirmed by an equally divided court.

W. P. Fillmore, for appellant; *F. M. Burbidge*, for respondent.

PERDUE, C.J.M.:—A non-suit was granted on the ground that the action, which was one to recover a commission for the sale of land, should have been brought against the owner of the land and not against the defendant who was himself only an agent. But there was no privity of contract between the plaintiff and the owner. The contract under which the plaintiff did the work was

MAN.
C. A.

made with the defendant who was acting for an undisclosed principal. The plaintiff did not know who the principal was until the day of the trial. He was, therefore, justified in suing the defendant for whom he did the work.

On the appeal, the defendant seeks to support the non-suit upon the ground that the plaintiff has not earned a commission under the contract. The crucial words of the letter from the defendant to the plaintiff are as follows: "The price quoted will protect you for a commission of $1 an acre in the event of a sale coming to us through your agency." These words seem to convey the meaning that if the plaintiff introduced a purchaser ready, willing and able to buy the land on the terms mentioned, the plaintiff would be entitled to the commission. The plaintiff performed his part. He brought in a purchaser who signed a writing agreeing to buy the land on the terms mentioned and who actually paid to the defendant at the same time the whole cash payment of $1,338. At the interview, the defendant stated for the first time that he would have to communicate with the owner and obtain his consent. But the plaintiff had performed the services he had undertaken before he was informed that the defendant's authority was limited and that the owner's consent was necessary before the sale could be consummated. The sale did not go through and the land was sold to another man.

I think the plaintiff made a *primâ facie* case against the defendant. It was due to the plaintiff that Walch should shew why the sale fell through. The only explanation as to this was given in a long-distance telephone conversation between Walch and the purchaser. This conversation should not have been received as evidence. It was not evidence against the plaintiff. There is no evidence shewing why the first purchaser was rejected and the land sold to another. The letter containing the terms of the employment states that the defendant had instructions from the owner to sell. On this representation the plaintiff acted and produced the purchaser. There is nothing to shew whether the defendant was or was not concerned in the second sale. In the absence of all explanation on the part of the defendant, the plaintiff should, in my opinion, succeed and have judgment for the amount claimed.

CAMERON, J.A., dismissed the appeal.

HAGGART, J.A.:—I have had the advantage of perusing the reasons of Fullerton, J. I agree with his statement of the facts,

MAN.

C. A.

but dissent from his conclusions. This is not an action for specific performance, nor a suit for the recovery of the purchase money. It is a suit by a sub-agent against the defendants, who assumed to have authority to sell the land.

The letter from Kramer, the owner, to the plaintiff and the surrounding circumstances shew all the elements of a complete contract, the services to be performed and the consideration. The defendants are the agents for an undisclosed principal. We are enquiring as to the contractual relationship of the parties to this suit. There was no privity between the plaintiff and Kramer, the owner. As between them, there was no creation or revocation of agency. Where a person makes a contract in his own name without disclosing either the name or existence of a principal he is primarily liable on the contract to the other contracting party though he may be in fact acting on a principal's behalf, nor does he cease to be liable on the discovery of the principal unless and until there has been an unequivocal election by the other contracting party to look to the principal alone. Every person who, in making a contract, discloses the existence but not the name of the principal on whose behalf he is acting is personally liable on the contract to the other contracting party. This is in substance the law as laid down in 1 Hals. p. 219. See also *Saxon* v. *Blake* (1861), 29 Beav. 438, 54 E.R. 697; *Ex parte Bird* (1864), 4 DeG. J. & S. 200, 46 E.R. 894; *Hobhouse* v. *Hamilton* (1826), 1 Hog. 401, and the cases cited in 2 Corpus Juris, at p. 816. There is an express promise to pay the $1 per acre and the breach has been proved. The plaintiff did everything he agreed to do or that could be done to close the sale, and I would hold that such was the understanding and intention of the parties.

I do not think there is much in the contention that the plaintiff could only recover on a *quantum meruit*. The remuneration is measured by the usual commission charged or allowed in such cases.

The absence of the defendant and Kramer from the trial is a proper subject for comment. They and they alone could have given the whole details of the transaction.

I would allow the appeal and enter a verdict for the plaintiff for $236.

FULLERTON, J.A.:—This action is brought to recover commis-

MAN.
C. A.

sion on the sale of land. On or about July 6, 1918, the plaintiff received from the defendant the following letter:—

Re N.E. ¼ and N. ½ of N.W. ¼ 25-5-3-East.

We have received instructions from a client to offer the above land for sale at $17 per acre on terms of one-third cash and the balance in five annual payments at 6%, at which price I consider this land a very great bargain. The price quoted will protect you for commission at $1 an acre in the event of a sale coming to us through your agency.

The plaintiff immediately visited the land and endeavoured to procure a purchaser. He interviewed several persons and took one man over the land. On July 23, 1918, he got in touch with one Dandenault, who said he would purchase it.

On July 25, 1918, plaintiff and Dandenault went to Winnipeg and saw the defendant. Dandenault paid the sum of $1,338, being one-third of the purchase price and signed an application for the purchase of the land. On that occasion, Walch informed Dandenault that he was not the owner of the land but his agent, that one Kramer owned the land and that he would wire him to ascertain if he would accept the offer. Walch further informed Dandenault that he had received a letter from the owner the previous week and that he thought it would be all right. About 8 or 10 days afterwards, Dandenault telephoned the defendant, who replied that he had received no answer from Kramer. About August 21, 1918, Dandenault again telephoned the defendant and was told by him that he had returned the cheque, that he could not do anything as Kramer had sold the land. The cheque was received by Dandenault shortly afterwards. It also appears that Dandenault bought the land in question from one Joubert on August 22, 1918, for $19 an acre.

Plaintiff admits in his evidence that he knew the defendant was not the owner of the land, but merely an agent, but he never learned who the owner was until the day of the trial.

At the argument, I was strongly impressed with the view that the plaintiff had made out a *primâ facie* case. Further consideration of the evidence and the authorities cited has convinced me that my view was a mistaken one.

I would interpret the contract as contained in the defendant's letter of July 6, above quoted, to mean that if the plaintiff produced a person ready to purchase on the terms stated and a sale was closed, the defendant would pay the plaintiff a commission of $1

MAN.
C. A.

an acre. There was nothing to indicate that the defendant had the exclusive sale of the property. In the absence of some such arrangement between the defendant and the owner of the land the latter was at liberty to sell the land himself or sell through other agents and after such a sale defendant would not be entitled to a commission even if he found a person ready and willing to purchase on the terms stipulated and had produced him to the owner before he had any knowledge that the owner had already sold the land: *Brinson* v. *Davies* (1911), 105 L.T.R. 134.

The statement of claim alleges that the defendant employed the plaintiff to offer for sale the land in question on certain terms, agreed to pay a commission of $1 per acre for finding a purchaser and that plaintiff had found the purchaser.

Plaintiff put in evidence the letter above quoted, which contains the terms of his employment. One term is that the commission was to be payable in the event of a sale coming to the defendant through the plaintiff's agency. The plaintiff has entirely ignored this term. He neither alleged it in the statement of claim nor gave evidence to shew that such a sale had been made. In my opinion, it was a condition precedent to the plaintiff's right to recover and should have been alleged and proved.

As no evidence whatever was given either to shew that a sale had been made by the defendant or that the defendant had been in any way responsible for the sale not having been made, I think the judge was right in granting a non-suit.

I would dismiss the appeal with costs.

Appeal dismissed; court divided.

"L'AUTORITE" Ltd. v. IBBOTSON.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. 1918.

APPEAL (§ I—1)—*Jurisdiction—Joinder of several actions—Separate condemnations—Supreme Court Act, s. 40, arts. 68-69 C. P. Q.*]—Motion to quash for want of jurisdiction an appeal from the judgment of the Superior Court of the Province of Quebec, sitting in review at Montreal, affirming the judgment of the Superior Court, District of Montreal, and maintaining the plaintiffs' action.

CAN.
S. C.

Alphonse Decary, K. C., for the motion; *Percy C. Ryan*, K.C., contra.

The judgment of the majority of the court was pronounced by DUFF, J.:—The appeal is from the Court of Review, and consequently the question of jurisdiction is governed by s. 40 of the Supreme Court Act, together with arts. 68 and 69 of the Code of Civil Procedure.

Now, the action was an action brought by eleven persons who allege themselves to be injuredby one and the same libel published by the newspaper "L'Autorité." It is quite obvious that this action must be treated as a joinder of several causes of action vested in the persons who were plaintiffs. Up to a certain point it is true that the facts constituting the cause of action of each of them are identical. There is, for example, the same publication, but beyond that it is impossible to say that the facts are identical. The facts relating, for example, to the extent of the temporal damages suffered by each of the plaintiffs and consequently the amount of damages recoverable by each of them, may be, and it is said are, different. In addition to that it is alleged and not disputed that separate independent and entirely different defences were set up as regards the different plaintiffs.

The action must, therefore, be considered as a joinder of several actions and when we come to apply s. 40 the question must be with regard to any one of these plaintiffs, whether or not the amount in dispute, as determined by the amount claimed, brings the case within art. 68 of the Code of Civil Procedure. In other words, whether or not the amount is over $5,000. The amount claimed in each of the cases is $2,000. It follows that the appeal should be quashed.

Appeal quashed.

N. S.
S. C.

Re ESTATE OF CRAIG.

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. November 30, 1918.

WILLS (§ I E—53)—*Settlement of accounts—Contest—Finding of Surrogate Judge—Reference to registrar to complete—Appeal—Notice to dismiss—Bonds for costs—Sureties—Approval of by registrar.*]—Motion to dismiss the appeal from the judgment of J. A. Grierson, Judge of Probate for the District of Yarmouth, N.S.,

N. S.
S. C.

in relation to the distribution of the estate of Mary Gray Craig, deceased. Motion dismissed.

W. E. Roscoe, K.C., in support of motion.

R. W. E. Landry, contra.

HARRIS, C.J.:—There was a contest in the Probate Court at Yarmouth, on the settlement of the accounts of the administrator before His Honour Judge Grierson, in which the administrator, who was the husband of the deceased, claimed that there were no assets whatever of the estate and that the disbursements amounting to $1,138.05 had been paid by him out of his own moneys. Grierson, J., filed a written memorandum containing his reasons for his decision on November 28, 1917, in which he charged the administrator with certain assets claimed by the husband to be his own property and reduced the amount of the alleged disbursement to $338.05. His decision concludes as follows:—

> The amount for distribution will be the amount of the mortgages with accrued interest, the market value of bank and Fox stock with accrued dividends, added to the $100 for table and jewelry less the sum of $338.05 for disbursements and the costs.
>
> This matter will be transferred back to the registrar to tax the costs, calculate interest and dividends, complete the account, ascertain the correct balance for distribution and prepare a decree in accordance with this decision. I will sign the decree when presented to me.
>
> One-half of the balance for distribution will go to the administrator, as husband of the deceased. The other half will go one-half to Jane Cunningham and the other half, being a quarter of the amount for distribution, will be equally divided among the four children of Charles Gray as provided by s. 7 (2) of c. 140, R.S.N.S. of 1900.

The registrar seems to have taxed the costs, calculated the interest and dividends, completed the accounts and drawn up the formal decree of the court which is signed by Grierson, J., dated and filed on February, 13, 1918.

It is to be noted that the Fox stock referred to in the memorandum filed by the judge, and the value of which he said was to be included in the amount for distribution was in the formal decree made and signed by him not so treated, but that decree provides that as this stock was of doubtful value, one of the two shares should be retained by John A. Craig, the husband of the deceased, and the other transferred to the other heirs or to such one of them as shall by agreement among themselves be decided upon.

On March 13, 1918, the solicitor of the administrator filed in the registry of the court—and also served upon the solicitor of the

N. S.
S. C.

respondents—a notice of appeal, headed in the cause and dated March 13, 1918, which reads as follows:—

> Take notice that this Honourable Court sitting *in banco* at the County Court House at Halifax, in the County of Halifax, N.S., will be moved on Tuesday, November 12, 1918, at the hour of 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard, for the appellant, John A. Craig, as administrator and next of kin of the estate of Mary Gray Craig, deceased, that so much of the decision herein, bearing date November 26, 1917, and the order or decree herein made on February 13, 1918, by Grierson, Judge of the Probate Court for the District of Yarmouth County, N.S., both on file in the office of the registrar of the Probate Court at Yarmouth, in the County of Yarmouth and Province of Nova Scotia, as directs that one-half of the balance for distribution of the estate of Mary Gray Craig, deceased, must go to Jane Cunningham and one-half of said half to be divided equally among the children of Charles Gray, may be set aside and dismissed with costs, and that a declaration be made that the said Mary Gray Craig died intestate and insolvent, without leaving property real or personal for administration. There will be read on said application the evidence given on the trial and exhibits and documents in evidence thereat, the decision and order or decree aforesaid, and papers on file herein.
>
> Dated at Yarmouth, N.S., this 13th day of March, A.D. 1918.
>
> (Sgd.) R. W. E. Landry, appellant's solicitor.

On March 20, 1918, he filed a bond to the registrar in the form FF in the statute, with two sureties in the penal sum of $240 conditioned for payment of such costs as should be awarded against him upon such appeal. This bond is dated March 12, 1918, and recites the decision and decree and that the above bounden John A.Craig had appealed from the decision and order or decree.

This bond does not bear any indorsement shewing that it was approved by the registrar, but only an indorsement reading: "Filed, March 20, 1918." Mr. Landry, the solicitor of the appellant, has filed an affidavit in which he states in effect that the bond "was approved by said registrar and duly filed by him after his approval of the sureties therein named and at my request." He also says that recently he asked the registrar if he had not upon filing the bond asked him if the sureties therein named were sufficient and that the registrar replied "I must have, Fred, but I cannot just remember."

There is an affidavit by Mr. Chipman, solicitor of respondents, to the effect that the registrar had informed him that neither the bond nor the sureties had been approved by him.

I think the reasonable inference is that the registrar, when he told Mr. Chipman this, had forgotten the circumstances related

N. S.

S. C.

by Mr. Landry and I accept the latter's statement, which I understand to be that the registrar approved of the sureties as sufficient.

S. 125 of c. 158 (R.S.N.S. 1900) provides:—

(1) Any party aggrieved by any order, decree or decision of a judge, may appeal therefrom to the Supreme Court at Halifax, which Court shall have power to confirm, vary or reverse the same.

(2) The appellant shall, within 30 days from the making of such order, decree, or decision, file in the registry of the court of probate a notice containing the grounds of appeal; and shall also, within 10 days after the filing of such notice, file a bond (Form FF) to the registrar with two sureties to be approved by him, in the penal sum of $240, conditioned for the payment of such costs as are awarded against him upon such appeal.

The respondent has moved to dismiss the appeal and the grounds urged are that: (1) The notice of appeal is too late. (2) The notice of appeal does not state any grounds. (3) The bond was not approved by the registrar. (4) The bond is bad because it is dated March 12, and the notice of appeal March 13. (5) The bond is to pay such costs "accruing" from such appeal whereas the form uses the word "arising" instead of "accruing."

I shall deal with these objections in the order named above.

1. The contention is that the order or decree only can be said to be appealed from and not the decision; that the attempt to appeal from the decision is too late because the notice was filed more than 30 days after the decision was given.

This contention presupposes that two notices, and of course, two bonds were necessary in this case—in effect two appeals from what is obviously only one matter. The word "decision" is defined in Wharton's Law Lexicon as "a judgment." The so-called decision in this case is in reality only the judge's reasons for the order or decree which he proposed to make, and he refers the whole matter to the registrar to make up the formal decree, and then we find the judge signing the decree, which differs in some respects from the so-called decision.

The decree crystallizes the decision and puts it into legal form.

I do not think the legislature ever intended that there should be two appeals with separate notices, bonds, etc., in such cases, and to so hold would, in my opinion, result in needless expense and confusion. I think one notice of appeal which is from both decision and the order was the proper one to give in a case such as this.

2. The notice of appeal must be read in the light of the facts. The question being litigated was as to whether certain assets

N. S.
S. C.

belonged to the estate of the deceased or to the husband, and the notice of appeal states that counsel will ask that it be declared that the deceased died intestate and insolvent without leaving property real or personal for administration. The notice also states that on the appeal the evidence given on the trial and exhibits and documents in evidence, etc., would be read. The object of stating grounds in the notice is to notify the respondent of the points which he will have to meet, and no one having in mind the questions at issue could read the notice without knowing that the appellant was claiming that on the evidence he was entitled to have the findings reversed and a decree that the deceased had died without leaving any property whatever; or, in other words, that the property in question belonged to him.

In the case of *Re Ralston* (1856), 2 Thom. R. 3 (same as 1 N.S.R.), Bliss, J., speaking for the court, decided, under practically the same statute, that the court had power to amend the notice of appeal by adding a ground; and if the court has this power I do not see why we cannot now allow more specific grounds to be added.

I would allow the appellant, within 15 days, to give respondent and to file a notice setting out in detail the grounds upon which he is relying. As the appeal has been transferred to the January docket the respondent will have ample time to prepare his defence.

3. The third ground urged is that the bond was not approved by the registrar. I think all that the statute requires is that the sureties should be approved by the registrar. There is probably a good reason for not requiring the bond itself to be approved as well as the sureties, and that is the registrar is often a layman who could judge of the sufficiency of the sureties but might not be competent to decide as to the form and sufficiency of the bond. That is perhaps why the legislature has only required the sureties to be approved. The sureties as I have already decided were approved.

4. The fact that the bond is dated March 12, and the notice March 13, I think is unimportant.

The bond recites that an appeal has been taken and I do not see how the bondsmen could be heard to say that this recital was false. The appeal is taken by giving the notice and it is not suggested that any other was given to which this recital could

N. S.
S. C.

refer. I have no doubt the correct date of the notice was the 12th, and that the discrepancy does not vitiate the bond.

5. The fifth objection was not pressed. The two words, I think, mean the same thing and counsel could not suggest any difference in their meaning.

I would dismiss the motion, but appellant should be required to file a full statement of the grounds he proposes to rely upon within 15 days, and he should pay any costs occasioned by this statement and under the circumstances there should be no costs to either side on the motion now dismissed.

RUSSELL, J.:—I agree.

DRYSDALE, J.:—I also agree.

RITCHIE, E.J.:—I agree with the judgment of the Chief Justice, except that I am of opinion that the notice of appeal is absolutely bad. But for the case of *Re Ralston*, I would have difficulty in coming to the conclusion that the amendment ought to be made.

Motion dismissed.

ALTA.
S. C.

REX v. PORHORLIUK.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Hyndman, JJ. October 28, 1918.

CRIMINAL LAW (§ V—155)—*District Judge's Criminal Court—Court of record—Jurisdiction in certain cases—Duty to keep record of case.*]—Appeal from the judgment of Crawford, Dist. Ct. J. Reversed.

Gordon E. Winkler, for appellant; *J. F. Lymburn*, for Crown.

The judgment of the court was delivered by

STUART, J.:—This case was presented to the court in a very unsatisfactory form. The District Judge's Criminal Court is a court of record. Yet, so far as appears, very little in the nature of a record is in existence. Very grave questions are raised as to what exactly took place when the court sat to hear the case, and these in respect to things which had to be done, in order to give the court jurisdiction. A court of record ought to have a record and an official whose duty it is to keep it properly. The clerk is supposed to be such an official. I doubt very much whether sufficient attention is paid to this matter in the District Judges' Criminal Courts. Strictly, a book, in which is entered by the clerk every essential thing which occurs except the testimony

ALTA.
S. C.

given by the witnesses, ought to be kept. The present habit of using only the method of filing documents, while no doubt saving a lot of trouble as to the entry of charges laid, is apt to lead to serious omissions and has led, in this case, to the omission of any record in any permanent presentable form of what actually took place as to the prisoner's consent to be tried upon a new charge for which he had not been committed, or of the exact order of time, here probably very material, in which such consent, if any, was given.

Upon the first two questions, there is no ground of appeal which can be maintained, and it should be dismissed with respect to these. The third question, as to the jurisdiction of the judge to try the accused, is the one upon which we have not been supplied with proper information. There is enough, however, in what is before us, to raise a doubt in my mind whether the conditions precedent, upon which alone the judge had jurisdiction to try the accused, were ever in fact fulfilled. But there is not sufficient either to satisfy me that they were not. In these circumstances, I think the proper course is to allow the appeal, and direct the trial judge to state a case on the third point, and, in doing so, to furnish us with as complete a record as is possible of what took place before him at any time in regard to the preliminaries to and the proceedings at the trial, which he held, including in these a statement of the charge upon which the accused was first brought before him and how this was made to appear. *Appeal allowed.*

HAMILTON v. COLLOWAY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. December 10, 1918.

CONTRACTS (§ V C—402) — *Exchange of lands — Misrepresentation—Rescission for.*]—Appeal from the trial judgment dismissing an action to set aside an exchange of lands on the ground of misrepresentation. Affirmed.

I. W. McArdle, for appellant; *I. C. Rand*, for respondent.

The judgment of the court was delivered by

HARVEY, C.J.:—This is an appeal from Scott, J. The plaintiff and defendant both formerly resided in Oregon. The defendant while there exchanged some property he owned in Oregon for a

half section of land in Alberta. He, subsequently, came to Alberta. Later, the plaintiff, who had also come to Alberta, and was looking for land came to the defendant who was not residing on or near the half section and asked if defendant still had the half section which he had known of his having previously acquired. They, thereupon, made an exchange of the half section for land of the plaintiff's in Oregon. The exchange was completely carried out by the execution of the proper documents of transfer and the plaintiff became the registered owner of the Alberta land.

This action is brought to set aside the exchange on the ground of misrepresentation. No allegation of fraud was made, and counsel for the plaintiff on the argument before us admitted that he could not succeed without alleging and proving fraud. He points out, however, that he applied to the trial judge to amend by alleging fraud before judgment was given but after the case had been closed and arguments made and he now renews the application. Counsel for the defendant objected and the trial judge reserved judgment, merely remarking that it was rather late to set up such a charge.

In the written reasons, which were subsequently given for judgment, no mention is made of the application but that was probably due to the fact that, in view of the conclusions reached by the trial judge, it became of no moment because he dismissed the action on the ground that the plaintiff had failed to prove that the representations had been made, which would, of course, be fatal to any action based on misrepresentation, whether fraudulent or otherwise. No one but the plaintiff heard the representations made by the defendant and there is a direct conflict of testimony between them, the defendant denying expressly or impliedly the alleged mis-statements. The trial judge states that he does not give much credence to the plaintiff's testimony. One of the reasons given is that he swears that the defendant represented the value of the land to be $5,000, upon which representation he relied and at the same time he is shewn to have sworn in the affidavit of value made by him for the purpose of registration at the time of the transfer that the value of the improvements was $1,000, and of the land without improvements $1,500. At the same time, the same values were sworn to by the defendant. The difference between the two however is that, at the trial, the plaintiff swore that the defendant told him that the land was worth $5,000,

ALTA.
S. C.

and he believed it, while the defendant denies having made such statement. Counsel for the appellant urges that parties make these affidavits of value without much regard to the truth of them, intimating that, for the sake of saving a few dollars of assurance fees or increment tax, parties will deliberately swear to what they know to be false. If that be true, such persons need not be surprised and they have no just cause for complaint if judges do not attach any higher value to their sworn statement than they put on it themselves. The trial judge had other opportunities also of estimating the value of the plaintiff's testimony which we do not possess, and it is quite impossible for us to say that he was wrong in refusing to accept this evidence and unless it is to be believed, he cannot succeed. I would, therefore, dismiss the appeal with costs. *Appeal dismissed.*

FARM PRODUCTS Ltd. v. MACLEOD FLOURING MILLS Ltd.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Hyndman, JJ. December 11, 1918.

ESTOPPEL (§ III E—70)—*Purchase of goods by branch office—Head office having no knowledge—Agent not authorised to purchase—Estoppel from denying authority.*]—Appeal from the trial judgment in favour of plaintiff in an action to recover the price of goods sold. Affirmed.

J. W. MacDonald, for appellant; *A. H. C. Dunham*, for respondent.

HARVEY, C. J. concurred with Hyndman, J.

STUART, J.:—I concur but with some hesitation.

BECK, J. concurred with Hyndman, J.

HYNDMAN, J.:—This is an appeal from the judgment of Jackson, D.C.J., Lethbridge, in favour of the plaintiff.

The plaintiff and defendant are both limited joint stock companies, the former having its head office at Lethbridge and the latter at Macleod, Alberta.

The plaintiff's action is for the price of a car of alfalfa, $169.84, and the freight from Lethbridge to Nelson, B.C., $55.90, in all $225.84. The alfalfa was ordered by telephone signed "Macleod Fl. Mills, Ltd." sent from Nelson where the defendant company had a branch of their business. The head office had no knowledge whatever of what took place between the plaintiff and its Nelson office and, as a matter of fact, did not become aware of the trans-

action at all until some months after everything had been done in connection with the matter when a demand for payment was made upon them.

They resist payment on the ground that their agent or representative at Nelson had no authority to purchase goods in their name, and it was established at the trial that the powers of the agent were so restricted. If the action rested solely on contract, the defendant would, undoubtedly, be entitled to judgment dismissing the action. But the plaintiff at the trial asked for leave to reply setting up estoppel, which was granted, and I think properly so. The facts developed were that the defendant, in December, 1916, prior to the date of the order which they now repudiate, ordered, through their head office, a car of hay for shipment to their branch at Nelson and which they duly paid for. Some objections to the quality of the hay were raised by the defendant by letter dated January 4, 1917, and a letter from the Nelson office to the defendant signed "Macleod Flour Mills, Limited, per J. J. Stephenson (Jr.)" was attached. The letter to the plaintiff contains the following paragraph:

> Referring further to the conversation our office had with you over long distance telephone in regard to car of alfalfa you shipped our Nelson Branch, we are enclosing a letter from our manager at Nelson, which is self-explanatory. .

The letterheads, besides exhibiting that the head office was at Macleod, gave a list of branch offices, including Nelson, Vancouver, and other important points in Alberta and British Columbia. There was, also, another transaction in hay between the parties for shipment to Nelson which was duly settled for, but the order and all arrangements were made by the head office and there was nothing said or done by the defendant which would lead the plaintiff to think the Nelson branch had any authority to purchase goods on their behalf except the intimation on their letterheads and the reference in their letter of January 4, to their "Nelson Branch" and their "manager" there.

The car which they refuse to pay for reached its destination and was paid for by the sub-purchaser to the Nelson manager but no entry of the transaction or the receipt for the money appeared in the defendant's books at Nelson or elsewhere and the agent left the country without accounting for same in any way.

The question for decision, therefore, is not what were the exact relations between the defendant and their Nelson office but did

ALTA.
S. C.

the defendants do any act or so conduct themselves as to reasonably lead the plaintiff to suppose that the agency or branch office at Nelson had authority to order the goods in question. (See dicta of Coleridge J., in *Summers* v. *Solomon* (1857), 7 El. & Bl. 879, 119 E.R. 1474.) It is I think, a question of fact entirely.

The situation must be looked at from the point of view of the ordinary business man and not from the lawyer's standpoint. Here is a company, part of whose business, to the knowledge of the plaintiff, was the buying and selling hay and other farm products and judging from the number of branches mentioned on their letterheads did an extensive business in cities and towns at long distances from the head office, some of them being cities much larger than Macleod. If, for instance, a dealer in flour at Vancouver, knowing his products constituted a large part of the business of the defendant, sold flour to the branch at that place, I hardly think it should be necessary for him to first communicate with the head office to ascertain whether or not their agent had the necessary authority. The point might, of course, be a nice one if the business assumed very large proportions, but I have in mind what is usually considered an ordinary every-day transaction. The facts here, of course, are different but in principle, I think, the same. It is one of degree only. The trial judge came to the conclusion that the plaintiff had reasonable grounds for supposing that the agency had the requisite authority. If the case had come before a jury, there would, undoubtedly, have been sufficient evidence to go to it and their finding of fact would have been conclusive. It seems to me that the trial judge's finding should be accepted in this instance. No hard and fast rule is possible in such cases, and, guided by the rule referred to above, each case must be decided upon its own merits. It is a case which falls within the well-known principle that whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it.

It was, unquestionably, the act of the defendants in publishing the fact that they maintained a branch office at Nelson without indicating in any way that its authority was restricted below that which the ordinary prudent business man might reasonably suppose existed in such a case. For these reasons I would dismiss the appeal with costs. *Appeal dismissed.*

INDEX.